

(His Honour referred to s. 90 and the table of goods "prohibited and restricted," and read sub-s. 4 under which the present proceedings were taken.)

It is taken admitted that the goods were found on board ship. Section 90 prohibits the importation of goods mentioned in sub-s. 4 "save as thereby excepted." Therefore tobacco is prohibited in packages containing other goods, but otherwise may be imported. It was carefully considered by the stipendiary magistrate whether the prohibition of such tobacco was absolute and gave him no discretion but to forfeit, or whether it was a prohibition *sub modo*, and would allow him a discretion to inquire as to the *mens rea* of the importer and to make an order according to the surrounding circumstances.

The stipendiary magistrate thought he had such a discretion, and, reading ss. 90 and 100 together, as he thought must be done when, as in this case, the prohibition is *sub modo* only and not absolute, I agree with him in that opinion. I regard s. 90 as amounting only to a prohibition *sub modo*—that is to say, only in particular circumstances or in a particular way. Does that section then confer upon the stipendiary magistrate a discretionary power? The stipendiary magistrate came to the conclusion that he had that power, and I consider he is right in that opinion. Assuming therefore that the goods were prohibited only *sub modo* they were liable to forfeiture, and the stipendiary magistrate had it in his power to order that forfeiture; for the order to be forfeited they must come before him under s. 100 which in express terms confers upon the stipendiary magistrate the power to order forfeiture, or to "make such order as the circumstances require."

These goods then not being absolutely prohibited the stipendiary magistrate was right in taking the view he did as to making what order he considered the circumstances required; and there being no intention to defraud he had the right to make the order he did and to require the tobacco to be given up to the importer on payment of duty. The burden of proof lay on the importer, but if there was no fraud it was only right he should be acquitted and that there should be allowed such a discretion to the stipendiary magistrate.

The decision must therefore be affirmed, and the respondents be allowed their costs of the appeal.

*Appeal dismissed with costs.*

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## REG. v. NAU TAUNEBO.

[Criminal Jurisdiction (Berkeley, C.J.) February 28, 1895.]

*Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, s. 6—Pacific Order in Council, 1893: Arts. 15, 35, 66—Removal for trial—Prisoner inadvertently committed for trial to High Commissioner's Court—whether order might be amended.*

A Deputy Commissioner of the Gilbert Group having ordered the removal of a native charged with murder for the purpose of being tried in Fiji, through inadvertence directed in the warrant of removal that such trial should take place "before the Court of the High Commissioner."

**HELD.**—The Jurisdiction of the Supreme Court of Fiji under the Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, and the Pacific Order in Council, 1893, to try a person charged with an offence committed in the Western Pacific and removed to Fiji for trial does not arise from the fact of committal for trial by a Deputy Commissioner of the High Commissioner's Court.

[**EDITORIAL NOTE.**—It was held in *R. Mortlemans* [1909] 1 Fiji L.R.—that the Supreme Court of Fiji has exclusive jurisdiction.]

PROSECUTION on a charge of murder. The facts fully appear from the judgment.

*J. H. Garrick* for the prosecution.

*C. H. H. Irvine, K.C.* for the defence, on the case being called, applied that the accused might be discharged without trial on the ground that the Supreme Court had no jurisdiction to try the case inasmuch as it had been committed for trial to the High Commissioner's Court.

*J. H. Garrick, contra,* asked that the necessary amendment might now be made.

**H. S. BERKELEY, C.J.**—This is an application to discharge the prisoner on the ground that this Court has no jurisdiction to try him, inasmuch as he has not been committed for trial before this Court, but before the Court of the High Commissioner for the Western Pacific. To this it is answered on the part of the prosecution that in the order sending the prisoner for trial before the High Commissioner's Court the magistrate has merely made a mistake in the name of the Court, and that such a mistake is an informality, which, under Art. 35 of the Pacific Order in Council, 1893, may be met by amendment.

The questions now are (1) is the prisoner within the jurisdiction of the Court, so, as to confer upon me the power to make any amendment in any proceedings heretofore taken against him ?

(2) If he is, should such an amendment as is suggested be made ?

With respect to the first point it is said that I can have no such power, because the prisoner is not before the Court at all, and never has been so ; that he has never been in any Court but the High Commissioner's Court, appearing in the first instance before a Deputy Commissioner for the Western Pacific, and then being by him removed to Fiji for trial before the High Commissioner's Court, so that the prisoner has not at any time been within the jurisdiction of the Supreme Court. If this contention is correct, then I think I would have no jurisdiction to make an order of amendment, for I should be ordering an amendment in a proceeding which has never been before me.

Whether this contention on the part of the prisoner is correct will depend upon the facts, and upon the effect of the Order in Council and of the Foreign Jurisdiction Act (1890) upon these facts.

Shortly stated, the facts are that the prisoner was charged on the 14th January, 1895, before Mr. Swayne, the Deputy Commissioner, with having murdered one Paul Kanneugiesser in one of the islands of Gilbert Group Protectorate on the 24th August, 1894, and that having heard the evidence the Deputy Commissioner ordered the prisoner to be removed to Fiji for trial before the High Commissioner's Court. Now

the crime of murder is one which is not cognizable by a Deputy Commissioner but is cognizable either by the High Commissioner's Court by a Judicial Commissioner within the Western Pacific or by the Supreme Court of Fiji if the person charged with the offence should be removed there. The jurisdiction of the High Commissioner's Court is over the offender while he remains in the Western Pacific ; the jurisdiction of the Supreme Court of Fiji comes into operation when the offender has been removed to Fiji. This jurisdiction of the Supreme Court is conferred upon it by the Foreign Jurisdiction Act, 1890, and by the Pacific Order in Council, 1893. Section 6 of the Foreign Jurisdiction Act authorizes this Court to inquire into and determine charges against persons sent here for trial from the Western Pacific. Article 15 of the Pacific Order in Council confers upon the Court an " original jurisdiction to hear and determine in Fiji any criminal cause arising at any place within the limits of this Order " ; and empowers this Court to proceed as it thinks just, either according to the procedure for the time being in force in Fiji, or according to the procedure under the Order ; and Art. 66 of the Order in Council requires the High Commissioner's Court to send for trial before the Supreme Court of Fiji all capital cases which cannot arrange to be heard by a Judicial Commissioner. It is clear, therefore, that the jurisdiction of the Supreme Court over the prisoner arises under the Foreign Jurisdiction Act and the Pacific Order in Council, from the fact that he is in Fiji charged with the crime of murder committed within the Western Pacific. The jurisdiction of the Supreme Court over the prisoner is dependent on that fact, and not on the committal for trial by the Deputy Commissioner ; for under the Act and Order referred to the Court has power to proceed to inquire into such a charge though no committal has been made. Indeed under Article 66 of the Order in Council the expression " commit for trial " is not used when reference is made to a trial before the Supreme Court of Fiji. In such a case the expression used is " shall cause him to be removed for trial before the Supreme Court of Fiji." Now what has the Deputy Commissioner done in this respect : what has he done in obedience to this Article which requires him to cause the prisoner to be removed to Fiji for trial before the Supreme Court ? I find that on the 16th January, 1895, he passed under his hand a formal document which he heads " warrant for removal for trial " entitled, as at that stage was proper, " in Her Majesty's High Commissioner's Court for the Western Pacific," in a matter of a charge against the prisoner, naming him.

Then I find that in the warrant, which is so far good and regular, the prisoner is directed to be " removed for trial to Suva in the Colony of Fiji there to be put on his trial ", etc. Had the warrant stopped at the word " trial ", no question of jurisdiction could have arisen for the only court that has jurisdiction to try a charge of murder committed in the Western Pacific and sent to Fiji for trial is the Supreme Court : but the Deputy Commissioner added the words " before the Court of the High Commissioner ". The addition, Mr. Irvine contends, is fatal to the trial of the prisoner by this Court inasmuch as it has the effect of destroying the jurisdiction which the Court would otherwise have had over the prisoner. It seems to me that inasmuch as the Court does not derive its jurisdiction from the act of the Deputy Commissioner in committing the prisoner for trial but from the fact that the prisoner is now

in Fiji charged with murder in the Western Pacific, the contention fails ; for it must follow that if the jurisdiction is not conferred by the act of the Deputy Commissioner it cannot be taken away by any act of his either. The Order in Council, Art. 66, authorized the Deputy Commissioner to cause the prisoner to be removed to Fiji for trial. He has done so. The Article further directs that the trial of the prisoner shall be before the Supreme Court. In making out the warrant for the prisoner's removal under this Article the Deputy Commissioner orders the prisoner to be removed to Fiji and tried before the High Commissioner's Court.

The latter portion of this Order is so directly opposed to the provisions of Art. 66, that I can only come to one of two conclusions, viz.: that the Deputy Commissioner deliberately disobeyed the provisions of the Order in Council, or (2) that in making out the order he wrote in the words " High Commissioner's Court " inadvertently instead of Supreme Court.

It seems to me that I should not be justified in coming to any other conclusion than that the words alluded to were inserted inadvertently ; and coming to that conclusion I come to the further conclusion that if there is any power in this Court to prevent a miscarriage of justice, that power ought to be exercised. Now I have no doubt, for the reasons given, that I have jurisdiction over the prisoner and the proceedings on this charge against him, and it seems to me that this is a proper case for availing of the powers conferred by the 35th Article of the Order in Council, 1893. By that Article no proceedings shall be invalidated by reason of any informality mistake or omission so long as in the opinion of this Court the essential requisites of law and justice have been complied with. Here every essential required by law and justice has been complied with ; every formality has been observed in the preliminary inquiry before Mr. Swayne : but that usually careful magistrate has omitted in making out his warrant to remove the prisoner to Fiji, to order the trial to be before the Supreme Court. He made this omission, and further, he made the mistake of ordering the trial to be before the High Commissioner's Court. It seems to me, that as every essential of law and justice has in other respects been complied with, and as the prisoner cannot in any way be thereby prejudiced in his defence, the order of removal should be amended by striking out the words " High Commissioner's Court " and be treated as if those words did not appear therein, and I order accordingly.

*Order made accordingly.*

(The trial then proceeded and the accused was convicted.)

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