It is also urged that the Collector should be regarded as having elected to pursue his personal remedy against the master and that thereby he had lost his remedy against the *res*—the ship. The proceedings by the Collector against the master before the Chief Police Magistrate were relied upon as supporting that contention. It seems to me, however, that it has no force. The Collector by proceeding in the court of the Chief Police Magistrate followed the mode prescribed by the Customs Ordinance, and what he did amounted really to nothing more than ascertaining the amount due for expenses. It really is not more than equivalent to a reference which might have been made by order of this Court to some person, say to the Chief Magistrate himself, to find what was due and report to the Court.

In marshalling the fund in court I think priority in payment out, after the charges of the marshal are satisfied, should be given to the costs of the plaintiffs, the seamen, for this reason that the fund now being distributed has been placed in court by their action against the ship. This was the view taken by Butt J., in the *Immacolata Concezione*, and I will act on that view. The costs of the Collector will rank next. There then will come the expenses of the Collector incurred under the authority of the Customs Regulations Ordinance, 1895, s. 49, and thereafter the amount found due to the seamen for wages, to which will be added a proper sum for subsistence. No allowance can be made to them for return passage to their homes. I think the principle of such allowance extends only to foreign seamen. In the case of British seamen, if they cannot find re-engagement they are entitled to be returned to their homes as distressed British seamen.

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## REG. *v.* MARTELL.

[Criminal Jurisdiction (Berkeley, C.J.) October 25, 1897.]

*Procedure for criminal offences under Pacific Order in Council*, 1893 : *Arts.* 15, 66—*Indictable Offences Ordinance* 1876, *s.* 4—*Criminal Procedure Ordinance* 1875, *s.* 5.

The accused Martell was arrested in the New Hebrides and, after an investigation by a Deputy Commissioner was committed for trial to the Supreme Court of Fiji under Art. 66 of the Pacific Order in Council, 1893, on a charge of manslaughter and was brought to Suva in custody. The Attorney-General entered a *nolle prosequi* in respect of this charge and the accused was released. He was immediately re-arrested by the police and brought before the Chief Police Magistrate at Suva on a charge of murder upon which he was committed for trial to the Supreme Court.

**HELD.**—(1) The Supreme Court of Fiji has under Art. 15 of the Pacific Order in Council, 1893, original jurisdiction to hear and determine any civil or criminal matter arising at any place within the limits of the Order, and may do so accordng to the procedure usual in Fiji or according to the procedure under the Order.

(2) A British subject, may if found in Fiji, be committed for trial by a stipendiary magistrate there for an offence wherever committed, if such offence be one cognizable by the Supreme Court.

[**EDITORIAL NOTE.**—The offence in this case was cognizable by the Supreme Court by virtue of Art. 15 of the Pacific Order in Council, 1893. The authority for the committal by the magistrate was found in s. 4 of the Indictable Offences Ordinance, 1876, (rep.) which was as follows: —

> "In all cases of indictable crimes or offences of any kind or nature whatsoever committed "on the high seas or in any creek harbour haven or other place in which the Admiralty of "England have or claim to have jurisdiction and in all cases of crime of offences committed on "land beyond the limits of this Colony for which an indictment may legally be preferred within "such Colony it shall be lawful for the Stipendiary Magistrate of the district in which person "charged with having committed any such crime or offence as aforesaid or with being "suspected to have committed any such crime or offence as aforesaid shall reside or shall be "supposed or suspected to reside or be to issue a warrant according to the form E in the "Schedule hereto to apprehend the person so charged and to cause him to be brought before "such Magistrate to answer the said charges and to be further dealt with according to law."

The power of magistrates to commit for trial is now given by s. 215 of the Criminal Procedure Code (Cap. 4). See also Magistrates' Courts Ordinance (Cap. 3), ss. 18, 19 and 22.

The references in the report to the Attorney-General's role of Grand Juror are preserved from the original report of the case by J. S. Udal Esq. who was at the time Attorney-General of Fiji and whose conception of his duty in this respect is, at least, of historical interest.]

Cases referred to :—

*Reg. v. Stanbury* [1862] 31 L.J. M.C. 88 ; 5 L.T. 686 ; 9 Cox, c.c. 94 ; 14 Dig. 147.

PROSECUTION on a charge of murder.

The Attorney-General, *J. S. Udal,* for the prosecution.

*H. S. Berkeley,* for the defence, before the jury was sworn, raised an objection to the jurisdiction of the Supreme Court to hear the case under the circumstances in which it had now come before the Court. It appeared that the accused had originally been sent down by the Deputy Commissioner, Captain Browne, of H.M.S. *Tauranga,* who had investigated the case at the New Hebrides, for trial before the Supreme Court of Fiji under Art. 66 of the Western Pacific Order in Council, 1893, upon a charge of manslaughter ; but on the proceedings coming before the Attorney-General in the ordinary way, a *nolle prosequi* had been entered by him in his capacity of Grand Juror, and the accused, who was then in custody in Suva, was accordingly discharged. He was, however, immediately afterwards re-arrested by the police and brought before the Chief Police Magistrate at Suva on a charge of murder, upon which he was committed for trial to the Supreme Court, and a true bill having been found in this case by the Attorney-General the accused was now put upon this trial before the Chief Justice and a jury.

He contended that a case of this kind could only be removed for trial to the Supreme Court of Fiji under Art. 66 of the Pacific Order in Council, 1893, and that the proceedings for manslaughter upon which he was committed for trial, having been quashed by the Attorney-General, he could not now be brought up before a stipendiary magistrate of the Colony of Fiji and committed for trial to the Supreme Court as if the offence had been committed in this Colony. A stipendiary magistrate in Fiji had no jurisdiction to entertain the preliminary proceedings upon a charge of murder committed in the New Hebrides, and he cited the case of *Reg. v. Stanbury* 31 L.J.M.C. 88 in support of this contention. The jurisdiction conferred by s. 4 of the Indictable Offences

Ordinance 1876,[1] upon stipendiary magistrates in Fiji over crimes committed on lands beyond the limits of the Colony for which an indictment could legally be preferred within the Colony was dependent upon whether the accused person resided, or was supposed to reside, within the Colony ; and that Martell, therefore, being resident in the New Hebrides, could only be committed for trial in Fiji by a Deputy Commissioner in the New Hebrides under Art. 66 of the Pacific Order in Council, 1893, which negatived any preliminary hearing before a magistrate here.

The Attorney-General, *J. S. Udal*, contra, pointed out that, in addition to the powers conferred upon the Supreme Court of Fiji by Art. 66 of the Order in Council over cases sent to it for trial by the Deputy Commissioners, by the provisions of Art. 15 it had also an original jurisdiction to hear any criminal matter arising at any place within the limits of the Order. In the present case the defendant, a British subject, being in Fiji, was arrested on a charge of murder committed in the New Hebrides and was brought before the nearest magistrate and by him committed for trial in the ordinary way to the Supreme Court. This jurisdiction is also expressly conferred by s. 4 of the Indictable Offences Ordinance, 1876, already alluded to, which not only extends the jurisdiction of the magistrates, as therein mentioned, over persons resident, or supposed to be resident, in the district of any stipendiary magistrate, but also over those who shall happen to " be " there ; and Martell, when he was arrested, happened to be within the district of the Chief Police Magistrate at Suva. By s. 5 of " The Criminal Procedure Ordinance, 1895[2]", every information coming before the Supreme Court must have been previously investigated by a magistrate, and the case therefore—being brought according to the procedure alowed by Art. 15, viz., " according to the procedure for the time being in use in Fiji "—was bound to have been brought first before the magistrate for committal for trial in the ordinary way.

H. S. BERKELEY, C.J.—Although a Deputy Commissioner may commit for trial before the Supreme Court of Fiji such a case as the present under Art. 66 of the Pacific Order in Council, 1893, yet it is clear that under Art. 15 of the said Order the Supreme Court of Fiji has original jurisdiction to hear and determine any civil or criminal cause or matter arising at any place within the limits of the Order in Coucil, and may do so either according to the procedure usual in Fiji, or according to the procedure under the Order. Further, that under s. 4 of the Indictable Offences Ordinance 1876,[3] a British subject, if found in Fiji, may be properly committed for trial by a stipendiary magistrate there, wherever the offence might have been committed, if the offence be one cognizable by the Supreme Court.

*Objection overruled.*

(His Honour, subsequently, at the request of the counsel for the defence, reserved the point for further consideration by the Court of Crown Cases Reserved under s. 44 of " The Criminal Procedure Ordinance, 1875," but in the event which happened, namely, the acquittal of the accused, such further consideration was not necessary.)

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1 *Repealed. See headnote of this report.*
2 *Repealed. Vide Criminal Procedure Code (Cap. IV), ss. 215, 239, 75.*
3 *Repealed. Vide Editorial Note.*

# REG. *v.* BEAUCLERC.

[Criminal Jurisdiction (Berkeley, C.J.) April 30, 1900.]

*Criminal procedure—question reserved for further consideration—whether question can be reserved after verdict recorded—whether right of reply by Attorney-General is applicable to the acting Attorney-General of Fiji.*

A conviction having been entered against the prisoner on the verdict of a jury, the prisoner moved to quash the conviction on certain questions reserved at the request of prisoner's counsel, three questions being reserved during the trial and before verdict and one after verdict recorded. The questions were reserved under s. 44 of the Criminal Procedure Ordinance, 1875, and related to :—

(1) A point of evidence.
(2) Amendment of information in several particulars.
(3) Right of reply of acting Attorney-General.
(4) General ground as to whether prisoner was rightly convicted.

**HELD.**—(1) The Court had no jurisdiction to reserve a question after the conclusion of the trial.

(2) The question as to order of speeches depends on a rule of practice and is not a question of law on which a conviction will be quashed.

*Obiter Dictum.*—The Acting Attorney-General of Fiji has the same right of reply as is accorded in England to Her Majesty's Attorney-General.

Note.—The remaining points dealt within the judgment are no longer of interest.

[**EDITORIAL NOTE.**—S. 44 of the Criminal Procedure Ordinance, 1875 (Rep.) was as follows :—

> "The Chief Justice may in his discretion reserve for further consideration any question of "law which may arise upon the trial of any information and in case the person tried shall be "convicted may postpone judgment until such question shall have been considered and decided "and in the meanwhile may commit the person convicted to prison or take a recognizance of "bail, with one or two sufficient sureties and in such sum as he shall think fit conditioned to "appear at such time or times as he shall direct and to receive judgment and upon such "further consideration of the question so reserved as aforesaid it shall be lawful for the Chief "Justice to affirm or quash the conviction."

Corresponding provisions are to be found in the Criminal Procedure Code, ss. 312 and 313 (Cap. 4, Vol. I. page 151.) As to right of reply see now Criminal Procedure Code, s. 149.]

Cases referred to :—

(1) *Reg. v. Christie* [1858] 7 Cox, cc. 506 ; 14 Dig. 294.

(2) *Reg. v. Stubbs* [1855] 25 L.J.M.C. 16, 7 Cox, cc. 48 ; 19 J.P. 760 ; 14 Dig. 461.

MOTION to quash conviction. The facts are fully set out in the judgment.

BERKELEY, C.J.—This was a motion to quash the conviction of a prisoner found guilty on an indictment charging him with larceny as a public servant.

The motion is made on certain questions reserved by me for further consideration three of which I reserved at the request of counsel for prisoner during the trial and one of which I reserved at the request of the prisoner's counsel after the verdict of the jury finding the prisoner guilty had been recorded.

The authority to reserve a Crown Case for further consideration is conferred by s. 44 of the Criminal Procedure Ordinance, 1875[1] by which the Chief Justice may in his discretion reserve for further consideration any " question of law " which may arise " upon the trial " of an information and in case the person tried " shall be convicted " may postpone judgment until such question " shall have been considered " and upon such further consideration may affirm or quash the conviction. It is to be observed that the jurisdiction conferred by the 44th sec. to reserve any " question of law " is confined to questions of law arising upon the trial and that the jurisdiction to further consider a case is confined to the cases of persons who shall be convicted after a question of law has been reserved by the Chief Justice. The words of the section which confer jurisdiction to reserve questions for further consideration are explained. The words are " May reserve any question of law which may arise upon the trial " and " in case the person tried shall be convicted ". The words " shall be convicted " follow it will be observed the words " may arise upon the trial " and to my mind clearly show that the jurisdiction conferred by the section is confined to cases of a conviction following after a question has been decided by the Judge at the trial and reserved by him for further consideration.

The questions reserved by me were as follows. Whether a certain " Statement " compiled by Mr. Forth the Colonial Auditor was wrongly admitted in evidence.

Whether an indictment might be amended more than once.

Whether the Acting Attorney-General of Fiji has the right of general reply when a prisoner does not call witnesses.

Whether having regard to the indictment and the evidence the prisoner was properly convicted of larceny.

The first three questions were reserved by me at the request of the prisoner's counsel during the progress of the trial. The fourth question was reserved by me after the trial had concluded, after, that is to say, the prisoner had been found guilty and the verdict of the jury had been recorded.

On full consideration I am of opinion that I had no jurisdiction to reserve the fourth question submitted for further consideration. It seems to me clear that the 44th sec. of the Criminal Procedure Ordinance contemplated that before any question of law is reserved by the presiding judge the point upon which the question arises should have been taken upon the trial and a decision delivered thereon by the judge. The present case is an instance of the necessity for insisting upon such a requirement, for the point taken after the conclusion in this case upon which the question arises is that though the evidence may show that the prsoner has been guilty of embezzlement it negatives the charge of larceny—the money charged as having been stolen having been left in prisoner's possession and sole control from the time when he first received it till he appropriated it to his own use.

Had that point been taken upon the trial the presiding judge would have directed the jury that if they considered the prisoner not guilty of larceny but guilty of embezzlement he would not be entitled to be

[1] *Vide Editorial Note.*

acquitted but that the jury should find him not guilty of larceny but guilty of embezzlement. This point however was not taken till after the trial had concluded. I am therefore on this motion unable to pay any regard to the point raised. I had no jurisdiction to reserve that question for him for the reason I have stated.

The point raised on question No. 2 was not argued on the motion, learned counsel for the prisoner stating that he was content merely to raise the point without arguing it. In my opinion the point is not sustainable and indeed is not arguable, it being clear that an indictment may be amended in as many separate particulars as may be necessary.

With regard to the point raised on question number one, I am of opinion that the statement referred to was properly received in evidence as an admission after the letter of the prisoner of the 5th April, 1899, had been given in evidence. With regard to the point raised on question number three I am of opinion that the Acting Attorney-General of Fiji has the same right of reply as Her Majesty's Attorney-General. The Attorney-General of Fiji has always since the foundation of the Colony been acceded the same right in this respect as is acorded in England to "Her Majesty's Attorney-General" and the Acting Attorney-General has in this Court the status of the Attorney-General. There is no true analogy between the Attorney-General of this Colony and the Attorney-General of the County Palatine of Lancaster, for the Attorney-General of Fiji is "Her Majesty's Attorney-General" while the Attorney-General of the County Palatine is not.

The case *Reg. v. Christie* cited by learned counsel for the prisoner has therefore in my opinion no application here—however even suppose the point to be a good one the conviction of the prisoner could not properly be quashed on that ground for at most it relates to a question of practice only and not of law and the presiding judge has by s. 44 of the Criminal Procedure Ordinance only jurisdiction to reserve questions of law for further consideration. On this point the case *Reg. v. Stubbs* 25 Law Journal M.C. 16 applies. In that case it was held that it is not a rule of law but of practice only that a jury should not act on the uncorroborated testimony of an accomplice and that if a jury choose to act upon such evidence the conviction cannot be quashed as bad in law. That case is clear authority for my holding that this conviction could not be quashed on the question whether the Acting Attorney-General of Fiji has the right of general reply when the prisoner calls no witnesses.

For the right of reply is not a rule of law but of practice only. This motion is therefore dismissed and the conviction of the prisoner is affirmed.