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possible position to complain of violence, that if he gave him double the amount he had given Harding in the last case—viz., 50*l.*—the ends of justice would be met. The finding his Lordship added, would carry costs, but he would look at the bill before allowing the amount.

*Judgment for plaintiff.*

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[APPELLATE JURISDICTION.]

HUNT v. THE QUEEN. (No. 1.)

*High Commissioner's Court for the Western Pacific at Samoa—Western Pacific Order in Council, 1877, ss. 17, 22, 23, 40, 54, 55, 219, 225, 229—Merchant Shipping Act, 1854, s. 267—Merchant Shipping Amendment Act, 1855, s. 21—Foreign Jurisdiction Act, 1813-49 Geo. IV. c. 83—Pacific Islanders Protection Acts, 1872 and 1875—14 & 15 Vict. c. 100, s. 12.*

The appellant, a British subject residing at Samoa who had, with others, determined at a public meeting to lynch a certain person then lying under a charge of murder and committed for trial to the United States—which purpose was subsequently carried out—was tried, with two others, in the High Commissioner's Court at Samoa, for murder and also, on a separate count in the same indictment, for conspiracy to murder. On the preliminary inquiry the two others were discharged; and the appellant was subsequently convicted of the conspiracy and sentenced to one year's imprisonment, but acquitted on the charge of murder.

On appeal to the Supreme Court of Fiji:—

*Held*, (i) That the High Commissioner's Court at Samoa had jurisdiction under the Western Pacific Order in Council, 1877, notwithstanding such Order had not been proclaimed until after the commission of the offence.

(ii) That conspiracy to murder, being an offence known to English law, could be tried under the Order in Council in the British Court

at Samoa, notwithstanding the absence of any local law on the subject.

(iii) That the appellant was rightly convicted, notwithstanding that a count for felony (upon which he was acquitted) was charged in the same indictment as that upon which he was convicted of misdemeanour, and that even if objection lay to such indictment it should have been taken at the trial.

(iv) That an unlawful agreement come to at a public meeting may constitute a conspiracy.

*Mr. Solomon* for the appellant.

*The Attorney-General* (Mr. Garrick) for the respondent.

The Court reserved its decision; the arguments and facts sufficiently appear from the judgment.

J. GORRIE, C.J. This is an appeal from the newly-constituted tribunal of the High Commissioner's Court for the Western Pacific.\*

This Court has power to entertain such an appeal by virtue of the Western Pacific Order in Council, 1877, sec. 54, and the appeal was accordingly heard on the 15th April, 1878.

The appellant was tried at Apia, Samoa, on the 23rd February, 1878, before the Judicial Commissioner for the Western Pacific and two assessors, on the charges,—(1) For having conspired with divers persons unknown to kill and murder one Charles Corcoran, at Apia, aforesaid; and (2) With having wilfully and feloniously and with malice aforethought killed and murdered the said Charles Corcoran. The Court below found him not guilty of the murder, but convicted him of the conspiracy to murder, and sentenced him to one year's imprisonment.

\* See the *Pacific Islands Protection Act*, 1875, s. 6.

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The accused appealed under s. 54, sub-s. 3,\* of the Order in Council, having taken two objections to the jurisdiction and competency of the charge before pleading, which were overruled; and these and other objections have been maintained under the appeal and the propriety of the conviction generally contested, as the whole case has under the Order in Council been brought up for review.

The objections thus argued to the validity of the conviction were—

(i) That the Order in Council having only been proclaimed by publication in the *Fiji Royal Gazette* of 2nd February, 1878, it was not competent for the High Commissioner's Court to try the appellant for a crime said to have been committed in November, 1877.

(ii) That conspiracy to murder under the English statute cannot be regarded as a crime in Samoa, such an offence not being one recognised in the territory where it is alleged to have been committed, and not being a crime by the law of nature, or of nations.

(iii) That the accused, having been found not guilty of the felony, could not legally be convicted of the misdemeanour of conspiracy to commit the felony with which he was charged which had merged in the felony.

(iv) That the evidence adduced was not sufficient to sustain the charge, the presence of the appellant with the man Corcoran when on his way to the place of execution being for an innocent purpose; and the Court had wrongfully assumed that such presence showed that his participation in the previous meeting, or so-called conspiracy, was with evil intention.

Now (i), with regard to the plea to the jurisdiction, there must be a clear distinction drawn between the power abiding by the Constitution in the Crown, or

\* (iii) "Where a person is convicted before the Court, and the sentence imposes a punishment of a money penalty of fifty pounds, or of one year's imprisonment, or any severer punishment, and the person convicted declares his desire to appeal"—  
an appeal is allowed, in the manner therein indicated, to the Supreme Court of Fiji.

conferred by Parliament, to judge subjects for crimes committed in particular places and the mere constitution of a court to enforce that jurisdiction. It has been found necessary for Parliament to confer at various times increased powers of jurisdiction upon the Crown in order that crimes committed on foreign territory by British subjects might not go unpunished.

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For example, the Merchant Shipping Acts, 17 & 18 Vict. c. 104, s. 267, and 18 & 19 Vict. c. 91, s. 21, provided, first, that any British seaman committing an offence either ashore or afloat, and, second, that any person, whether seaman or not, committing an offence either on board ship or in any foreign port or harbours should be liable to be tried in any court in Her Majesty's dominions which would have had cognisance of the crime if committed in its ordinary jurisdiction.

Then we have the Foreign Jurisdiction Act (6 & 7 Vict. c. 94), which was passed to remove doubts as to the validity of the jurisdiction over Her Majesty's subjects in foreign territories. By that Act it was provided that crimes committed in foreign territory might be inquired of by the Supreme Court of any colony to which the offender might be sent by the officers lawfully authorised to apprehend and grant warrants for transmittal for trial.

There have been, moreover, and are statutes specially referring to jurisdiction over British subjects sailing in the South Seas or residing in the numerous islands of the Pacific. The Act 9 Geo. IV. c. 83, being a Constitution Act for New South Wales, gave jurisdiction to the Supreme Court of that colony to inquire into offences committed in these seas, and also in the islands of New Zealand, Otaheite, or any other island, country, or place situate in the Indian or Pacific Oceans not subject to His Majesty or to any European power.

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And now there are the Pacific Islanders Protection Acts of 1872 and 1875. The latter Act, by the sixth section thereof, provides that—

It shall be lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places 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 then follow provisions for creating by Order in Council the Office of High Commissioner and the erection of a Court of justice.

That office has now been created and a Court of justice established, but the appellant contends that the Court cannot judge of crimes committed before its own creation or the date of publication by which the commencement of its functions were made known to Her Majesty's lieges. The measure of the jurisdiction of the Court is thus sought to be limited not by the territory over which its powers extend, or the nature of the offences committed to its cognisance, but by the time of the commission of the offence as compared with the date of the opening of the Court. No authority was quoted to sustain this pretension, and if it were well founded it would not only be applicable to the Court of the High Commissioner but to all courts. Thus the jurisdiction of the Supreme Court of this Colony would be limited by the date of its creation, while in point of fact it constantly deals with disputed questions long anterior to its organisation.

The argument is based on a misconception as to the source of jurisdiction. Courts of law exercise their powers—not from attributes inherent in themselves—whenever the particular individuals necessary to constitute a court are appointed. They exercise the jurisdic-

tion of the Crown which is the fountain-head of all judicial power. And thus it is that the Order in Council, in treating of the jurisdiction of the Court in question, says (s. 17) :—

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All Her Majesty's jurisdiction, exercisable in the Western Pacific Islands in criminal and civil matters, shall, subject and according to the provisions of this Order, be vested in and exercised by the High Commissioner's Court.

In answer to the argument that to limit the jurisdiction as the appellant contended for would be practically giving a pardon to all criminals for crimes committed before the constitution of this particular Court, the appellant's counsel contended that such crimes could be tried according to the methods in force before the constitution of the Court. But it is clear that the erection of the new court took away the powers previously vested in any other courts. The Supreme Court of New South Wales, for example, even if the Act of George IV. were otherwise in force, could not now try any of Her Majesty's subjects for offences committed in the Western Pacific, except under s. 52 of the Order itself, any more than it could try for offences committed in New Zealand after the constitution of the Supreme Court of New Zealand.

Another argument used by the learned counsel was not without its acuteness. He contended that under the section above quoted Her Majesty's jurisdiction was to be vested in the High Commissioner's Court subject to the provisions of the Order, and that it was one of the provisions of the Order that it should commence and have effect on a day fixed by proclamation under the hand of the Governor of Fiji, which was done in February, 1878, whereas the crime is said to have been committed in November, 1877. But the

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commencement of the Order is not declared to affect, and cannot be held to affect, Her Majesty's jurisdiction in the Western Pacific which is delegated by the order of the Court,—a jurisdiction which it might well be contended existed at least from the time of the passing of the Constitution Act of New South Wales, but which certainly was fully conferred on the Crown by the Pacific Islanders Protection Act of 1875.

I must, therefore, come to the conclusion that this ground of appeal is not well founded.

(ii) The next contention was as to the charge of conspiracy to murder. Now as to this, the general principle (where not controlled by statute) may be that a subject is not answerable for what is done on foreign territory, and that if the particular act charged was not a crime in the territory where it was committed it could not be held to be a crime for which the perpetrator was answerable to an English court, even under the statutes making him generally answerable for crimes to the courts of his own country. The whole of this subject is rather obscure from the fact that in early times when our great legal treatises were written the subject was not one which was forced upon the attention of the courts as it is now, and from the slavish manner in which later writers follow in the footsteps of the early commentators. We had to refer to certain aspects of the question in relation to torts in the case of *Harding v. Liardet*\* and to quote the case of *Regina v. Lesley* (1), decided in the year 1860 in the Court for Crown Cases Reserved, where the principle laid down was that the captain of an English ship was not responsible for acts done in Chili by direction of the Chilian authorities, although unlawful by the law of England; but that he

\* *Ante* p. 15.

(1) 29 L. J. (M. C.) 97.



became responsible when beyond Chilian waters, and his acts as captain were only controlled by his responsibility to the laws of his own country. The question was again touched upon, but only touched upon, in the case of the *Attorney-General of Hongkong v. Kwok-a-Sing* (1) in 1874. It is there laid down by the Judicial Committee of the Privy Council, at p. 198, as follows:—

Their Lordships cannot assume, without evidence, that China has laws by which a Chinese subject can be punished for murdering beyond the boundary of the Chinese territory a person not a subject of China. Up to a comparatively late period England had no such laws. Moreover, although any nation may make laws to punish its own subjects for offences committed outside its own territory, still in their Lordships' opinion the general principle of criminal jurisprudence is that the quality of the act depends on the law of the place where it is done.

In this case the general principle must be considered with the modification that England has made laws to punish its subjects for offences committed out of the territory. No doubt a very important question might arise when the territory, although not a civilised power in the ordinary sense of the term, had a law on any given subject directly antagonistic to English law, or differing from that law in such a way that the act done was looked upon in the territory in a much less serious light than in England. The contention of the appellant that such a conflict arises in this case is not borne out by anything to be found in the case itself. There is nothing to show in what manner conspiracy to murder would be treated in Samoa, but as the islands are only very recently, and very loosely, subject to any general government, and the penal laws consist of the will of the local chief over his own people, it may well be that conspiracy to murder would be treated more severely

(1) L. R. 5 P. C. 179.

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and not with greater forbearance than by the of law England.

However that may be, the fact of the constitution of the High Commissioner's Court, and the assertion by Her Majesty of jurisdiction over her subjects in these islands shows that they are not regarded as civilised powers in any sense of the term from whose laws or customs any arguments could be drawn in a question of this nature. The jurisdiction which Parliament authorised the Crown to assert was a jurisdiction conformable to English law. Indeed the words of the Act of 1875, are:—"In the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory." Such a jurisdiction must be exercised by the Crown in conformity with English law, unless the cession or conquest had been regulated by treaty stipulating for the continuance of other law. That this is the understanding of the Crown may be gathered from the terms of s. 22 of the Order in Council, where it is provided that—

Subject to the other provisions of this Order, Her Majesty's criminal and civil jurisdiction exercisable in the Western Pacific Islands shall, as far as circumstances admit, be exercised on the principles of and in conformity with the statute and other law for the time being in force in and for England.

This is conclusive; for the jurisdiction given by Parliament, the law-making power, confers upon the Crown the same right of legislating by Order in Council for British subjects resident in the Western Pacific as if they were congregated into and composed one Crown Colony.

But besides the positive provision just quoted the Order in Council has a negative provision not less important. By s. 23 it is provided that—

Except as regards acts declared by this Order to be offences against this Order, any act that would not by a Court having criminal juris-

diction in England be deemed an offence, making the person doing the act amenable to punishment in England, shall not, in the exercise of criminal jurisdiction under this Order, be deemed an offence, making the person doing the act amenable to punishment.

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While the jurisdiction is to be exercised conformably to English law, acts which may be crimes or offences under foreign law are not to be deemed offences under the Order unless they are offences by English law. A practical illustration of what is covered by this section may be taken from Tonga, where it is an offence contained in their code of laws to manufacture the native cloth called *masi* or *tapa*. Although a British subject may be resident in Tonga, and under the general principles of international law subject to the law of the territory, he could not be tried in the High Commissioner's Court for the Western Pacific for any such offence, because it would not make the person doing the act amenable to punishment in England. Conspiracy to murder, however, being a crime by the statute law of England and especially applicable to the conspiracy to murder other than British subjects, which was the case here, the second ground of appeal is, for the reasons given, in my opinion, also untenable.

(iii) The third ground of appeal—stated rather than argued—was that the applicant could not be legally convicted of the misdemeanour of conspiracy to murder because he had also been charged with the felony of murder, and had been acquitted of the felony, and that the misdemeanour had merged into the felony.

It is the fact that in this case the appellant was charged in two separate counts with the misdemeanour of conspiracy to murder and with the felony of murder. In England had those two counts been charged in the same indictment it is possible, had the accused objected,

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the judge would have called upon the prosecutor to make his election upon what count he would proceed; not, he it remarked, upon any ground that there cannot be both a misdemeanour and a felony involved in the same general series of unlawful acts, but upon the ground either that the prosecutor being prepared to prove the felony, there was no necessity to inquire into the lesser offence of what he had conspired to do, which is what is meant by the expression in Stephen's *Commentaries* (book vi., s. 14) as to the conspiracy merging in the felony, or as a matter of order and convenience, and not to prejudice the prisoner on his trial. But if no objection had been made by the prisoner, and the case had gone to trial, and the jury had found the prisoner guilty of the felony, the objection that there had been a misjoinder of counts and the judgment could not be entered up on the indictment because of the misdemeanour count standing on the face of it would not hold. This was decided in *The Queen v. Ferguson* (1) in the Court for Crown Cases Reserved. Lord Campbell, who was then (1855) Chief Justice of England, gave the judgment of the Court in these words:—

In this case there is no difficulty. It is said the conviction is improper, because the indictment contains a count for a misdemeanour. We are all clearly of opinion that there is not the smallest pretence for the objection, and that the conviction is as good as if the prisoner had been convicted on an indictment containing a count for a felony only.

If this was the law where the prisoner was found guilty of the felony and the misdemeanour stood charged on the indictment, much more is the decision applicable where the deceased was found not guilty of the felony—the heavier charge—and his conviction stands upon the misdemeanour only. The appellant did not contend

(1) 24 L. J. (M. C.) 61.

that the evidence showed that he had truly been guilty of the felony, and that, therefore, he could not be found guilty of the misdemeanour. That used to be contended at one time, and gave rise to the expression that the misdemeanour had merged into the felony. The doctrine was wholly discountenanced by the case of *The Queen v. Button* (1) the rubric of which is,—

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Where the evidence in support of an indictment for a conspiracy shows the object of the conspiracy to be in itself felonious, and that a felony was committed in carrying it out, the defendants were not entitled to an acquittal on the ground that the misdemeanour is merged in the felony.

And by the statute 14 & 15 Vict. c. 100, s. 12, the result aimed at in this case is now embodied in the law.

The Order in Council itself, with the elaborateness which is its characteristic, provides, in s. 40, that if on a trial for misdemeanour the facts proved amount to a felony, the accused shall not therefore be acquitted of the misdemeanour, but that the accused shall not be liable to be prosecuted thereafter on the same facts for the felony, unless the Court had abstained from pronouncing a decision on the misdemeanour and directed the accused to be tried for the felony.

That, it will be observed, does not touch the question of the misdemeanour and felony being charged in the same indictment, a question which in practice seldom arises from the nature of the case, the prosecutor when he charges the felony being desirous to obtain a conviction for the felony, and the general rule of practice of the courts regarding the misdemeanour as contained and comprised in the felony, and requiring the prosecutor to make his election. But this case shows how important it is to have the power to charge a misdemeanour in one count and a felony connected with the

(1) 18 L. J. (M. C.) 19.

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same transaction in another count, and here it is necessary to point out that the Order in Council has made some material changes in the procedure on such trials and given greater powers to the High Commissioner's Court. It is the Court which, by s. 219, in a case of a trial with assessors, states the charge against the accused:—"The charge on which the Court orders him to be tried shall be stated in writing by or under the direction of the Court." By s. 225, the Court may at any time amend the charge in any matter, or form, or of substance, but not so as to prejudice the accused in his defence. And by s. 55, when treating of such an appeal as the present, it is provided that the Supreme Court shall not amend a conviction or sentence, or vary a sentence on the ground "of any objection which, if stated during the trial might have been met by amendment of the Court." And lastly, there is a special power under s. 229, that "Parties may be charged with different offences in the same charge, where the person injured is one and the same person, or the several offences constitute or relate to one and the same transaction," leaving, however, the Court free to separate them afterwards, and separate the trials to be had if so advised. There seems to be little doubt that under this section the accused may be charged with both a misdemeanour and a felony, relating to the same transaction; and that it was under this section that the Court proceeded in framing the charge under which the appellant was tried.

Such being the state of the law and the procedure under the Order in Council, I must hold that this ground of appeal also cannot be sustained.

These were the substantial legal grounds put forward by the appellant, but two others were incidentally

mentioned, although not so prominently maintained, which I think it right to consider and dispose of. The first was that the appellant having been originally charged by the prosecutor before the Court with having conspired with two other persons named, and these two having been discharged by the Court after the preliminary inquiry on the ground of want of evidence, the charge against the appellant necessarily fell and he ought to have been discharged also, as one person cannot conspire.

There appears to have been an early case where three persons have been charged as conspiring together, and two of them were acquitted on the trial; the third was held to be entitled to an acquittal also. Had this objection been brought to the notice of the Court at the end of the preliminary inquiry when the two other accused were discharged, it would no doubt have received very careful consideration, although the accused was not then on his trial, as the original charge was simply that the three persons named conspired together. But no such representation appears to have been made nor if it had been made does it follow that it would have been the duty of the Court to discharge the prisoner if it believed that, although not conspiring with the other two, he had conspired with others unknown, and accordingly the Court, acting on the powers contained in the Order in Council, directed the appellant to be charged with divers other persons unknown to the prosecutor, and for the felony.

Now, although it is usual to charge by name more than one person, because the names are usually known, yet an indictment would be a good indictment in England which charged a person with conspiring with divers others to the jurors unknown (Archbold, p. 984,

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quoting Hawkins' *Pleas of the Crown*). A more strict rule could certainly not be adopted in the case of the High Commissioner's Court, which has to perform the functions of magistrate, grand jury, public prosecutor and all, and under circumstances of difficulty and pressure which would render it impossible to administer justice were the same elaborate preliminary inquiries necessary and technical objections to pleadings encouraged or allowed. It is for this reason that the Order in Council has changed the form of laying charges against the accused, and given ample powers of amendment where objections are taken at the trial, and prohibited the Court of Appeal from quashing convictions on grounds which could have been cured at the trial had the objections been taken.

Another of those legal questions less prominently argued was that a conspiracy, as that is known to the law, could not be made at a public meeting. I find no authority for this in the reference given to Stephen's *Commentaries*. And there is no authority for it in the definition of conspiracy in the legal writers or the statutes. "Conspire" does not stand alone in the definition of the crime. The statute is directed against those who shall conspire, confederate, and agree together. A conspiracy or confederation which does not even seek concealment, but is done in open defiance of authority, would not be less but more dangerous and criminal. I may quote the words of the judges in giving their opinion to the House of Lords in the case of *Mulcahy v. The Queen* (1), one of the Fenian cases in 1868, as applicable here.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do

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(1) L. R. 3 H. L. p. 317.



a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of such of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Grose, J., said, in *Rex v. Brissac* (1) is generally matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

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The number and the compact give weight and cause danger, and this is more especially the case in a conspiracy like those charged in this indictment. Indeed it seems a reduction to absurdity, that procuring a single stand of arms should be a sufficient overt act to make the disloyal design indictable, and that conspiring with a thousand men to enlist should not. And so I would say here that it would be absurd if the secret agreement of two or three persons to murder should be indictable, but the agreement of a hundred persons assembled together in a tavern to do the same unlawful act should be held to be not unlawful.

The ground is now clear for considering the propriety of the conviction on the merits.

The conspiracy charged was the agreement of a body of foreign residents in Apia to take from the custody of the United States Consul, or the persons authorised by him, the body of a prisoner who had been committed by the said consul to take his trial for murder in the United States, and to lynch him in Samoa to prevent his being sent to the United States. There can be no doubt that any British subjects who thus took the untried prisoner from the lawful custody in which he was held, and hanged him (for the crime was carried out) committed murder by the law of England, and that the

(1) 4 East, 171.

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conspiring, confederating, and agreeing together to do this act would be a conspiracy to murder under the statute. It was proved that a meeting of the white residents or foreign residents in Apia was held to consider "the recent murder case," that a resolution was carried at that meeting to have the prisoner brought on shore and hung, and that parties from the meeting forthwith brought him on shore and hung him. The appellant was at the meeting; the Court below came to the conclusion that he took part in the meeting; and the Court came to the conclusion also that from his subsequent acts in assisting in the proceedings which terminated in the hanging of the prisoner that he approved of the result of the meeting, and was an accomplice in the unlawful agreement there come to and the action determined upon.

The only doubt I have had was occasioned by the very strong appeal which the counsel for the appellant made upon the nature of the acts which the appellant was proved to have done at and subsequent to the meeting. The particular act spoken to as having been done by the appellant at the meeting was to propose that the vote should be taken by ballot, which the learned counsel very ingeniously contended was done in order that those disapproving of the violence might safely vote to the contrary. And more than one witness spoke to the prisoner having called upon the appellant to prevent him being injured by the mob before he reached the place of execution. The argument of the appellant's counsel was that that explained the appellant's presence with the mob; his getting a clergyman to pray with the prisoner, and his blindfolding him being all acts of mercy and not necessarily showing that the appellant was one of the mob or approved of their procedure.

There are, however, other portions of the evidence which have a different signification; and the whole question of the real meaning of the acts which the appellant did in connection with the lynching were no doubt carefully considered by the Court below, where two assessors wholly unconnected with the locality and local prejudices gave their assistance to the judge. Even were my doubts of the true nature of the appellant's acts stronger than they are, I would hesitate much before upsetting upon the merits a conviction arrived at by the Court below in such circumstances.

I must therefore affirm the conviction upon the evidence also and the whole case; but as the getting of the clergyman to the poor wretch while on his way to execution, and in the face of opposition by the mob, was not otherwise than merciful so far as it went, and also as the hearing and judgment on this appeal have been delayed not by any fault of the appellant but because of the illness of the Judge of the Court of Appeal, I direct that the year of imprisonment awarded against the appellant do count from the 23rd day of February, 1878, being the date of his conviction in Samoa. The imprisonment shall be without labour on the public works, if directed by His Excellency the High Commissioner to be suffered in Fiji; and until the place is so determined I give directions to the Superintendent of Police to detain the appellant in custody under the conviction now affirmed.

*Conviction affirmed.*

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