1880
October 22.

[CIVIL JURISDICTION.]

HUNT *v.* GORDON.

Prohibition Order—Western Pacific Order in Council, 1877, *ss.* 7, 9, 10, 13, 25, 237—*Western Pacific Order in Council*, 1879.

The defendant, as High Commissioner of the Western Pacific, had issued a prohibition order against the plaintiff under s. 25 of the Western Pacific Order in Council, 1877, debarring him from remaining in Samoa, which order was alleged to have been served on a Sunday.

On an action for damages being brought in the Supreme Court of Fiji against the defendant for having instituted these proceedings maliciously and without proper evidence,

Held, that no action will lie against the High Commissioner of the Western Pacific for anything done by him honestly and without malice under the powers vested in him by such Order, the same protection being accorded to him as to a judicial officer under similar circumstances.

Held, further, that, under rule 237 of the Order in Council, the writ might have been properly served on a Sunday.

Mr. Garrick and *Mr. Winter* for the plaintiff.

The Acting Attorney-General (Mr. Solomon) for the defendant.

The facts and arguments in the case sufficiently appear from the judgment.

J. GORRIE, C.J. This is a case in which the plaintiff represents himself as Chief Secretary and Minister of Lands to Malietoa, the so-called King of Samoa, and that he is presently residing in Levuka. The action is laid against Her Majesty's High Commissioner for the Western Pacific,* and damages are claimed by the plaintiff for an alleged wrongful act of the defendant.

* Sir Arthur Gordon, Governor of Fiji, afterwards created Baron Stanmore.

The alleged wrong is said to have arisen from a writ* of prohibition having been issued by the High Commissioner against the plaintiff under s. 25 of the Western Pacific Order in Council, 1877. A plea, apparently challenging the jurisdiction of the Court, is raised by the defendant under paragraph 7 of his statement of defence; but, after explanation by the learned counsel and the fact that by the action no appeal (which is barred by the Order in Council) is attempted against the writ of prohibition, although damages are sought because of its issue, this plea to the jurisdiction may be regarded as abandoned and requiring no formal judgment thereupon.

There was no attempt to question the jurisdiction of the Court, as in the recent case of *Musgrave* v. *Pulido* (1), and, indeed, after the judgment in that case, it would have been hopeless to do so. But I am afraid the effect of that judgment has been misunderstood in some quarters. It merely affirmed the doctrine that the governor of a colony, like any other subject, may be impleaded in the courts of the colony, and the judgment of the court below, which was affirmed, was simply setting aside the demurrer which raised the question of jurisdiction, and ordering the defendant (the Governor of Jamaica) to answer further to the plaintiff's action. Here the defendant, who is not sued as Governor but as High Commissioner, does not challenge the jurisdiction on any similar ground, but pleads a general and also a special plea which will be found set forth in the eighth and ninth paragraphs of the statement of defence, viz., that he is not guilty by statute and that he ought not to be compelled to answer to the action,—which I take to mean to answer further to

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(1) L. R. 5 App. Cas. 102.

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the action,—because what he did was done as High Commissioner, and that he is entitled to the privileges and exemptions appertaining to such office; and that the acts complained of were done by him in exercise of the powers expressly conferred on him by the Order in Council. The latter plea, in fact, is covered by the former; and under the two pleas the defendant has contended in effect that what he did was done as a judicial act by the officer designated for the purpose by the Order in Council, or at all events that if the act was not a judicial act it was an executive act which the Order in Council, issued in pursuance of certain Acts of Parliament, required him to perform, and that therefore he cannot be called upon to answer further or be held liable in damages.

Before the argument was taken in support of this contention the plaintiff's counsel opened his case, and, as it was necessary to understand clearly what such case really was before the Court could determine whether the pleas in defence were sufficient without further inquiry, I found that the allegations of malice and without probable cause, contained in the sixteenth paragraph of the statement of claim, were not the gist of the action as maintained at the bar, but that what the plaintiff contended was that the evidence upon which the defendant acted in issuing the writ of prohibition was not proper evidence or any proof to which the word evidence could be properly applied, and, therefore, that in issuing the writ of prohibition upon such a description of evidence the defendant had committed the tort which laid him open to a claim for damages. In supporting this contention the plaintiff's counsel referred particularly to the evidence of one Coe—whom he described as a person unworthy of belief—and read

or referred to a portion of his affidavit which showed that he represented the plaintiff as a person who had advised, or was advising, the Samoan King to make war.

The plaintiff also maintained, as set forth in the sixteenth paragraph of the statement of claim, that the act of the defendant was not a judicial act; and he further contended that the writ of prohibition having been personally served on the plaintiff on a Sunday it was not legal. In order to clear the last point out of the way it is not necessary to enter into that region of argument upon the meridians* into which the Acting Attorney-General for the defendant was not afraid to enter, that Sunday is not Sunday in Samoa because it may then be Monday in England. By common consent that day of the month is held to be Sunday here which is held as Sunday at home; and we cannot allow the Western Pacific to be deprived of its Sabbath by geographical refinements. In point of fact there is no formal service of a writ of prohibition provided for in the Order in Council. The writ itself is dated on Saturday; and if the High Commissioner, as alleged by the plaintiff, personally informed him of the writ being issued at as early a date as possible and gave him a copy, that was something of which the plaintiff could scarcely complain. If, however, the intimation of the writ were to be regarded as a formal service, then, as s. 237 of the Order in Council provides that a search warrant, or warrant for apprehension or commitment or other purpose, may be issued and executed on Sunday where the urgency of the case requires, I would hold such a service on Sunday—because of the urgency of the High Commissioner's duties when visiting these

* See Ordinance XIV. of 1879, whereby an uniform date is provided for the whole of the Colony.

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places in Her Majesty's ships of war—to be a good service.

All the material facts alleged by the plaintiff which raised the question which the plaintiff's counsel explained to be the gist of his action—viz., that the evidence taken before the issue of the writ of prohibition was not evidence in the proper meaning of the term—are admitted by the defendant. The allegations are contained in the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the statement of claim. The qualification alleged by the defendant in regard to the statement in the sixth paragraph that he informed the plaintiff of the evidence on oath he had obtained in support of the charges made against the plaintiff was in effect admitted by the plaintiff's counsel at the Bar, who contended, in reference particularly to the evidence of one witness, that it was not worthy of belief. The allegations set forth in the twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the statement of claim are denied by the defendant, and are objected to by him as surplusage and bad in form. They were no doubt intended to lead up to the charge of malice, contained in the sixteenth paragraph, which the plaintiff's counsel has eliminated from the case, except so far as malice might be inferred from the granting of the order upon insufficient evidence. As to the allegation contained in that paragraph that the High Commissioner in issuing the writ of prohibition was not in the exercise of any judicial duty we shall presently inquire.

The ground is thus cleared and the facts on record for the consideration of the plea put forth by the defendant, in the eighth and ninth paragraphs of the statement of defence, that what he did was done under

the Order in Council, and that he is privileged and protected when thus acting and cannot be sued in damages for acts so done. Now although the High Commissioner has under the Order in Council—especially the amended Order of 1879—power, which may more properly be regarded as executive than judicial, yet the prime object of the Order in Council and the Acts of Parliament which authorised it was to provide for a jurisdiction over British subjects in the Western Pacific in the event of offences being committed by them. The office of High Commissioner is created and constituted under s. 7 of the Order; of a Judicial Commissioner under s. 9; and of Deputy Commissioners under s. 10; while under s. 13 it is provided that the High Commissioner, the Judicial Commissioners, and the Deputy Commissioners form the members of the High Commissioner's Court. In the ordinary cases, therefore, of the exercise of the powers conferred by the Order in Council these officers are judicial officers having the privilege and protection of all judicial authorities in the exercise of their functions, which is that they cannot be sued for an adjudication, according to the best of their judgment on the matter, within their jurisdiction; and that a matter of fact so adjudicated by them cannot be put in issue in an action against them.

But it has been contended by the plaintiff, both in his statement of claim and in argument in answer to the learned counsel for the defendant, that the issue of a writ of prohibition under s. 25 is not a judicial act, as it expressly provides that it is to be done by the High Commissioner under his hand and official seal, and not under the seal of the Court. There can be no doubt, however, that a person who is not even a judicial functionary may be called upon to perform a judicial act,

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and that in doing so he will be as much protected as any other judicial functionary—and this is well illustrated in the case of *Kemp* v. *Neville* (1) in 1861, where the functionary called upon to perform a judicial duty was a Vice-Chancellor of the University of Cambridge, and where in the performance of that duty he was found entitled to the protection of all judicial officers.

It does not follow, therefore, that because the High Commissioner is called upon under s. 25 to perform this duty in his individual capacity, and not when sitting as a Court, that it is not a judicial act. Let us see what is the nature of the act in itself. First of all he is required to take evidence on oath. The words are,—

> Where it is shown by evidence on oath to the satisfaction of the High Commissioner that any British subject is disaffected to Her Majesty's Government . . . . . or is otherwise dangerous to the peace and good order of the Western Pacific Islands, the High Commissioner may, if he thinks fit, by order under his hand and official seal, prohibit that person, &c.

To take evidence on oath is essentially a judicial function, and the object of this writ of prohibition—the preservation of the peace and good order of the Western Pacific—is no less than that which is usually laid upon judicial or magisterial authorities. Again, by sub-s. 2 of s. 25, the refusal to obey the writ of prohibition is to be visited by legal punishment, and even where the offender may not have been convicted of the offence of refusing to obey the prohibition, the High Commissioner has power to remove him in custody to some place in the Western Pacific Islands beyond the limits specified in the order. This is a power to punish following upon a conclusion arrived at after taking evidence on oath. Then again it is provided by sub-s. 3

(1) 31 L. J. (C. P.) 158.

that an appeal shall not lie against an order of prohibition or removal. This, the learned counsel for the plaintiff very properly contended, meant—when taken in connection with sub-s. 5 providing for a report to the Secretary of State—that the act was truly a political act, and the responsibility laid upon the High Commissioner as a political officer.

I lean to the opinion, however, that the shutting out of the right of appeal rather shows that the issuing of the order of prohibition was a judicial act, but one which in its nature required to be made final, as any provisions permitting of litigation in regard to it would destroy its efficacy as a measure for the preservation of peace. I am certainly strengthened in my view that the issuing of the order of prohibition is a judicial act by finding the form of the writ* of prohibition among the judicial forms of procedure (No. 33) provided in the Appendix to the Order in Council. Now if this be so, no allegations such as those made by the plaintiff that the evidence on oath taken by the defendant could not properly be called evidence would form a ground of action. Whether the evidence was such as another court would regard as good evidence, or whether any court or other functionary would have come to another conclusion than the High Commissioner upon the evidence, cannot be made a ground of any claim of damages against the functionary who rightly or wrongly did come to a decision upon the evidence before him. And the fact whether the plaintiff is or is not a person dangerous to the peace of the Western Pacific cannot be put in issue against him in such an action as this. The Order in Council itself, indeed, as if foreseeing the contention now raised has provided a definition of evidence which

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would of itself shut the door on the plaintiff even if the rules of law on such subjects were not well established. Under s. 4 the word "proved" means "shown by evidence on oath in the form of affidavit, or other form, to the satisfaction of the Court, or of the member or officer thereof acting or having jurisdiction in the matter." The word "evidence" thereof means what is proved on oath to the satisfaction of the Court or officer, and that is exactly what is stated in the writ of prohibition which is embodied by the plaintiff in his statement of claim. It commences: "Whereas it has been shown by evidence on oath to my satisfaction . . ."

I am so satisfied that the views I have above enunciated afford the true solution of this question, that it is the less necessary to dwell at length upon the alternative plea of the defendant that even if the act complained of had not been a judicial act, as it was done in obedience to the duty laid upon the High Commissioner by the Order in Council, no action can lie, for no tort can be alleged where a simple legal duty has been performed. I am quite clear that no mistake in the appreciation of evidence—which is what the learned counsel represented as the gist of his case—would warrant an action of damages as for a tort against even a non-judicial officer, and that the pleas pleaded by the High Commissioner would be a sufficient answer to any such action. If any malice is alleged in such cases, either against a person performing a judicial act or a person performing in an official capacity a legal duty, it must, I apprehend, be not mere inferential malice to be deduced from the defective mode in which the duty may have been alleged to have been performed, but personal malice which must be directly proved. In these circumstances I hold that there is not in the case any tort set forth which could

warrant further inquiry in this case, and that the defendant's pleas upon the admitted facts are a full and complete answer to the case as put before the Court, and that the action must be accordingly dismissed. I allow costs; and, as the plaintiff represents himself as an official of the King of Samoa and only temporarily resident in Levuka, I think it right, in this case, that the attorney should be looked to for the amount in the first instance, leaving him to recover the same from his client. I allow 15*l.* 15*s.* in name of costs.

Judgment for defendant with costs.

[APPELLATE JURISDICTION.]

HUNT *v.* THE QUEEN. (No. 2.)

1882
Jan. 18.

Prohibition Order—Western Pacific Order in Council, 1877, *s.* 25—*Naturalisation Act*, 1870—*Treaty between Great Britain and Samoa.*

On an appeal to the Supreme Court of Fiji against an order of conviction for breach of a prohibition order made by the Deputy Commissioner in Samoa under the Western Pacific Order in Council, 1877, s. 25, on the ground that the defendant, a British subject, was naturalised as a Samoan and had ceased to be within the scope of the Order in Council,

Held, that notwithstanding anything contained in the Naturalisation Act, 1870, in the absence of any corresponding law in Samoa the defendant could not be naturalised as a Samoan and thereby be divested of his allegiance to Her Majesty, but must, as a British subject, remain subject to the provisions of the Order in Council.

Other technical objections to the validity of the conviction were overruled.

Mr. Hobday for the appellant.

The Acting Attorney-General (Mr. Solomon) for the respondent.

The facts and arguments sufficiently appear from the judgment.