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of the Ordinance* are not so clear as they might be, but as they do not clearly show that the penalty was to be computed from the time that the money was payable, I must hold that it was not. A penalty to be enforceable must be clearly expressed on the face of the Ordinance. I therefore hold that the Chief Police Magistrate was right in computing the penalty after the expiration of the three months.

Appeal dismissed.

[APPELLATE JURISDICTION.]

Sept. 25.

MANÆMA AND OTHERS *v.* McARTHUR AND COMPANY.

Western Pacific Order in Council, 1877: *Art.* 4 (6), 5, 6, 57, 58, 65, 121 (3), 145: *Schedule*, §§ 276, 280: *Form* 44—*Treaty of Samoa of* 28*th August*, 1879, §§ 4, 5—*Pacific Islanders Protection Act*, 1875, *s.* 6—"*Foreigner*"—*Stats.* 13 *Eliz. c.* 5; 27 *Eliz. c.* 4.

In an action for damages for trespass upon and for the recovery of possession of lands brought in the Deputy Commissioner's Court at Samoa by a native together with three others who were British subjects,

Held, on appeal to the Supreme Court of Fiji, firstly, that such an action would lie, and that although the Order in Council might not confer the actual power to enforce a decree for possession of land, even as between British subjects, the Court could nevertheless decide the right to its possession, leaving it to the successful party to enforce the order, if necessary, by any means open to him under the Order in Council or otherwise.

Secondly, that the defendants, having a permanent business establishment in Samoa, although not personally resident there, were "within the Pacific Islands," and, as such, were properly before the Court.

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* The words of s. 97 of XI. of 1877, so far as they apply, are as follows: "Where any such moneys shall have been due by any person for any time exceeding three months after the day on which such moneys became due and payable such person shall be subject to a penalty at the rate of ten per centum per annum on the amount of all such moneys due by him to be paid and recovered."

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Semble, that the term "foreigner" in Art. IV. (6) must be intended to refer to the subject of a foreign "State," and not to a native of Samoa or other country coming under the provisions of the Western Pacific Order in Council, 1877.

This case, which was an appeal from the decision of the Deputy Commissioner at Samoa, was heard on the 31st August and 2nd September.

Mr. Napier (of the New Zealand Bar) for the appellant.

Mr. Irvine for the respondent.

The facts and arguments sufficiently appear from the judgment.

FIELDING CLARKE, C.J. This is an action brought by one Manæma, a native woman of Samoa, in the Navigators' Islands in the Western Pacific, and James Sinclair, Hugh Hart Lusk and William Mathieson, British subjects, against William McArthur & Co. for recovery of possession of certain lands in Samoa, alleged to have been wrongfully seized by the defendants, and for damages for trespass. The Deputy Commissioner at Samoa has given judgment for the defendants and the case comes before the Supreme Court of Fiji on appeal. Manæma claims to be entitled to the lands in question under a conveyance from one Frank Cornwall, a man with whom she has been living at Samoa for some years. The other plaintiffs claim under a lease purporting to be executed by Manæma, "by her attorney, Frank Cornwall," whereby for the consideration of fifty pounds the lands included in the conveyance to Manæma were leased to Messrs. Sinclair, Lusk and Mathieson for the space of one year from the 8th of December last.

Three objections are taken to the jurisdiction of the High Commission Court, two of which relate to the persons of the litigants and the other to the subject-matter of the action. Those relating to the persons of the litigants depend upon the meaning and effect of the 1st and 3rd clauses of the 6th Article of "The Western Pacific Order in Council of 1877," under which Her Britannic Majesty's High Commission Court for the Western Pacific is constituted, and its powers and jurisdiction defined and limited. The Article is as follows :—

> This Order applies to—1. All British subjects for the time being within the Western Pacific Islands whether resident there or not. 2. All British vessels for the time being within the waters mentioned in Article 5 of this Order. 3. Foreigners in the cases and according to the conditions in this Order specified but not otherwise.

Firstly the defendants object that at the time of action brought they were not "within the Western Pacific Islands." The writ is addressed to "Sir William McArthur & Co., of New Zealand and Samoa," and the service, to which no objection was taken, was effected at Samoa. No appearance is necessary under the practice of the Court and none was entered. Article 65 of the Order in Council provides that

> . . . . . there shall ordinarily be no written pleadings; but the Court may at any time if it thinks fit order the plaintiff to put in a written statement of his claim, or a defendant to put in a written statement of his defence.

Presumably the orders here alluded to were made in this case as written statements of claim and defence are amongst the papers forwarded from Samoa. In the statement of claim the defendants are described as "Sir William McArthur, Alexander McArthur, Charles Cookman McWilliam and Frederick Larkins, all trading together and carrying on business at Samoa and also

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at Auckland as William McArthur & Co., and relief is claimed against "the defendants." Had the action been in a court where formal pleadings are necessary I should have considered it doubtful whether the plaintiffs were not precluded by the form of their statement of claim from alleging that the defendants were sued as partners in their partnership's name. *Munster* v. *Railton* in the Court of Appeal (1), seems to show that by the present practice of the courts in England an action commenced as it now may be against a firm may by the form of the statement of claim be converted into an action against one or more individual partners, but as the delivery of written statements on either or both sides is in the Western Pacific a matter for the judge's discretion and as it is provided by Article 58 that "every action shall be heard and determined in a summary way" I think that the nature of the action and the form of the judgment must be determined by the form of the writ (see the judgment of Lord Justice Brett in the case of *Jackson* v. *John Litchfield & Sons*). (2) The Order in Council (Article 248) permits the suing of partners in the name of the firm and from the form of the writ I am of opinion that this course has been adopted in the present case. The materiality of this point is that while no one of the individual partners of the defendants' firm is or has been "within" the Western Pacific it is submitted that the firm of partnership is properly said to be "in" Samoa on account of its business transactions in that place. The evidence adduced at the trial did not show more than that the defendants had for some years been in the habit of doing business in Samoa through agents, but on the hearing of the appeal an application was made

(1) L. R. 11 Q. B. 435. (2) L. R. 8 Q. B. 474.

to me to admit the affidavit of Mr. Napier, the gentleman who conducted the plaintiff's case, to the effect that defendants had a large store at Apia in Samoa at which they traded and carried on business by servants and agents, and affixed to which was a sign-board with the words "Wm. McArthur & Co." in large letters. I admitted this evidence on the ground that the very notoriety of the facts deposed to might account for this absence in the evidence, and because I thought they were material to the point of jurisdiction. It seems to me that the locality of a firm must depend upon where it regularly carries on business, and that the defendants' firm having a permanent business establishment both in Auckland and Samoa can be properly said to be "in" or "within" those two places at the same time. [See judgment of Mellor, J., in "*The Buenos Ayres and Ensanada Port Railway Co.* v. *The Northern Railway Company of Buenos Ayres*" (1), where the parties, who were companies registered and having offices in London but domiciled and carrying on business in the Argentine Republic, were described as being "in" England and "within the jurisdiction" of the English courts.]

The other objection on the score of personal jurisdiction is that Manæma is not a "foreigner" within the meaning of the 3rd clause of Art. 6, and that the Court cannot entertain the suit as far as she is concerned because the application of the Order in Council is limited to British subjects and foreigners. "Foreigner" is stated in the definition article—Art. 4, (6)—of the Order in Council to mean "a subject or citizen of a state in amity with Her Majesty" and the question whether Samoa is in a state of amity with Her Majesty has been argued at length. Samoa

(1) L. R. 2 Q. B. D. 210.

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may, perhaps, be deemed to be within some of the definitions of the word "state" to be found in works on international law and reported cases. In one case cited to me by Mr. Napier (the report of which he had not got) a tribe of American Indians (Cherokees), was described as a "state," but I should imagine that their political history was no doubt much older than that of Samoa. The question, however, is in what sense the word "state" is used in the Order in Council. I was asked to take judicial notice of the constitution of the kingdom of Samoa, a matter about which I have only very scanty information, and I was referred to a treaty dated the 28th of August, 1879, made between Her Majesty, through the High Commissioner, and "the King and Government of Samoa," as showing that whatever was the political condition of Samoa at the date of the Order in Council it was now recognised as a state in amity with Her Majesty. Clause 5 of the treaty provides that every civil suit which may be brought in Samoa against any subject of Her Majesty shall be tried by the High Commissioner or other duly authorised British officer. And clause 4 contains a similar recognition of Her Majesty's exclusive criminal jurisdiction over British subjects. These clauses involve a recognition and confirmation of the jurisdiction previously asserted, and seem to me to leave the position of Samoa with respect to that jurisdiction exactly where it was before. The Order in Council is immediately founded on the 6th section of the Pacific Islanders Protection Act, 1875, which provides that—

> It shall be deemed lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands in the Pacific Ocean not being within Her Majesty's dominions nor within the jurisdiction of any civilised power in the same and as ample a manner as if such

power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the Office of High Commissioner in over and for such islands and places or some of them, &c.

In the Order in Council itself the Navigators' Islands are placed (Art. 5) in the same category as all the other islands and places to which the Order applies, and in the preamble of the Order these islands and places are referred to as "not being within the jurisdiction of any civilised power." The conditions under which a "foreigner" can sue or be sued in the High Commission Court are (Art. 145) that he first file the consent in writing of the competent authority on behalf of his own nation to his submitting and that he does submit to the jurisdiction of the Court, and that if ordered to do so he find security for the due performance of any order the Court may make against him. The first condition is inserted to prevent any difficulty of an international nature which might arise from the mistaken assumption of jurisdiction over the subject of a foreign state in a place where such state may have equal rights with Her Majesty. The second condition is to prevent the possible injustice to British subjects which might arise if the Court after pronouncing against a foreigner who had voluntarily submitted to the jurisdiction found itself powerless to give effect to its decree. In the determination of the point under discussion I have really only the Order in Council and the statutes upon which it is founded to guide me. It seems to me that by the Order in Council Samoa is in the same position as all the other communities of the Western Pacific over which the jurisdiction of the Court extends, and, if I am right in supposing that the treaty does not alter matters in this respect, it would follow that if Samoa is to be

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deemed a "State in amity with Her Majesty," other native communities having (as most of them have) some form of government of their own would come within the same definition. I cannot suppose that the Order in Council contemplates the necessity of "the consent in writing of the competent authority" in places described as "not being within the jurisdiction of any civilised power," and I think that the whole tenor of the Order in Council shows that by the word foreigner is meant the subject of a "foreign state" as that expression is usually understood, viz., a state capable of entering into all international relations with the other nations of the world. It is not, however, necessary to pursue the inquiry further because, in my opinion, the adjudication of a civil suit brought by a native of the Western Pacific (though not a "foreigner") against a British subject in the High Commissioner's Court is nothing but the "application" of the Order in Council to a British subject. In vol. i. of Phillimore's *International Law*, second edition, p. 393, I find a reference to the case of *The Laconia*. (1) Their Lordships of the Privy Council in their judgment said:—"There is no compulsory power in an English court in Turkey over any but English subjects, but a Russian, or any other foreigner, may, if he pleases, voluntarily resort to it with the consent of his Sovereign and thereby submit himself to its jurisdiction." Taking into consideration the fact that the jurisdiction of the Consular court in Turkey is derived from and limited by the concessions of the Turkish Government and is, therefore, at any rate not more extensive than the jurisdiction over British subjects in the Western Pacific, I think that it may be gathered from this case that even

(1) 2 Moo. P. C. Rep., N. S. 85.

if the Order in Council had not expressly provided for "foreigners," they could, with the consent of their own Governments, have sued British subjects in the High Commission Court, and I think it further follows that when such a consent is not necessary on international grounds there is nothing to prevent the High Commission Court exercising its jurisdiction over a British subject at the suit of any plaintiff. Manæma gave security for costs and filed the consent of the King of Samoa. The latter was a very proper precaution, whether necessary or not, and the security gives every proper safeguard to the defendants. Under these circumstances I have come to the conclusion that Manæma has a right to sue.

The next objection to be dealt with relates to the subject-matter of the action. It is said that the Court cannot entertain an action which involves the title to land at Samoa. One of the heads of the plaintiff Manæma's claim, viz., that the Court may declare that she is the owner of the lands in question, I dismiss altogether from consideration as beyond the powers of the Court and the scope of the action; but the main point is whether the Court can act directly upon the land by means of an order for possession. The Order in Council both in Art. 280 and Art. 57 recognises actions respecting land in the Western Pacific, but it is suggested that these provisions do not mean that the Court can go beyond the powers exercisable by the English courts respecting foreign land. It is of course well known that the Courts of Equity in England have not hesitated to affect foreign lands by decrees binding personally upon those within the jurisdiction, and there appears to be no distinction in this respect between lands in the colonies and lands in foreign countries. In *Lord Cranstown* v.

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Johnston (1), which was a suit to set aside a judgment fraudulently obtained in St. Kitts, whereby the judgment creditor had possessed himself of his debtor's lands in the debtor's absence by means of a forced sale, the Master of the Rolls (Sir R. P. Arden) said, "It was not much litigated that the Courts of Equity here (in England) have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. The only distinction is that this Court cannot act upon the land directly, but acts upon the conscience of the person living here."

On the principle of not acting directly upon the land, the English courts have always refused orders for possession of land in a foreign country: *Roberdeau* v. *Rous* (2), *Angus* v. *Angus* (3), and other cases cited in the notes to *Penn* v. *Lord Baltimore*. (4) The reason of this refusal is twofold. Firstly, by the principles of International law every sovereign state has paramount domain over the land within its own territorial limits and, therefore, the title to real property can only be acquired, passed, and lost according to the law of the Sovereign who has such paramount domain. In *Roberdeau* v. *Rous* Lord Hardwicke said that the Court had no jurisdiction to put persons in possession in a place where they had their own methods on such occasions to which the party might have recourse. The other reason is that no sovereign state has the actual power to execute such of the decrees of its tribunals as affect to deal with land beyond the jurisdiction. (Foote's *Private International Jurisprudence*, pp. 120, 121.) Such a decree, if made, might be, as Lord Romilly said

(1) 3 Ves. 170.
(2) 1 Atk. 543.
(3) West's Rep. 23.
(4) 2 White and Tudor's Leading Cases.

in *Norris* v. *Chambers* (1), "A mere *brutum fulmen*, incapable of being practically enforced." It seems to me that the first of these reasons does not apply to the present case. Even if Native Land Courts exist at Samoa the joint operation of the Order in Council and the treaty above alluded to would prevent any proceedings to disturb a British subject in possession of lands at Samoa being brought in any other Court other than the High Commissioner's Court. The second reason has, perhaps, a limited application. I doubt whether the Order in Council confers the actual power to directly enforce a decree for possession even as between British subjects, but as the Court has jurisdiction in Samoa over British subjects there I see no reason why I should not decide the question of right to possession, leaving it to the plaintiffs, if I decide in their favour, to enforce the order if necessary by any means which may be open to them under the Order in Council or otherwise. The Order in Council, while recognising actions respecting land, could, I think, hardly have intended that in a case like this where both parties trace their claim to possession from the same British subject the Court could not decide between them.

There is another objection which would until recently have applied in England to a claim either in "ejectment" or for "trespass" to land situate abroad. These forms of action being "local" in their nature could, by the Rules of Procedure, have only been brought in the place where the land was situate. In my view it is not necessary to discuss the effect of the recent abolition of the distinction between "local" and "transitory" venue, because as the trial was held in the *forum situs*

(1) 30 L. J. Eq. 288.

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the objection would not apply. I merely mention the objection because it formed matter of argument.

I now proceed to consider the facts. On the 5th February, 1879, Cornwall, who at the time was indebted to the defendants in the sum of 5,664*l.* 1*s.* 2*d.*, conveyed the lands which are the subject of this action to Manæma by a deed which recites no valuable consideration, and which was admitted to have been purely voluntary. On the following day he executed a mortgage to a man named Nelson of certain other lands expressed to be in consideration of a debt of 16,000*dols.* owing by him to Nelson, but which debt by Nelson's own admission had no existence. Cornwall kept the conveyance to Manæma in his own possession, and he and Manæma continued to live together on the land until he left for England in the middle of 1880. Before leaving, Cornwall arranged for an advance of 1,200*l.* from a Mr. Ruge which was repaid during his absence from the produce of the plantations. During his absence Manæma no doubt remained in possession of the house and exercised some supervision over the plantations, but I think it appears from the evidence that she was acting in the interest and for the benefit of Cornwall and was generally regarded as his representative. Cornwall returned in September, 1881, and resumed possession, but had left again before the seizure of the lands by defendants' agents mentioned below. In July and November, 1879, Cornwall had executed two deeds of mortgage to the defendants of lands other than those conveyed to Manæma, the latter deed being apparently intended to be in substitution of the former. In 1881 the defendants sued Cornwall in the High Commission Court for their debt which was covered by promissory-notes and obtained a judgment for the

amount due to them. This judgment was confirmed on appeal by the Supreme Court of Fiji and at the same time the mortgages given to McArthur were ordered to be cancelled—why or under what circumstances does not appear. The defendants afterwards took out a writ of seizure and sale of Cornwall's goods according to the form provided by the Order in Council (Schedule Form 44) and under this the lands conveyed to Manæma were taken in execution, a Mr. Hetherington of Samoa, defendants' solicitor, acting in the matter, as he says in his evidence, in the double character of agent for McArthur & Co. and officer of the Court. By Mr. Hetherington's instructions these lands were offered for sale by an auctioneer, and were bought in by Mr. Hetherington on behalf of McArthur & Co. for 354*l*. Manæma was turned out of possession of the house she was occupying and the defendants have since claimed to be owners of the lands in question and have exercised acts of ownership over them. I may say at once that I think the seizure and sale of the lands under the writ of *fi. fa.* was illegal, and does not in the least justify the defendants' present possession, but this is not enough because the plaintiffs must make out their case notwithstanding the weakness of the defendants' position. It appears, however, to be clearly established that as against a wrong-doer actual possession is a good title, and this would seem to be the case even though the plaintiffs fail in an attempt to make out a legal title. *Davison and others* v. *Gent* (1), *Arber* v. *Whitlock* (2). On the ground, therefore, of actual possession of the house at the time of seizure, Manæma, if there be no other defence, is entitled to damages for trespass. She is not entitled to an order for possession because

(1) 26 L. J. N. S. Ex. 122. (2) L. R. 1 Q. B. 1.

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the lease which is jointly set up by herself and the other plaintiffs was executed before action brought. This lease is signed by Cornwall as attorney of Manæma, and a copy of a written authority by Manæma purporting to constitute Cornwall Manæma's attorney in all matters and reciting that "everything which he may do shall be deemed to be done by me (Manæma) and shall be unquestioned by me," is produced as evidence of Cornwall's authority to make the lease. I have no doubt that the above recital expresses exactly the position Manæma was intended to take. Everything that Cornwall did was as is stated, to be deemed to be done by her, but I think that this arrangement was to suit Cornwall's purposes and not Manæma's and that the lease was really made by Cornwall alone with the object of enabling the lessees to sue in the High Commission Court. Whether this lease would be good for every purpose or not the lessees have under it the permission of Cornwall (and as far as it may be material of Manæma also) to take possession, and as the defendants trace their claim to possession also through Cornwall, but without in my opinion showing any right at all, it seems to me that as against them the lessees have a right to succeed in ejectment, and as they made entry before action, in trespass also.

It is said, however, that against all the plaintiffs the case falls to the ground because the conveyance to Manæma was fraudulent and void as against purchasers and creditors under the statutes 13 Elizabeth c. 5, and 27 Elizabeth c. 4, respectively. The latter statute has no possible application. Judgment creditors are not "purchasers" within the statute in England (*Bevan* v. *Lord Oxford*) (1), and much less in the Western

(1) 25 L. J. N. S. Eq. 299.

Pacific, and McArthur & Co. were not purchasers from Cornwall in any other sense. With respect to the former statute I certainly think that from the amount of Cornwall's indebtedness at the time of the conveyance one cannot but assume that his intention was fraudulent because although it is stated that he had other land of great value, the value whatever it may have been could not have been realised. The fact, too, of his retaining the conveyance, the almost contemporaneous arrangement with Nelson, the form of the so-called power of attorney and the application of the produce of the estates for his benefit all point in the same direction. Nor do I think that the mortgage to defendants makes any difference, as I think it was not accepted by them as full and sufficient security for their debt, but that their agent being instructed to get whatever security he could, took all that Cornwall would give. On the other hand it is argued that the statute of Elizabeth has no application because lands in the Pacific cannot be taken in execution and therefore no creditor could be defrauded by the voluntary conveyance to Manæma. No doubt the statute only applies to such property as is subject to execution, but although no writ of *elegit* or other execution against the freehold of land is provided by the Order in Council a creditor may under Art. 276 apply for sequestration of the debtor's property after an order of arrest (as elsewhere provided by the Order in Council) has failed to produce payment. I think that a voluntary and fraudulent conveyance would under the statute be void as against a sequestration duly issued, but I cannot understand how this can be a justification for a trespass when no order for an arrest or for a sequestration has been made or even applied for. Sequestration of the profits of an estate by

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an officer of the Court is a very different thing to a transfer by a means of a forced sale and even though a creditor may by some means or other be able to have execution against houses and plantations, it does not follow that he is justified in forcibly seizing them without resorting to the means provided by law.

On the question of damages the true position of Cornwall with respect to the land has in my opinion a very important bearing. I am satisfied that he and not Manæma is the person who would have taken any produce or profits of the lands and plantations if the defendants had not seized them and that he would have done so in reality on his own account and not by virtue of any authority derived from Manæma. If Cornwall had sought to recover damages in his own name for the loss of this produce the defendants could have availed themselves of their judgment debt in answer to his claim. It would therefore be obviously unjust to let Cornwall recover through Manæma and at the same time avoid his just responsibility. Manæma has in my opinion suffered no damage whatever beyond the personal inconvenience in being expelled from her home, and in estimating the amount (which under Art. 121, (3,) of the Order in Council, I think I am justified in doing on the hearing of this appeal) I cannot exclude my general knowledge of the mode of native life in the South Seas. I accordingly assess these damages at the sum of 50*l.* for which amount Manæma will have judgment. Messrs. Sinclair, Lusk and Mathieson have not proved that they had any intention or object in taking the lease other than the bringing of this action, but as no defence on the ground of maintenance is set up I think they are entitled to recover the 50*l.* which it is not denied they actually paid. They

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are also in my opinion entitled to possession and there will be a declaration and order to that effect and a judgment in their favour for 50*l*. The plaintiff Manæma will have costs of the appeal as well as costs in the Court below. The other plaintiffs will have costs in the Court below but not costs of appeal as the appeal was entered on behalf of Manæma alone.

Judgment for plaintiffs.

[APPELLATE JURISDICTION.]

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June 14.

RECEIVER-GENERAL *v.* BRODZIAK AND COMPANY.

Customs Regulation Ordinance 1881, *ss.* 77, 100—*Forfeiture of dutiable goods.*

Upon proceedings being taken for the forfeiture of dutiable goods under s. 77 of the Customs Regulation Ordinance 1881,* and the goods having been ordered by the magistrate to be forfeited,

Held, on appeal, that the magistrate was not bound to order the forfeiture, but that he had a discretion given to him under s. 100, to dismiss the case if he thought that no intention to defraud had been shown.

This was an appeal by the defendants against an order made by the Chief Police Magistrate under s. 77 of the Customs Regulation Ordinance 1881, whereby certain goods, the property of the defendants, had been forfeited under the following circumstances. An employé of the firm had passed entries for certain dutiable goods at the Customs, but had not included in those entries certain other goods contained in the same packages, though the invoice of the goods so omitted was presented at the

* As to forfeitures under this section, see now s. 51 of Ordinance I. of 1895.