Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McArthur & Co. v. *Cornwall and another, and Cross Appeal of Cornwall and another* v. *McArthur & Co., from the Supreme Court of Fiji; delivered 14th November* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The suit in which these appeals are presented was brought in January 1887 by Frank Cornwall and Manaema against the Defendants in their partnership name of McArthur & Co. Cornwall is a British subject, and is described as a planter and trader of Samoa. Manaema, a native of Samoa, is the wife of Cornwall, or has lived with him as such. The Defendants are British subjects, carrying on business in Samoa as traders and planters. The suit was brought in the High Commissioner's Court for the Western Pacific. The wrongs alleged are, first, that on the 27th March 1882 the Defendants dispossessed the Plaintiffs of lands in Samoa which were specified in Schedule A, and have since that time taken the produce and have neglected or injured the land; and, secondly, that on the same day the Defendants dispossessed Cornwall of other lands in Samoa which are specified in Schedule B, and have since that time taken the produce.

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The relief prayed is first (as to both Plaintiffs and as to Schedule A) 30,000*l.* damages for conversion of the produce, and 20,000*l.* for injury to the land; and secondly (as to Cornwall and as to Schedule B) 10,000*l.* damages for conversion of the produce, and recovery of the land.

The Defendants filed statements of defence in the months of March and April 1889. The effect of these statements is to deny the title of the Plaintiffs and to allege the lawful ownership and possession of the Defendants. They set up a title under the bankruptcy of Cornwall and a sale to them by his trustee in the year 1888, but that title is not now relied on. As regards Manaema they plead that she had previously brought an action in the High Commissioner's Court in respect of the same matters for which she now sues, that the Supreme Court of Fiji, sitting in Appeal, made a decree dated the 25th September 1886 awarding her 50*l.* damages and her costs, and that she cannot recover anything further.

The action was tried in April and May 1889, before the Deputy Commissioner Mr. de Coëtlogon, sitting with two Assessors of whom one retired during the trial on account of ill health; and, on the 25th May 1889 the Court pronounced a decree declaring that the Plaintiffs were entitled to recover the sum of 41,276*l.* for damages, and the costs of suit, and that Cornwall was entitled to recover possession of the lands in Schedule B, and ordering accordingly.

The Defendants appealed to the Supreme Court of Fiji, which, by a decree dated the 13th March 1890, affirmed the decree below so far as it declared Cornwall entitled to recover possession of the lands in Schedule B; but in other respects reversed it, adjudging that Manaema was not entitled to any damages, and that as between Cornwall and the Defendants there must be a new trial on the question of damages.

Both sides now appeal from the decree of the Supreme Court of Fiji, the Plaintiffs contending that the decree of May 1889 is right and should be restored; and the Defendants contending that the action should be wholly dismissed for want of jurisdiction in the Court, and (as regards Schedule A) for want of proof that Cornwall had possession at the time of the alleged trespass, and (as regards Schedule B) for want of proof that Cornwall ever had any title to the lands, or that the Defendants had ever entered upon them.

As regards the possession and ownership of Cornwall and the possession of the Defendants, it may be at once stated that their present pleas are in contradiction to their previous contentions and conduct, and to the facts established in evidence; and that it is difficult to understand why such pleas were put upon record. Mr. Napier has hardly endeavoured to support them at the bar, though they appear to have been seriously contested in the Court below. The questions for their Lordships to decide are, first, whether there is ground for any decree against the Defendants; and secondly, if there is, whether the decree of the High Commissioner's Court can be maintained. If there must be a decree, and the decree of the 25thMay 1889 cannot stand, the Chief Justice of Fiji is clearly right in directing a new trial.

As regards procedure and the jurisdiction of Her Majesty in Council, the case stands in a singular position. In May 1889 the ordinary course of appeal from the High Commissioner's Court was first to the Supreme Court of Fiji and then to Her Majesty in Council. But on the 14th June 1889 a treaty was made between Her Majesty, the Emperor of Germany, and the President of the United States of America, by which it is provided that there shall be established

in Samoa a Supreme Court, consisting of one Judge, who is to be named by the three signatory Powers, or failing their agreement by the King of Sweden and Norway; and that his decision upon questions within his jurisdiction shall be final. Upon the organization of the Supreme Court all civil suits concerning real property situate in Samoa, and all rights affecting the same, are to be transferred to its exclusive jurisdiction. Their Lordships have been given to understand that the Supreme Court contemplated by the treaty is in working order, but they have no information as to the time when it was organized so as to take exclusive jurisdiction of all civil suits. The hearing in Fiji, though subsequent to the treaty, has been conducted without any reference to it. But then the ratifications of the treaty were not completed till the 12th April 1890. Both parties have conducted this appeal as though the treaty would not affect the case until it had been disposed of by Her Majesty in Council. In some views of the case it would have been necessary for their Lordships to pause until they were better informed as to the organization of the Court, for no provision is made by the treaty for cases under hearing or under appeal. But as they have come to the conclusion that both appeals should be dismissed, and that the existing decree should remain intact, there is nothing in the treaty which, in any state of the facts, can render it incompetent for Her Majesty in Council, acting on the advice of this Board, to pronounce such a decree as that, or which can make such a decree inconvenient or embarrassing to the new Court before which the case, if further prosecuted, must come. And their Lordships have thought it best to deliver reasons for their judgment exactly as they would if the case had to go back in the ordinary way to Courts subordinate to Her Majesty in Council. They

think that such a course is the most respectful to the Supreme Court of Fiji, and also to the Supreme Court of Samoa, and also the most likely to be of use to the litigant parties. It may also possibly be of some use to the Supreme Court of Samoa, seeing that the litigants are British subjects; that their disputes have hitherto been tried according to English law and procedure; and that the treaty contemplates the use of English procedure until the Supreme Court sees fit to make new arrangements,

The transactions of the parties prior to the present suit are numerous and complicated; but, in the view their Lordships take of the case, it is not necessary to state them in more detail than suffices to exhibit their bearing on the questions of jurisdiction, and of the plea of *res judicata* in bar to Manaema's claim, and of the principles on which damages should be estimated.

It appears that in the year 1877 and afterwards Cornwall and the Defendants were carrying on trade in Samoa. Cornwall was in possession of considerable tracts of land, and the Defendants advanced him money to pay his labourers. (Rec., p. 344.) On the 5th of February 1879 Cornwall, who then owed the Defendants 5,664*l*., made a voluntary conveyance to Manaema of the lands comprised in Schedule A; and on the next day he executed a mortgage of other lands to one Nelson, ostensibly to secure a debt of 16,000 dollars, but really without any consideration at all. (Rec., p. 124.) In the month of August 1881 the Defendants recovered judgment in the High Commissioner's Court against Cornwall for the sum of 5,500*l*. then owing by him. Upon this Cornwall left Samoa, as he says, to prosecute an appeal in Fiji against the Defendants' judgment; and he did go to Fiji and prosecute his appeal, which was dismissed in January 1882; but he left Samoa suddenly and clandestinely.

(Rec., p. 127.) He has never returned thither, nor did he prefer any claim in respect of his land till this action was brought.

In the month of November 1881 the labourers on Cornwall's land, being unpaid, sued Cornwall in the High Commissioner's Court, and obtained a decree for 900*l.*, in granting which the Court made severe remarks on the misconduct of Cornwall in leaving his labourers without supplies or provision for returning home. (Rec., p. 227.)

Under both these judgments, writs of Fi. fa. were issued. The goods and chattels of Cornwall were sold, but failed to satisfy the claim of the labourers, to which priority was accorded. Under the judgment obtained by the Defendants the lands comprised in schedules A and B, or large parts of them, were put up to public auction, and were knocked down to the Defendants for sums amounting to 8,565 dollars (Rec., pp. 238, 239.) It is not alleged that the Defendants paid any of the purchase money. It is not necessary to go into the details of these execution sales. It has been held by the Courts below, and is not now disputed by the Defendants, that they were unauthorized, and could not confer any title. The Defendants, however, took possession in pursuance of them, and that is the trespass complained of in the present action.

In December 1885 a document was executed by Cornwall, ostensibly as the attorney of Manaema, purporting to be a lease of the lands in Schedule A to Sinclair and others for a term ending the 8th December 1886. (Rec., p. 125.) And in the month of March 1886 Manaema and the lessees brought an action for the recovery of the same lands, and for damages amounting to 22,000*l.* The Court of the High Commissioner dismissed the action, on what ground does not appear. But on appeal the Supreme Court of Fiji decided that the lessees were entitled to have

possession of the lands, and to 50*l.* damages; and that Manaema was entitled to 50*l.* damages. The view of the Chief Justice was that Cornwall's conveyance to Manaema in 1881 was colourable and fraudulent, and that he remained the owner of the land; that Manaema was entitled to damages because she was in actual occupation of a house, and was illegally turned out by the Defendants; and that the lease of December 1885 was executed by Cornwall as principal and passed the property to the lessees for the term of the lease. This decree bears date the 25th September 1886.

It appears to their Lordships that, as between Manaema and the Defendants, the present action raises precisely the same points as were tried and decided in the action of 1886, and therefore that the Supreme Court of Fiji was quite right in holding, on this ground, that Manaema can recover nothing further in the present action.

Of the transactions after the decree of September 1886 very little need be said. The Plaintiffs' writ of summons was issued and their statement of claim filed in June 1887. The Defendants did not file their defence till March 1889. In the meantime they made an ineffectual attempt to appeal to Her Majesty in Council from the decree of September 1886. They illegally retained possession of the land against the lessees. In 1887 an attempt made by Sinclair to obtain a writ of possession was refused by the Acting Deputy Commissioner. (Rec., p. 274.) Some renewals of the lease to Sinclair and others were made. But (Cornwall's bankruptcy being placed out of the question) nothing occurred to alter the position of the parties before the trial, except the persistent refusal of the Defendants to recognize the rights established by the suit of 1886.

It has been stated above that the defences resting on the allegations that Cornwall has not any title, and that the Defendants have not entered on the lands, are wholly unsubstantial. No defence remains therefore except that the High Commissioner's Court had no jurisdiction to entertain the suit. It is contended, first, that the Defendants personally do not fall within the jurisdiction; and, secondly, that suits relating to land are not within it.

The Court was created by an Order in Council dated the 13th August 1877, and made by virtue of the powers vested in Her Majesty by the Pacific Islanders Protection Acts 1872 and 1875, and by the Foreign Jurisdiction Acts 1843 to 1875; and by Sect. 6 it is expressed to apply to "all British subjects for the time being "within the Western Pacific Islands, whether resi- "dent there or not." These words are doubtless intended to cover as wide a class relating to Samoa as is allowed by the words used in the Pacific Islanders Protection Act of 1875, which gives power to the Crown to exercise jurisdiction over its subjects in those parts, and to create a High Commissioner and a Court of Justice. The persons over whom jurisdiction is given are described as "The subjects within any islands "and places in the Pacific Ocean, not being "within Her Majesty's dominions, nor within "the jurisdiction of any civilized Power." There is no doubt that the islands of Samoa, then called the Navigators' Islands, are among the places here mentioned. But it is contended that inasmuch as no one of the partners in the firm of McArthur & Co. has dwelt or is to be found within the bounds of the Islands, they are not "within" them as required by the Statute and the Order in Council.

It certainly would be a very startling result if persons who had obtained the possession

of lands through the processes of the High Commissioner's Court should be able to retain that possession and to prevent examination into the validity of those processes by alleging the incapacity of the Court to exercise jurisdiction over them. If it were necessary it would have to be considered whether those who set a Court of Justice in motion, and obtain the aid of its decrees and officers, are competent to deny its authority to enforce against them liabilities arising out of their misuse of those decrees and officers. But it is not necessary, because the Defendants had a store in Samoa in which they carried on business by servants and agents, and affixed to which was a signboard with the words "Wm. McArthur & Co." in large lettters. And their Lordships agree with the Supreme Court which in the suit of 1886 held that this circumstance clearly brought the Defendants within the Statute and the Order in Council. Certainly if it were not so, Statutes and Orders so framed would fail largely of their intended effect, for it is often the persons who live far off, but take profit from the spot by agents, who are least careful of the rights of those who are on the spot, and who most require the control of local authority.

It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to Her Majesty over land in Samoa. But the Order in Council is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and must be held to do so in all those places in which Her Majesty has been enabled to give it by the assent of the ruling power. So far as regards Samoa the matter is provided for by a treaty dated the 28th August 1879 between Her Majesty and the King and Government of Samoa. In that treaty Article III. guarantees to British subjects full

liberty for the free pursuit of commerce, trade, and agriculture, and creates a special tribunal for deciding disputes respecting purchases of land from Samoans. Then Article V. provides that every civil suit which may be brought in Samoa against any subject of Her Britannic Majesty shall be brought before and shall be tried by Her Britannic Majesty's High Commissioner, or other authorized British officer. This treaty applies itself to the Order in Council of 1877, and appears to their Lordships to be sufficient without any fresh Order in Council to confer on the High Commissioner jurisdiction over such a suit as this.

The result so far is that though the Defendants can plead successfully that Manaema's claims have been disposed of, that plea only leaves them answerable to Cornwall. Against him their pleas fail, and he must be treated, as the decree appealed from treats him, as entitled to recover possession of the lands, and damages for dispossession. Then comes the difficult question, what damages? The decree of the High Commissioner's Court, which Cornwall strives to retain, proceeds on the principle of ascertaining the number of cocoanut trees on the land, and assigning an average annual value per tree during seven years of illegal occupation. By this process the sum of 24,676*l.* is brought out as the value of the produce. Then sums, amounting to 9,600*l.*, are added for depreciation and neglect, and 7,000*l.* as "penal damages for illegally holding possession of the lands." (Rec., pp. 102, 103.) These sums make up the total amount decreed, viz., 41,276*l.*

Their Lordships concur with the Chief Justice of Fiji in thinking that such an amount is altogether disproportionate and excessive. The net profit of the estate is put at 3,500*l.* a year, or thereabouts. This is the property for the labour on which Cornwall was unable to pay a

sum of 900*l.* in the latter part of 1881, which he allowed to pass by an irregular process into the hands of his judgment creditors in 1882, without, apparently, any attempt to get it back, though he might have done so by raising some 6,000*l.*, less than two years' income at the supposed rate. The method which leads to this result is a very dangerous one. It affords the widest scope for conjectures, which it is impossible to bring to any sure test except by examining actual transactions with the property and its produce, or with other properties in exactly similar positions. No accounts have been produced nor has any other evidence been tendered on Cornwall's part to show what profit accrued during his possession. Cornwall himself has kept at a distance from Samoa. The leases to Sinclair and others are at a rent of 50*l.* only, and the sales upon the executions were for small sums, and those upon the bankruptcy for still smaller; but all these transactions were unreal ones, and no reliance can be placed on them. The Defendants produced some accounts relating to one of the plantations, which were rejected by the First Court, the reason being, if the Supreme Court of Fiji was rightly informed, that they were mutilated. No doubt there has been great dearth of evidence, and it is the Defendants who have been in possession who ought to produce the best evidence, and it is against them that presumptions must be made on points left in doubt. Still the presumptions must not be so incredible as those adopted by the First Court. It appears to their Lordships, indeed, that, even if the method were right, the evidence does not warrant the conclusions of the First Court as regards either the number or the yield of the trees. The Court seems to have applied to large areas statements made with reference to very small ones, favoured by position or by the

attention of the cultivator. Notwithstanding some sanguine estimates of value, the impression made upon their Lordships by the whole evidence is that the property is one of very uncertain and fluctuating value, of very little value to one who cannot pay for labour; to one who can, dependent on the supply of labour from time to time; and that during the period under review there have been great difficulties in getting the desirable supply of labour. It is probably on this last ground that the Supreme Court of Fiji thought that the Defendants ought not to be charged with the large sums awarded by the First Court for deterioration and neglect. The cultivation had gone back from the impossibility or extreme difficulty of getting labour.

The learned Chief Justice says that the safest measure of damage seems to be the value of the produce which the plantations may upon the evidence be taken to have been capable of yielding at the time they were taken possession of. (Rec., p. 300.) He considers that there is evidence to warrant him in taking that value at 1,200*l.* a year, and, for the purpose of making an offer to the parties, calculates that a fair sum for damages would be 15,000*l.*; this sum being made up of eight years of the value of 1,200*l.* without allowing any deduction for expenses, and with the addition of 5,400*l.* for penal damages. Cornwall however would not accept the reduced sum; and so there was no course left but to direct a new trial. Their Lordships also have tried to bring about a compromise between the parties, but they have not been more successful than the Chief Justice of Fiji.

Their Lordships cannot find any better principle than that of the Chief Justice for the first step in ascertaining the amount of pecuniary damage. But they cannot see why the Defendants should not be allowed a proper

sum for expenses, nor why they should be fined in a further sum for Cornwall's benefit under the name of penal damages. These consequences are inflicted upon the Defendants because, it is said, they have defied British law, and committed a trespass unauthorized and wilful in its inception, and persistent and definite in its continuance. (Rec., pp. 300, 301.) Assuming in Cornwall's favour that such conduct would authorize what is in its nature a fine or penalty, and is not damage to the Plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships cannot take so severe a view of the conduct of the Defendants.

What was the position of the parties when the trespass was first committed? The Defendants were creditors of Cornwall; he was legally bound to pay them to the extent of his whole property; he was especially bound in honour to let them have value out of his plantations because their money had gone to pay for the labour on those plantations. What he did was to execute a fraudulent conveyance to Manaema, and a fraudulent mortgage to Nelson; to leave the islands directly a judgment was obtained against him, suddenly, secretly, in violation, as the solicitor in the action states, of his pledged word, and leaving his labourers to shift for themselves in a way which was highly discreditable to himself, and which must have been injurious to the property. When out of the islands he was busy in endeavouring to upset the judgment, apparently a perfectly just judgment, obtained against him by the Defendants. It is not shown by anything in this Record that the seizure and sale of the land effected by the Defendants was more than a mistake of law. But even if the Defendants did think that they could safely take a short cut to obtain one of their debtor's assets clearly avail-

able to make good their debt by some process, there was certainly much in Cornwall's conduct to provoke them to do so, and it is hardly for his sake that they should be visited with penalties greater than the loss which he has suffered.

The conduct of the Defendants after the decree of 1886, or at least after their failure to get leave to appeal from it, is less excusable. The illegality of their possession, though disputed before, was then made manifest. It is true that Cornwall has never offered to repay the judgment debt, and that, for aught that appears, the Defendants may still be found creditors on an account taken between them, when the profits of the land have been fixed. But that did not justify their retention of the land after a decree for its restoration. To say however that for such a piece of disobedience to the law they shall be disentitled to charge their expenses on the land against their receipts from it, and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships. The Defendants have been, at least, very imprudent in the first instance, and afterwards more than imprudent, have been wrongheaded and obstinate. For that they will suffer in at least part of the costs of this expensive and harassing litigation, and in all those reasonable presumptions which will be made against them in questions respecting their receipts and expenses which they ought to clear up and do not.

The nature of the advice which their Lordships will humbly tender to Her Majesty has been before indicated. It is that both appeals should be dismissed, so that the decree will stand affirmed. There will be no costs of these appeals.