

[APPELLATE JURISDICTION.]

1890
Feb. 5—
Mar. 12.

MCARTHUR AND COMPANY v. CORNWAL AND MANĒMA.*

Appeal from High Commissioner's Court in Samoa—Advocate's right of audience—Action for trespass to and for recovery of possession of lands in Samoa—Jurisdiction—The Foreign Jurisdiction Acts, 1843–1875—The Pacific Islanders Protection Acts, 1872 and 1875—The Western Pacific Order in Council, 1877: Art. 17–19, 57, 91, 110, 112, 114, 116, 129, 136, 265—Treaty between Great Britain and Samoa of 28th August, 1879: Art. 3, 5, 6—Measure of damages for trespass—Costs.

The Court of the High Commissioner for the Western Pacific at Samoa has, by virtue of the Western Pacific Order in Council, 1877, Art. 17–19 and of Art. 3 and 5 of the treaty between Great Britain and Samoa of 28th August, 1879, jurisdiction to entertain an action between British subjects for trespass to and for the recovery of possession of lands in Samoa.

The Deputy Commissioner at Samoa is, for the purposes of his bankruptcy jurisdiction, only a judge of limited and inferior jurisdiction, and, beyond issuing a summons and appointing an *interim* receiver, can only act under the direction of a Judicial Commissioner.

Held, on appeal, that, in such an action, the proper measure of damages for the pecuniary loss sustained is the gross annual value of plantations at the time they were taken possession of, together with a substantial sum by way of penal damages for the personal wrongs and injuries sustained by reason of the wrongful trespass.

Seem, that an advocate of another British possession who has conducted a case in a court below from which an appeal lies to the Supreme Court of Fiji has no claim as of right to be heard upon such appeal, though he may properly be allowed audience as a matter of courtesy upon application being made for that purpose.

The question of costs was specially considered.

This was an appeal from the High Commissioner's Court for the Western Pacific at Samoa to the Supreme

* See *Manāma and Others v. McArthur and Company*, ante p. 125.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL

Court of Fiji in respect of an action for trespass to and for the recovery of large tracts of land at Samoa belonging to the plaintiffs, Cornwall and Manæma his wife, a native of Samoa, and for damages for the wrongful occupation of the same by the defendants, McArthur & Co., since 1882. In the Court below the Deputy Commissioner, Colonel de Coëtlogon, and his assessor Mr. S. Dcan (after the other assessor, Mr. E. W. Gurr, had retired through illness) after an exhaustive trial covering a period of twenty days between April 23rd and May 25th, 1889, had awarded the plaintiffs the sum of 41,276*l.* damages, and had made an order upon the defendants to deliver up to them the above-mentioned lands. The Court had condemned the defendants in costs, and had further ordered those costs to be paid before staying proceedings on appeal. From this judgment the defendants, McArthur & Co., now appealed to the Supreme Court of Fiji.

Mr. Garrick, and *Mr. J. P. Campbell* of the New Zealand Bar (with whom was *Mr. W. Cooper* of the same Bar), for the appellants.

The Attorney-General (Mr. Udal) and *Mr. Solomon*, Q.C., for the respondents.

Before the appeal was opened Mr. Garrick made an application that Mr. Campbell, who had conducted the case in the Court below at Samoa on behalf of the defendants, should be allowed audience in this Court for this case only, and referred to the recent case of Mr. Napier, of the New Zealand Bar, who was permitted a similar privilege of audience by Chief Justice Clarke in 1886.

The Attorney-General intimated that he had no objection to the application.

His Honour said that he could find no reference in the records to Mr. Napier's case and alluded to the case of *In re Tisdale's Petition* (1) and said that if the rules in Fiji had been the same as those obtaining in the Privy Council he should have felt bound by the decision in that case. Here the rules gave a dispensing power for good cause shown, and under the particular circumstances of the case, no objection having been raised by the Attorney-General, he would grant the application.

The grounds of appeal (thirteen in number) and the arguments and facts of the case, so far as are material, are sufficiently stated in the judgment. At the conclusion of the arguments, his Honour, having sat for fourteen days, took time to consider his decision, and on the 5th March delivered judgment as follows:—

H. S. BERKELEY, C.J. This is an appeal from Her Britannic Majesty's High Commissioner's Court for the Western Pacific. The action, which was for damages for trespass to lands situate in the Samoa or Navigators' Islands and conversion of the produce thereof and for possession of a portion of such lands, was heard before the Deputy Commissioner at Samoa sitting with assessors. In this action the respondents have received a verdict for 41,276*l.* damages. Judgment for that amount, with costs, has been entered up against the appellants, and an order for possession as prayed has been made.

The case now comes to this Court on appeal, under

(1) L. R. 14 App. Cas. 328.

1890

MCARTHUR
AND
COMPANY
P.
CORNWALL.

1890 Art. 110 of "The Western Pacific Order in Council of
1877."

MCARTHUR
AND
COMPANY
v.
CORNWALL.

The appeal was made on thirteen grounds, three of which were practically abandoned at the hearing, but ten of which are relied on. The case on appeal was argued very fully and ably, and at great length, as its importance required.

A preliminary objection to the hearing of the appeal was made on behalf of the respondents. The objection was based on the alleged non-compliance by the appellants with the requirements of Art. 114 of the Order in Council, 1877. - The appellants had on the 25th May, 1889, immediately after judgment was given against them in the Court below, filed a paper in the following terms:—

Mr. Campbell to move that the appellants be allowed to appeal to the Supreme Court of Fiji from the decision of the Court herein.

Appeal allowed this 25th day of May, 1889, subject to Article 265. sub-section 4.

H. DE COETLOGON,
Deputy Commissioner.
RUSSELL AND CAMPBELL,
Solicitors, Auckland.

Art. 265 refers to costs, and has no application here; and the appellants had, on the 20th day of January, 1890, filed in this Court the grounds, thirteen in number, upon which they intended to rely on the hearing of this appeal.

In doing what they had done, the appellants, it was contended, had merely given notice of an intention to ask leave to appeal, and had not in any sense complied with Art. 114, which requires an appeal motion-paper to be filed in the Court below. More than six months had elapsed since the delivery of the judgment in the Court below, and the appeal could not now be heard

except by leave from the Court on application under Art. 112 of the Order in Council of 1877, and it was argued that leave should not be given unless the appellants undertook to abide by any order which might be made against them, they having neglected to comply with an order of this Court made against them in a former action respecting the *locus in quo*, in which they were defendants.

This preliminary objection was overruled by me. The paper filed by Mr. Campbell on the 25th of May was, I think, intended as an intimation to the other side that the case would be taken to the Court above; and though it was not perhaps in the form contemplated by Art. 114, yet, as it was intended to comply with that Article, and as the respondents appear, it is, I think, sufficient. A notice of appeal, though informal, may yet be sufficient—*Little's Case* (1)—and I think this motion-paper here sufficient, though perhaps informal. Moreover, at the most, the appellants can only be charged in this respect with an irregularity, which the respondents, by appearing at the hearing of this appeal, must be taken to have waived: *In re McRae*. (2)

An application was then made on behalf of the appellants for leave to adduce fresh evidence on the appeal. This application I refused, as the evidence was directed (1) to impugn the accuracy of the "minutes" taken in the Court below; (2) to question the power of the Court to amend its own judgment; (3) to show that certain verbal directions had been given by the Judicial Commissioner to the Deputy Commissioner in respect of bankruptcy proceedings taken in the High Commissioner's Court by the appellants against the respondents.

(1) I am of opinion that the accuracy of these "minutes"

(1) L. R. 8 Ch. D. 806.

(2) L. R. 25 Ch. D. 16.

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

cannot be questioned in this appeal. If the appellants were dissatisfied with the accuracy of the minutes as taken, they should have given notice to vary them, and have moved accordingly. They cannot attack their accuracy on appeal without having so moved: *General Share and Trust Company v. Witley Brick and Pottery Company*. (1) (2) Judgment may be amended at any time by the judge who delivered it; and such amendment may be in substance or in form. (3) It was unnecessary at this stage to show that the judge in the bankruptcy proceedings had acted properly and within his jurisdiction, for that would be presumed if, as was for the time presumed, he was a judge of a Court of superior jurisdiction. At a later stage of the hearing, the question whether the High Commissioner's Court by a Deputy Commissioner was a Court of superior jurisdiction in bankruptcy was raised, and I then stated that I would consider whether the evidence which I had previously refused to receive might then be received; but Mr. Garrick, who appeared for the appellants, stated that he did not desire to tender the evidence, but relied upon the Order in Council of 1877 to establish the jurisdiction in that respect.

Mr. Garrick, on behalf of the appellants, then asked for leave to further amend the amended statement of defence which had been filed in the proceedings in the Court below by a plea to the jurisdiction of the High Commissioner's Court to entertain an action for trespass to lands in an action claiming the possession of lands situate in the territories of the King of Samoa, in order to raise the question of the jurisdiction of the Court below in this respect more fully than it was raised by the plea as already pleaded below. The

(1) L. R. 20 Ch. D. 130.

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

Attorney-General, for the respondents, urged that the amendment should not now be allowed as it would entirely alter the nature of the case to be met, and the amendment was not asked for in the Court below, and the respondents could not be placed in the same position as if the appellants had pleaded correctly in the first instance. He relied upon *Newby v. Sharpe* (1) and *Steward v. The North Metropolitan Tramways Company*. (2) I allowed the amendment asked for, as the statement of defence already contained a plea to the jurisdiction, though not such a full one, and I did not think the respondents would be prejudiced by the plea being amplified, and, moreover, because I considered that with the view of trying here the real question between the parties, the amendment should be allowed; for if the Court below had no jurisdiction, there would be no question between them which could be tried. In my opinion, the respondents are not affected injuriously by this amendment at this stage, for I hold that independently of that plea I should be bound to take notice of want of jurisdiction in the Court below if facts appearing on the face of the proceedings ousting that jurisdiction were brought to my notice. The mere omission of the defendants below to plead specially to the jurisdiction will not give the Court jurisdiction: *Spooner v. Juddow*. (3) Now, it appears by the statement of claim that the lands the trespass to which is complained of are situate in Samoa, out of the territories of Her Majesty the Queen. It is therefore imperative that the question of jurisdiction, imperfectly, perhaps, raised in the Court below, should be fully raised and decided here.

(1) L. R. 8 Ch. D. 39.

(2) L. R. 16 Q. B. D. 556.

(3) 6 Moo. P. C. C. 257.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

This brings me to the grounds upon which the appellants rely in the prosecution of this appeal.

I will deal first with the ground 11, which, taken with the amended plea to the jurisdiction, raises the whole question of the right and power of the High Commissioner's Court to entertain this suit.

It is argued for the appellants that neither the statutes under which the High Commissioner's Court is established nor the treaty between Her Majesty and the King of Samoa of the 28th August, 1879, do or can give the High Commissioner's Court jurisdiction in any shape over lands situate in Samoa, or jurisdiction to entertain any suit relating to any question or dispute arising out of or relating to the possession of such land, and that, having regard to the power of the Samoan authorities over the land, no order could be made directing restoration of possession thereof, or decreeing damages for trespass thereto. In support of this contention, *Pitts v. La Fontaine* (1) is relied on. *Pitts v. La Fontaine* is no doubt a strong case for the appellants, if the facts and circumstances in that case are analogous to those here. In that case, which was in the Privy Council, Sir James Colville said their Lordships "cannot, having regard to the power of the Turkish authorities over the land, and to the fact that Constantinidis is not subject to the jurisdiction of the British Consular court, absolutely direct a restoration of possession; still less can they deal with the question of damages to the movable property." So far as the question of jurisdiction over the persons to be affected by any order which may be made here goes, there is no analogy between *Pitts v. La Fontaine* and this case; for the respondents, who are the persons who would be affected, are British subjects,

(1) L. R. 5 App. Cas. 561.

trading at Samoa, within the jurisdiction of the High Commissioner's Court. But it is contended that, as in the case of *Pitts v. La Fontaine*, the power of Turkish authorities over the land rendered the Consular court of Constantinople powerless to make an order for restoration, so here the power of the King of Samoa over the land renders the High Commissioner's Court unable to make an order for possession, and, it is further contended, unable to entertain a suit for damages for trespass to land.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

Whether this contention is sound or not, must, I think, depend upon the construction to be placed upon Art. 5 of the treaty between Her Majesty and the King of Samoa, and upon the effect to be given to Art. 3 and 5 of the treaty, coupled with the Western Pacific Order in Council under which the High Commissioner's Court is constituted. For it must always be borne in mind that the law and institutions of a state may operate beyond its own territory, and within the territory of another state, by special compact between the two states. And the judicial power of a state over persons, and, I take it, over property, real or personal, within its territory, may be limited or parted with altogether in favour of another state by compact with that other state. And the surrender of authority may be explained or warranted as being with a view to the attainment of the objects of the treaty. This seems to be recognised by Mr. Wheaton in his *International Law*, 8th ed., page 176, par. 110-111. Let me consider, then, the objects of the treaty between Her Majesty and the King and Government of Samoa. They are, *inter alia*, the establishment of perpetual peace and friendship between the subjects of Her Majesty and those of the Samoan state (Art. 1); (2) full liberty to British subjects for the

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

free pursuit of commerce, trade, and agriculture, and the peaceable possession of all lands heretofore purchased by them from Samoans (Art. 3).

Having considered the objects of the treaty, I will consider the means agreed upon between the contracting parties for attaining these objects. First, for securing peace and friendship, it is agreed that "If any subject of Her Britannic Majesty in Samoa is charged with a criminal offence cognisable by British law, such shall be tried by Her Britannic Majesty's High Commissioner for the Western Pacific Islands" (Art. 4). This gives, on the part of the Samoan state, the High Commissioner absolute and exclusive criminal jurisdiction over British subjects in the territories of the King of Samoa. Again, for securing attainment of this object, Her Majesty engages to cause regulations to be issued to enforce the observance by British subjects of such of the existing municipal laws and police regulations of Samoa as may hereafter be agreed upon and for the due observance of quarantine. Next, for securing British subjects in the peaceable possession of their lands, that is guaranteed by the King as far as relating to lands bought "from Samoans in a customary and regular manner." If any dispute should arise concerning "the fact of such purchase," that is to be referred to a mixed commission. Disputes then with regard to lands in the possession of British subjects in Samoa are, when those disputes relate to the "fact of purchase" from a Samoan subject, to be referred to a special tribunal, namely, a mixed commission (Art. 3). But a question with respect to land in the possession of British subjects in Samoa, which cannot be classed as a dispute as to "the fact of purchase" of such land from a Samoan subject, how are they to be dealt with and settled? In other

words, how and before what tribunal is a claim for trespass to land possessed by a British subject in Samoa, or a question as to the right of possession thereof or title thereof as between British subjects, to be determined? The object of Art. 3 of the treaty, so far as "liberty for the free pursuit of agriculture" is concerned, will not be attained unless some tribunal is invested with authority to deal with the questions of trespass to lands and to the right to possession thereof. That is clear. Well, the object of the treaty in this respect was, it seems to me, intended to be attained by Art. 5 of the treaty. Other articles having specially provided for criminal offences and municipal and quarantine matters, Art. 5, which deals separately and wholly with civil matters, runs in these words—

Every civil suit which may be brought in Samoa against any subject of Her Britannic Majesty, shall be brought before and be tried by Her Britannic Majesty's High Commissioner, or such other British officer duly authorised, as aforesaid.

Now, the words "every civil suit which may be brought" are most full and comprehensive. They embrace every description of suit, and consequently embrace a suit or action for trespass to land, and a suit or action for the purpose of settling (as between British subjects always) the title to the possession of lands. This seems to me the only proper interpretation of the language of Art. 5. It is the only interpretation which will enable the objects of "free pursuit of agriculture," "peaceable possession of lands" by British subjects, aimed at by the treaty, to be attained. In my opinion, the King and Government, or, in other words, the authorities of Samoa are by this article stripped of their judicial power over such lands as are possessed by British subjects in Samoa and such power is vested in

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

the High Commissioner for the Western Pacific as the "officer duly authorised" in that behalf. I think this is the effect of the treaty between Her Majesty and the King and Government of Samoa, and that what has been done in this respect has been done with the intention and the direct view of attaining the objects of that treaty.

Holding this view, then, I am of opinion that this action was cognisable by the Court below, for, by the *Western Pacific Order in Council*, 1877, the High Commissioner's Court for the Western Pacific is "duly authorised" to exercise all Her Majesty's jurisdiction exercisable in the Western Pacific in civil matters (Art. 17); and the whole jurisdiction of the Court may, subject to the Order in Council, be exercised by the High Commissioner (Art. 18), or by a Deputy Commissioner in respect of the particular district to which he is appointed (Art. 19); and by the Order in Council, 1877, constituting the Court, proceedings by action relating to "land or other property, or for the recovery of damages or otherwise concerning any civil right or other matter of a civil nature at issue," are authorised to be taken in the High Commissioner's Court (Art. 57).

It was contended at the Bar that so much of the Order in Council as authorised proceedings relative to land to be taken was *ultra vires*, and not warranted by the *Pacific Islanders Protection Acts* under which it was urged the Order in Council was framed. I do not, however, concur in that view. First, because it is erroneous to say that the Order in Council is framed under the authority of the *Pacific Islanders Protection Acts* alone. The preamble to the Order in Council of 1877 shows that the Order was framed and passed "by virtue and in exercise of the powers in this behalf by 'The

Pacific Islanders Protection Acts 1872 and 1875,' and by 'The Foreign Jurisdiction Acts, 1843 to 1875,' or otherwise in Her Majesty vested"; and, secondly, because, by the *Foreign Jurisdiction Acts*, Her Majesty may exercise "any power or jurisdiction which Her Majesty now hath, or may hereafter have, within any country out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory," and I am of opinion that full jurisdiction over all civil matters, of whatever nature, at issue between British subjects in Samoa, has been conferred by the King and Government of Samoa on the High Commissioner's Court under Art. 5 of the Treaty of 1879. I am of opinion, therefore, that the Deputy Commissioner had jurisdiction to entertain this action, and that, unless it can be otherwise impeached, his judgment must stand. If this judgment stands, the Court below will, on further application made, take all such proceedings as are within its jurisdiction in order to give effect to its order for possession: *Pitts v. Le Fontaine*. (1)

I will now take the 12th ground of appeal. This is based on a plea of *res judicata* so far as the respondent Manæma is concerned. It is argued that in a former action, in which she was one of the plaintiffs and the appellants were defendants, the cause of action—namely damages for trespass to the lands mentioned in the fourth, fifth, sixth, and seventh paragraphs of the statement of claim—was litigated and decided upon. To this it is replied that in that action the respondent Manæma had no opportunity of recovering damages for the wrongs now complained of, and that no decision

(1) L. R. 5 App. Cas. at p. 581.

1890
MCARTEUR
AND
COMPANY
v.
CORNWALL.

was given on any claim she may have then made in this respect. Now, what are the facts? It appears that sometime in the year 1886 the respondent Manæma, joined with other parties, commenced an action for trespass to lands against the present appellants. In the statement of claim in that action, Manæma, therein described as of Fasitootai, Samoa, declared (par. 2) that she was the owner and in possession of certain lands being plantations known as Faleula, Magia, and Lata, and (par. 6) that the appellants, then defendants, in the month of April, 1882, "wrongfully broke and entered upon the said plantations, and wrongfully took possession, &c.," and (par. 8) "that the defendants further, in the month of June, 1882, broke and entered Fasitootai and wrongfully ejected her, and took wrongful possession thereof and of all the plaintiff Manæma's lands," and in conclusion she prayed 500*l.* for damages for the wrongs set forth in par. 8, and 20,000*l.* in respect of the wrongs set forth in par. 6. The statement of claim (par. 7) also contained a claim for damages for breaking the plaintiff's house at Fasitootai, and for assaulting her.

The case was heard before the High Commissioner's Court at Samoa, when judgment was given generally for the defendants. Against this judgment Manæma appealed to this Court,* with the result that she was adjudged to be entitled to recover "the sum of 50*l.* for damages." In giving his judgment, the learned Chief Justice said: "On the ground, therefore, of the actual possession of the house at the time of seizure, Manæma, if there be no other defence, is entitled to damages for trespass"; that is to say, Manæma was declared to be entitled to succeed on the 7th paragraph of her statement of claim. But she had made two other claims for

* *Ante* p. 125.

damages—one of 500*l.* and the other for 20,000*l.*,—the smaller in respect of the trespass to the lands known as Fasitootai, on which stood the house she had been occupying; the larger in respect of the trespass to the plantations known as Faleula, Magia, and Lata. The question is, how were those claims dealt with? For Manæma it is said they received no consideration—they were not adjudicated upon. For the appellants it is said the Chief Justice considered Manæma had no interest in the lands, and accordingly refused her damages in respect of the trespass of them, while he gave her 50*l.* in respect of the trespass and personal assault committed in evicting her from the house at Fasitootai, of which she was in actual possession. The latter seems to me to be the true construction to be placed upon the proceedings. The case had come before the Chief Justice on appeal from a judgment which refused Manæma any relief at all. On review, the learned Chief Justice thought that she was at least entitled to 50*l.* on the ground, as he says, of her actual possession of the house at the time of the seizure. He therefore awards her 50*l.* for damages on the above grounds, with nothing on account of the charged trespass to the lands claimed by her. Why was this? I think the reason will be seen on reference to the reasons and grounds stated by the Chief Justice in giving judgment. He says, in effect, that he considers the document of title, under which alone Manæma could claim to have any interest in the land, void and of no effect; that, having no interest in the lands, she has suffered no damage by any trespass that may have been committed on them, and consequently he could give her no damages. This was, in my view, equivalent to dismissing so much of Manæma's appeal as referred to the refusal by the High Commissioner's

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

Court to give her damages for trespass to the lands mentioned in her statement of claim. It is as well, perhaps, for me to refer a little more in detail to the reasons given by the Chief Justice, for his judgment was not appealed against. In considering the amount of damages that ought to be awarded against the defendants, he says:* "On the question of damages, the true position of Cornwall with regard 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 he would have done so in reality on his own account, and not by virtue of any authority derived from Manæma"; and, again, "Manæma has, in my opinion, suffered no damages whatever beyond the personal inconvenience in being expelled from her home," and again, "I accordingly assess these damages at the sum of 50*l*." Now I regard this as a decision adverse to Manæma's claim to be entitled to damages for trespass to the lands mentioned in the statement of claim. I think any cause of action which she may have had against the defendants, now appellants, in that regard has been determined, and cannot be again litigated by her.

Now, turning to the statement of claim in the present action, in which Manæma is again the plaintiff and the appellants (the defendants in the former action) the defendants, I am at once struck with the patent fact that the lands in respect of which Manæma now joins with Mr. Cornwall in an action claiming damages for trespass are the identical lands which she set out in the 6th and 8th paragraphs of her statement of claim in the former action, and in which she was declared by the

* *Ante* p. 140.

Chief Justice, from whose decision there was no appeal, not to be interested and to be entitled to no damages in respect of any trespass thereto. I cannot understand how it can be argued that in the former action Manæma had no opportunity to satisfy her claims in respect of trespass to those lands. She conceived that she was entitled to several remedies against the then defendants. She continued to claim for these remedies in one action, and in my opinion is now bound by the final judgment in that action. If she had had any interest in the lands trespassed upon, she could have recovered damages in that action; having in the opinion of the learned Chief Justice no interest therein, she recovered no damages in that respect. I cannot question the correctness of the view taken by the Chief Justice. Rightly or wrongly, he decided against the claim, and that decision not having been appealed against, absolutely, in my opinion, excludes the plaintiff Manæma in the present action. So, far, therefore, as the judgment of the Court decrees the plaintiff Manæma entitled to recover damages against the appellants, it must be reversed, and judgment must be entered in their favour as against the plaintiff Manæma.

I think the view I have taken here is borne out by the decisions in *Alison's Case* (1), and *Serrao v. Noel*. (2) On this case the learned Chief Justice bases his judgment, giving Manæma only 50% for damages, on the ground that she had no interest in the lands trespassed upon and that the real owner of the lands was her present co-plaintiff, Mr. Cornwall.

I will not stop to examine the proposition suggested during the hearing of this appeal, that Mr. Cornwall, the respondent here, having allowed Manæma to come

(1) L. R. 9 Ch. App. 24.

(2) L. R. 15 Q. B. D. 549.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

forward as plaintiff in the former action claiming an order for possession, cannot now be heard as alleging ownership and possession in himself at the time of the trespass. I say that I do not concur in that proposition. I think that after the Chief Justice has declared that the conveyance to Manæma was void, that she had no interest in the lands which entitled her to recover damages for a trespass to them; that, though in possession, she was "acting in the interests and for the benefit of Cornwall, and was generally regarded as his representative," Cornwall has the clear right to try in his own name the question of the trespass to the lands. To hold otherwise would amount to a practical denial of justice to Mr. Cornwall, and enable the appellants, if they are trespassers, to go scot free, without having had their conduct subjected to the review of any Court. For if the claim of Manæma is *res judicata*, and that of Cornwall is not to be heard for the reason suggested, then there is no one to call the defendants to account for the seizure and sale of lands under a writ of *fi. fa.* which the Chief Justice, in giving judgment on the appeal *Manæma v. McArthur & Co.*, said was "illegal and does not in the least justify the defendants' present possession,"—no one to call them to account for holding these lands since they seized them in 1882. The effect of my judgment in respect of this plea of *res judicata* is to make Mr. Cornwall the sole plaintiff in the Court below.

Now, with regard to Cornwall's claim, the appellants rely *inter alia*, and as their 6th ground of appeal, on a plea of bankruptcy at the time of the hearing in the Court below, and on the fact, as alleged, that the action brought by the plaintiff before the bankruptcy proceedings were taken was afterwards discontinued by the trustee. For the plaintiff it is alleged that the

bankruptcy proceedings were not taken *bonâ fide* for the purpose of securing a distribution of the bankruptcy property among his creditors and for winding up his estate, but that an abuse was made of the Court for the sole and express purpose of stifling this action; that consequently the Court below was warranted in treating the adjudication as a nullity; and the respondent, plaintiff below, further says that the appellants, defendants below, being wrong-doers, cannot set up the title of the trustee in bankruptcy; and it is also alleged that, apart from the *mala fides* of the proceedings, no weight should be attached to the adjudication, it having been made without authority by the Deputy Commissioner, who, for the purpose of bankruptcy proceedings is, it is argued, a judge of inferior jurisdiction. The appellants, on the other hand, assert their right, though the sole creditors, to take bankruptcy proceedings, and say that the adjudication, though made by a Deputy Commissioner, must be taken to have been made with authority and to be the act of the High Commissioner's Court, which is a Court of superior jurisdiction in bankruptcy. That, being a Court of such jurisdiction, the adjudication cannot be questioned in a collateral proceeding, such as this action for trespass, and they strongly rely upon this plea as preventing the plaintiff, now respondent, from being heard.

I am bound to say that the only conclusion that can, in my opinion, be come to on the evidence is that these bankruptcy proceedings were taken for the sole and simple purpose of defeating this action. The whole course of the proceedings shows this to be the case. Firstly, all the petitioners are the defendants in an action claiming 60,000*l.* damages for trespass to alleged bankrupt's lands. These proceedings in bankruptcy are

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHEE
AND
COMPANY
v.
CORNWALL.

not taken till after this action was brought and had been pending for some time. The acts of bankruptcy alleged are the absconding from Samoa of Mr. Cornwall, and the taking in execution of some property stated to be his. But the alleged absconding would appear from the evidence to have been a departure from Samoa for the purpose of bringing an appeal before this Court, and that departure occurred some eight years previously, viz., in the year 1881; and if the evidence as to another part of the case against Cornwall is to be relied upon, all his property had been seized and sold in March or April, 1882. Then the trustee—who it appears left the employ of the petitioners to become trustee, and on return to his employ afterwards he was discharged—this trustee, immediately on his appointment, at the request of the creditors “all proved creditors being present,” as he naively declares, omitting to mention that the sole creditors were these petitioners, against whom a claim for 60,000*l.* for damages was laid, files a discontinuance of the action, taking upon himself, at the request of the defendants practically—for I have pointed out that they were the only and petitioning creditors—to settle this large claim against them in their favour. The conduct of the trustee in so acting was inexcusable and suspicious in the extreme. Here was an action for a claim which, if a just one, would have enabled the bankrupt to pay his creditors—for the defendants were his only creditors—in full; and notwithstanding this, the trustee, at the request of the defendants, his old employers, absolves them from all liability and leaves the bankrupt—plaintiff—still in the position of hopeless debtor to those from whom, if his action was successful, he might receive a sum in excess of any then due by him.

The rest of the proceedings under the bankruptcy and the trustee's conduct therein, confirm my impression of the want of *bona fides*. The conditions of sale of the bankrupt's real property—such real property being the lands the subject of this action for trespass—are prepared by the solicitor of the sole creditors (the defendants), who was also the solicitor for the defendants in the action. The conditions of sale are drawn in such a manner as practically to keep off purchasers; and ultimately the whole of the trustee's interest in the immense area owned by the bankrupt—that is, the plaintiff in the action for trespass—is purchased for a trifling sum by the sole creditors, that is by the defendants in the action. The whole design is transparent. Whether by what they have done, and by what the trustee has done at their request, the appellants have succeeded in creating for themselves a defence to the action, I will now consider.

I will say at once I do not think they have. First, they gained nothing by inducing the trustee to file what has been styled “a discontinuance of the action.” It was no doubt intended to be such, but it was not a discontinuance. The action had been commenced prior to the taking of bankruptcy proceedings, and the trustee could not discontinue without first having himself made a party to the record, which he never did.

Then I think that this adjudication was, having regard to Art. 91 of the *Western Pacific Order in Council* of 1877, *ultra vires* of the Deputy Commissioner, and consequently void. The proceedings were clearly informally commenced, being commenced by petition instead of by summons, as required by Art. 91, and they were improperly proceeded with to adjudication, and the consequent proceedings were made and

1890

MCARTHUR
AND
COMPANY
S.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

were taken without directions from a Judicial Commissioner, as required by Art. 91, sub-art. 3, of the Order in Council of 1877; and on the face of the proceedings it would appear that Mr. Cornwall was at the time out of the jurisdiction, not being then a "resident British subject" (Art. 91).

I think that the Deputy Commissioner was, for the purposes of his bankruptcy jurisdiction, a judge of limited and inferior jurisdiction; that he is unable to proceed further than the issue of a writ of summons and the appointment of an *interim* receiver until he has received the direction of a Judicial Commissioner; and the evidence of his having received those necessary instructions verbally is very unsatisfactory, and it is only to be so inferred from some correspondence which passed between the Judicial Commissioner and the Deputy Commissioner after the adjudication had been completed. It was pressed upon me by Mr. Campbell, of the New Zealand Bar, one of the learned counsel for the appellants, that once an order had been made by a Court of superior jurisdiction, that order cannot be attacked in incidental or collateral proceedings, and that the order, until appealed from, is good; and he pointed out that there has been no appeal from the order of adjudication here, and he relied upon *Revell v. Blake*. (1) I concur in this as a proposition; but as I think that the Deputy Commissioner is, until he receives the directions from a Judicial Commissioner, a judge of limited, and so inferior, jurisdiction; and as the adjudication here was made, as far as it appears (unless I am to presume something) without any such directions, it seems to me that the proposition submitted by Mr. Campbell not only does not apply, but that *Revell*

(1) L. R. 8 C. P. 533.

v. *Blake* shows that the Deputy Commissioner, assuming him to be a judge of limited jurisdiction, having exceeded the limits of his jurisdiction in making an order of adjudication without directions from a Judicial Commissioner, such adjudication and the proceedings therein are void, and may be shown to be so here, and might have been so shown in the Court below at the trial. See the judgment of Blackburn, J., at p. 544. It has been held that the maxim "*Omnia præsumuntur rite esse acta*," which was pressed upon me, will not operate to give jurisdiction to an inferior Court. In the case of *The King v. Inhabitants of All Saints, Southampton* (1), Holroyd, J., says: "The rule that in inferior Courts and proceedings by magistrates the maxim "*Omnia præsumuntur rite esse acta*" does not apply to give jurisdiction, has never been questioned." In my opinion, therefore, the *onus* is the appellants' of showing that this adjudication of bankruptcy, which they rely on to stop these proceedings, is a valid and conclusive one, and this I do not think they have done. I will not presume anything, unless I am obliged to do so, in favour of proceedings which I believe to have been commenced and continued, not *bond fide* but for the sole purpose of preventing a Court of justice from hearing the plaintiff.

It was urged on the part of the respondents that even if the adjudication of bankruptcy was valid, the right of action, being a personal one, did not pass to the trustee. Well, the judgment of the Chief Justice in the action *Manæma and others v. McArthur & Co.* was put in evidence in the Court below, and in that judgment Cornwall is stated to have been in possession by Manæma at the time of trespass. "She," said the Chief Justice, "was generally regarded as Cornwall's

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

(1) 7 B. & C. 790.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

representative." Indeed, it is not denied that Cornwall was in possession at the time of the original trespass in 1882. It may be, therefore, that there are two causes of action here, one, the personal action for being deprived of the possession, which would not pass to the trustee, and the right to damages for the conversion of crop, which might or might not pass. I do not, however, consider this question, for I hold that the adjudication is not shown to have been valid. It has not been proved that the adjudication was made on the direction of the Judicial Commissioner. But even if the adjudication were valid, the further question must be considered, viz., can the appellants being wrong-doers, trespassers, under a writ of *fi. fa.*, which could give them no right to take possession of Mr. Cornwall's real property, can they now set up the title of a third party—the trustee—to protect themselves from the consequences of their wrongful entry and wrongful continued possession? I do not think they can. In *Jefferies v. The Great Western Railway Company* (1), Lord Campbell, at p. 109, says: "The defendants were trying to set up the title of the assignees, thereby acknowledging they had no good title of their own; and if they had no good title they were wrong-doers at the time of the conversion; and being wrong-doers, and the plaintiff in possession, I am of opinion that, according to the law of England, they were not entitled to question the title of the plaintiff." And again, in the same page, that learned judge said: "It is of the greatest importance that a man shall not, having no good title of his own to the property, be allowed to seize it." And again: "It is allowed that if an action of trespass is brought by the party in possession, the

(1) 25 L. J. Q. B. 107.

defendant cannot set up the *jus tertii*, he having no right in himself. I think there is no difference whatever for this purpose between an action of trespass and an action in trover. In both cases the plaintiff rests upon his possession of the property."

The appellants have in my opinion failed in their 6th ground of appeal.

The 7th ground of appeal was not pressed, and may be dismissed from consideration with this remark, that there is nothing in it; for the Order in Council of 1877, Art. 129, states:

If in the course of a trial an assessor is, by sufficient cause, prevented from continuing to serve, the trial shall proceed, with the aid of the other assessor (if any).

Now, by the note of the judge of the Court below, it appears that there were two assessors, and that one—Mr. Gurr—who is charged to have been improperly discharged from attendance, was prevented by illness from attending, and that, I take it, is sufficient cause within the meaning of Art. 129. The trial, therefore, was properly proceeded with in his absence by the judge, with the aid of the other assessor.

Grounds 4, 10, 13 were passed by at the appeal, and require no remark.

The 5th ground of appeal relied on was that several persons, though resident in Samoa, were allowed to give evidence by affidavit instead of being examined *vivâ voce*. The judgment of Jessel, M.R., in *Warner v. Mosses* (1), was relied on as showing that it is, in general, improper to receive in evidence the affidavits of witnesses who can attend at the trial. It was insisted that the Court should have required the attendance of these witnesses for *vivâ voce* examination, and it was

(1) L. R. 16 Ch. D. 100.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL

urged that the failure of the Court in this respect entitles the appellants to have a new trial at least. I concur in saying that as a general rule a witness should not be examined *ex parte*, but there may be cases in which this may be done with propriety, and it is suggested for the respondent that this was such a case. It appears that none of the persons whose evidence is objected to under this head of appeal were British subjects. None of them were persons within the jurisdiction, personally, of the High Commissioner's Court, and it is urged that consequently the Court below had no power to enforce personal attendance. Now, as regards the witnesses, Nelson, Stechlin, and Coe, this is undoubtedly true. They are, respectively, a Swede, a Swiss, and an American, and so the personal attendance of neither of them could have been enforced. With respect to the other witnesses, they appear to have been Samoans, and under the treaty, Art. 6, their attendance might, technically, have been enforced. It was in evidence, however, that they, or some of them, were subpoenaed and refused to attend. This objection should really have been taken under the appeal head of improper admission of evidence. Reference to the judge's notes, however, discloses the fact that the reception of this evidence was not objected to in the Court below. I think that on that ground, if on no other, the alleged improper reception of these affidavits cannot now be urged by way of appeal. Again, on reference to the judge's notes it will be seen that an objection of this nature was taken by the defendants, now appellants, to the reception of the affidavit of one Betham; that affidavit was rejected, and Betham was called. As the appellants in the instances which they now bring forward stood by and allowed the Court to receive these

affidavits without objection, they must be taken to have consented to their admission, and they cannot now say the evidence was improperly allowed to be given on affidavit: *Shedden v. Patrick and the Attorney-General*. (1)

1899
MCARTHUR
AND
COMPANY
v.
CORNWALL

I will now consider the 3rd ground of appeal, viz., that the Court below improperly admitted evidence "then objected to by counsel for the defendants." The evidence said to have been improperly admitted consists of (1) the shorthand notes of the argument before their Lordships of the Judicial Committee of the Privy Council on a motion for leave to appeal in the case *Manama and others v. McArthur & Co.*; (2) of the affidavits of certain persons resident in Samoa. Now, it is well to remember that the wrongful admission or rejection of evidence is not necessarily a ground for a new trial. It must, in addition, be shown that the evidence materially affected the result of the trial, and that thereby some substantial wrong or miscarriage has been occasioned on the trial: *Shapcott v. Chappell*. (2)

Moreover, in order to lay the foundation for an objection of the sort, it must be shown that the objection relied on at the appeal against the admission of the evidence was submitted to the Court below. In *Shedden v. Patrick and the Attorney-General*, Lord Chelmsford, at p. 543, says that it is necessary to show "that the evidence admitted was received after having been objected to"; and *Penn v. Bibby* (3), is an authority to show that the judge below should have an opportunity of deciding upon a distinct question as to the admissibility of the evidence tendered, and at page 543 in his judgment in *Shedden v. Patrick and the Attorney-*

(1) L. R. 1 Sc. & Div. App. at p. 544. (2) L. R. 12 Q. B. D. 58.

(3) L. R. 2 Ch. App. 127.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

General, Lord Chelmsford said "the only authentic information as to the admission or rejection of evidence is the judge's notes." Now, I see nothing in the judge's notes on the trial in the Court below to show that the objections now taken here to the admission of the evidence were taken and submitted to his Honour. The only note is, "After argument the Court admitted" the evidence, detailing what the evidence was. It is impossible to say what the nature of the objections were upon which that argument was founded. On the rule as to what is required to ground an objection to the rejection of evidence, Lord Chelmsford, in *Penn v. Bibby*, at p. 137, says: "The question should have been formally tendered to the judge and rejected by him as inadmissible." Now it appears that his Honour was never distinctly required to admit any specific question, but from some cursory remarks it is assumed he would not have permitted a particular line of cross-examination. The principle here enunciated applies equally when the objection raised is to the wrongful admission of evidence. It must be shown affirmatively what the objections to the questions allowed or evidence refused were; that is not shown, and it is asserted on the part of the respondent that the objections now raised were not taken in the Court below, and I am asked by the appellants to assume that they were raised, and that the judge omitted to note them. This I cannot do.

I do think that the copy of the proceedings before the Privy Council was not properly admissible in evidence. With respect to the evidence of Stechlin, Coe, and Nelson, I think the Court was exercising a discretion vested in it when it admitted this evidence. As to the rest of the evidence admitted, as I have pointed out, no specific objection appears to have been made to its reception.

But having regard to the rest of the evidence in the trial, which it is conceded was properly admitted, it seems to me that the verdict would have been just the same, even if this evidence, charged as having been improperly admitted, had been rejected. I am therefore of opinion that it has not been shown that any evidence has been admitted which would have entitled the defendants below to a new trial, and therefore the 2nd ground of appeal cannot be sustained.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

My remarks on this ground of appeal apply generally to ground of appeal 3, which is founded on the alleged wrongful rejection of evidence. It is urged by the appellants that the following question was improperly rejected: "Can you swear that Cornwall ever owned or was in possession of lands in Schedule A?" For the respondent, it is said this was properly rejected, because in the former action, in the statement of defence which was in evidence, the appellants, then defendants, had in paragraph 12 of the statement of defence pleaded that Cornwall was in possession as owner at the time they obtained possession, and that this has been found as a fact in the judgment in that action. I think the question was properly rejected. It was inconsistent with the case set up by the defendants themselves by their pleadings.

It was also urged that certain general questions appearing in the judge's notes, and numbered 1 to 8, were improperly rejected, and that the Court refused to compel one Sinclair to produce certain leases from Cornwall to him. With respect to the general questions, 1 to 8, they were for the most part inconsistent with the defendants' pleadings, and they were put in order to set up the *jus tertii*, which as wrong-doers the defendants, now appellants, could not be allowed to do. Moreover, even

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

if the defendants could have set up the *jus tertii*, title could not be shown in this loose manner. These remarks apply to the production of leases by Sinclair, with this additional remark that there is nothing to show that Sinclair had been subpoenaed to produce the leases. The judge's note is: "Mr. Campbell recalled the witness Sinclair to produce certain leases, &c." I cannot say that the appellants have shown that any evidence properly tendered by them as defendants below was improperly rejected by the Court below, and I do not see how the issue could have been affected favourably for them even had the questions rejected below been allowed. There is abundant evidence that Cornwall was in possession at the date of the taking possession of his lands by the appellants in 1882, and that they have remained in possession ever since; and evidence showing that others had also trespassed thereon during the same time could not help them, and they were not entitled to set up title in others. There is, in my opinion, no foundation for this ground of appeal.

It was contended, generally, with respect to the judge's notes—or general minutes as they are called—on the trial below, that they are not to be taken as authentic and conclusive as being objections taken and questions submitted by the appellants from the decision of the Court below, because they are not signed as required by Art. 136 of the Order in Council, 1877; and, it was argued that the fact that they were not signed appears from the certified copy sent on this appeal under Art. 116 of that Order in Council, which article it was contended requires that the original minutes taken below should be sent up. Well, first of all, Art. 116 does not require that the original minutes should be sent up. The Art. only requires that the writ

of summons, statement of claim and defence, orders and proceedings, a certified copy of all written and documentary evidence admitted or tendered, and the notes of the oral evidence, the appeal motion-paper, and the arguments referring to any arguments filed under Art. 114 (if any) should be sent up. The word "proceedings" cannot be held to include the minutes of the proceedings, for, if for no other reason, by Art. 136 (2) those minutes are to be preserved in a public office in the Court below. This, to my mind, shows clearly that it was never intended that the minutes themselves should be sent up, for they could not be so treated if they are to be "preserved in a public place in the Court below." As to the minutes, it has not been shown that they were not signed as required by Art. 136, and I assume they were, and I have before me a certificate from the judge below that the copy sent up is a true copy of the minutes he took. That copy is not signed by the judge, but that I do not take to be necessary. As I have already said, if the appellants desire to challenge the minutes, they should have moved prior to the hearing of the appeal. The judge seems to have included in the minutes what are properly the notes, so far as they are his notes, of objections taken and questions submitted to him. They are in my opinion conclusive.

I will now consider the 1st ground of appeal, which is that the Court below refused to allow the appellants, defendants below, to amend their pleadings. The way in which this ground is stated, though no doubt unintentionally, is calculated to mislead. The Court below did allow one amendment, and an amended statement of defence is on the file; but it appears that the Court did refuse to allow a further amendment to that amended defence. The trial had commenced on the 23rd of April.

1899
MCARTHER
AND
COMPANY
P.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

On the 15th of May, that is to say after the case had being going on for some twenty days, the amendment refused was asked for. I am not inclined to interfere with the decision of the Court below in refusing this amendment, for I am of opinion that the defendants have not been prejudiced, or been deprived of any defence which they could have properly set up. Moreover, the appellants sought by this amendment, as it seems to me, completely to change their defence. *Laird v. Briggs* (1) and *Newby v. Sharpe* (2), show that this should not be allowed. There is nothing in this ground of appeal which entitles the appellants to impeach the judgment of the Court below. It was contended for the appellants, principally in reply, that the Court below should have nonsuited the plaintiff, respondent here, because they, having leased to one Sinclair after the trespass, and not having regained possession since, had not sufficient possession to enable them to sustain an action for trespass, the possession being in the lessee. This was not pleaded as a defence, nor was the point taken in the Court below as it should have been if intended to be relied on at the appeal. Moreover, it is a plea setting up the *jus tertii*. For all these reasons I do not think it can be made of any avail in this appeal, even if there be otherwise anything in the contention.

But it is urged as the 8th and 9th grounds of appeal that the verdict was against the weight of evidence, and that in any case the damages were enormously excessive, and on each of these grounds it is contended that the appellants are at least entitled to a new trial. These two grounds are closely allied, and in the argument before me were treated practically as one. For

(1) L. R. 16 Ch. D. 440.

(2) L. R. 8 Ch. D. 39.

the purposes of my judgment, I will first treat them separately and then together. First, then, as to the allegation that the verdict was against the weight of evidence. As far as that allegation goes to the verdict, as a verdict, for the plaintiff, without reference to the amount of damages, I think it fails as a ground of appeal, for there was ample evidence of the possession by Mr. Cornwall in 1882, and of the trespass by the defendants, now appellants, in that year, and of their continuing trespass. The possession of Cornwall was pleaded by the present appellants when they were defendants in the action *Manæma and others v. McArthur & Co.*, and Cornwall was stated in the judgment of Chief Justice Clarke to have been in possession, by means of Manæma, of the lands now mentioned in Schedule 'A' to the statement of claim in this action. Then, with regard to other lands, Carruthers, in his evidence, says he took possession of certain lands in the name of the whole; and Fletcher, the appellants' general-manager, says: "Any lands that Cornwall claims in Samoa Wm. McArthur & Co. claim." But as far as the allegations that the verdict was against the weight of evidence goes to the amount of damages awarded, it requires careful consideration, and must be considered along with ground of appeal 9, viz., that the damages were excessive—in other words, on that head the grounds combined come to this, that the amount of damages given is not warranted by the wrongs shown to have been sustained by the plaintiff. I wish to be clearly understood. I think the Court below was right in entering a verdict for the plaintiff Cornwall, and that it only remains to consider whether the amount of the damages awarded is excessive—so excessive as to entitle the defendants, now appellants, to a new trial, supposing

1880

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL

the plaintiff, now respondent, to be unwilling to have those damages reduced to such amount as I might think would not be excessive, supposing I think they ought to be reduced. If the plaintiff will consent to have them so reduced, there need be no new trial, even though I should come to the conclusion that the damages are excessive, for the case of *Belt v. Lawes* (1), decides that where the plaintiff is entitled to substantial damages, and the verdict which he has recovered cannot be impeached except on the ground that these damages are excessive, the Court will refuse a new trial if the plaintiff alone, without the defendants, consent to the damages being reduced to an amount which the Court would not have considered excessive had they been given by the Court below.

Now, the plaintiff in this case, if entitled to any damages at all, was, I am of opinion, entitled to substantial damages. The defendants can show no right, legal or equitable, to the possession of his lands and the lands they have kept the plaintiff out of, and from enjoying the possession of, for a period which now approaches eight years. Indeed, I cannot say that the Court and Assessors below were wrong on the evidence submitted to them in awarding to the plaintiff below exemplary damages. The question I next have to consider is whether such damages were not excessive, even when regarded as exemplary damages. On the question of damages, conflicting evidence was given as to the area of the plantations; as to the nature and extent of the cultivation thereon, including trees growing on the plantations; as to the yield of cocoanut trees, and the value of the produce; and generally as to the condition of the plantations before they were taken possession of by the defendants,

(1) L. R. 12 Q. B. D. 356.

and their present condition. This evidence was given at great length in the Court below, and was much commented upon here, and I am asked by the appellants, upon the evidence, to disagree altogether with the verdict, and to come to the conclusion that at the time when they took possession of Mr. Cornwall's lands when he absconded from Samoa and abandoned them, to say that the lands are of little value, and that he is only entitled to nominal damages, or at the most, to what would be a fair rent for the properties during the time defendants have had possession; and to say, further, that the plantations are now in a better state than when taken possession of because improvements by way of buildings have been effected. Now the Court below has found against the appellants on all these points, and has come to the conclusion that the plaintiff, the respondent here, has suffered damages to the extent of \$1,276. Now, with respect to the allegation that Mr. Cornwall had absconded from Samoa, there was evidence which a jury could not but accept, for it appears in the records of the Court that Mr. Cornwall left Samoa for the express purpose of going to Fiji, where he afterwards arrived to prosecute an appeal against the very judgment under which the writ of *fi. fa.* by virtue of which the lands are said to have been seized and sold, was issued. As to having abandoned the property, the fact that his labourers sued him, and that he was unable to pay them, and that he never returned to Samoa, was relied upon. On the other hand, it was put to me that Mr. Cornwall had arranged for an advance from a Mr. Ruge, from whom it appears he had previously had advances, which he had repaid, to pay these labourers, but that this arrangement was upset by McArthur & Co. taking proceedings against

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

him, and the evidence of Carruthers was relied on, and certainly may support this view; and to account for Mr. Cornwall not returning to Samoa, it was pointed out that while he was away in Fiji, proceedings were being taken in Samoa with the object of arresting him; that authority, while he was so absent prosecuting his appeal, was given to one McKenzie to seize and hold one of his estates, viz., Lata. As showing that the property must have been of very small annual value, the fact of the labourers having to sue is again used. The inability of Mr. Cornwall to raise 5,000*l.* to pay off McArthur & Co. is pressed, while on the other side I am reminded that in 1879, but two years previously, the appellants were content to take Lata, one of the plantations which they now say were valueless, as being of itself good security for the amount of 5,000*l.* which they then advanced to Mr. Cornwall, and it was pressed upon me that the inability to raise 5,000*l.* in cash in a place like Samoa on the properties is no criterion of their value; and, further, that in 1880 Mr. Cornwall was able to raise 1,200*l.* from Mr. Ruge, and that that sum was repaid from the produce of the plantations within twelve months or so of its being borrowed. With respect to the condition of the plantations, it was admitted by the appellants, on the hearing of this appeal, that Lata was in a worse condition than at the time it was taken possession of by them. As to the condition of the rest of the property, the evidence is conflicting, but in favour of the view asserted by the plaintiff, the respondent here. It must be borne in mind that the evidence shows that after the labourers who had been in the employ of Mr. Cornwall were returned to their homes, their time having expired, Messrs. McArthur & Co. found great difficulty in obtaining labour owing to

the refusal of the High Commissioner for the Western Pacific to sanction recruiting of labour for service in Samoa. It is only natural to suppose, therefore, that the plantations did suffer for want of labour after they fell into the hands of the appellants.

With respect to 50*l.* a year being a fair rent for the property, it is pointed out that this was recognised by the Chief Justice in the action *Manæma and others v. W. McArthur & Co.* as being merely a nominal sum named in the lease which had been granted for the sole purpose of bringing an action to test the defendant's right to hold the land. I am bound to say I think that is so. Now all this has been submitted to the Court and assessors below, and they have found for the plaintiff. Why should I disturb that finding? Can I disturb it? I do not think I can. In *Commissioner for Railways v. Brown* (1), Lord Fitzgerald says: "Where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand, the setting aside of such a verdict should be of a rare and exceptional occurrence." Therefore, as I have before said, I think the verdict here must stand, and the sole question is whether the full amount of damages awarded should stand also or whether that amount should be reduced. In favour of the damages being reduced the appellants urge that their original taking was *bonâ fide*, under the belief that, having obtained a writ from the High Commissioner's Court authorising the sale of Mr. Cornwall's "goods and other property," and having bought at a sale under that writ, they were entitled to take possession of the real property, and they say at the most they should only pay what would amount to a fair rent for

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

(1) L. R. 13 App. Cas. 133.

1880
McARTHUR
AND
COMPANY
v.
CORNWALL.

the time they have occupied, urging that 50*l.* a year is a fair rent, that being the amount at which the plantations were leased to Sinclair and others in 1886.

As the question of their *bona fides* has been raised by the appellants, it must be examined. They say; we honestly thought we had bought the lands; therefore we took possession of them; therefore we have kept possession of them; therefore, if we have been mistaken, we should be dealt leniently with. In considering this, I must consider the evidence *contra*, to which my attention was called, and I find that on the 6th January, 1882, before the appeal was heard in Fiji, the hearing not being concluded till the 19th February, 1882, the appellants, through their solicitor Hetherington, sent to one McKenzie, then in possession of Lata for Mr. Cornwall, the following communication:—
“Know all men by these presents that McKenzie is hereby authorised to occupy and hold possession of Lata plantation and premises and use all produce and native food upon such plantation. He is also authorised to warn off and eject all trespassers, and do all things which shall be necessary for the prevention of thefts and the lawful punishment of trespassers and thieves.”
This document Mr. Hetherington signs as “Attorney for Messrs. McArthur & Co., execution creditors in *re McArthur & Co. v. Cornwall*,” and there is this post-script: “The above to continue until further notice.”
But the sale under which the appellants say they bought and entered did not take place till March or April, 1882. Now, this act, at a time when an appeal against their judgment was pending, is pressed against the appellants as showing that they intended all along to get possession of the plantations without reference to any legal process.

Next, my attention is called to a letter written to the appellants by the High Commissioner for the Western Pacific, dated 7th May, 1884, in reply to one from them of 7th April previous. In that letter the High Commissioner says: "You inform me that 'as I am aware' your firm purchased through the Court of the High Commissioner for the Western Pacific all Frank Cornwall's right, title, and interest in certain blocks of land and including plantations more or less cultivated," and after a desire to obtain at least sufficient labour for the cultivated part, they ask for a copy of such regulations, &c. "In reply, and as to the first matter, I have the honour to state that I am not aware that your firm purchased any land, or the interest therein of Mr. Frank Cornwall"; and then the High Commissioner, after giving reasons for being supported in his assumption, continues: "Upon this point I request you to note that your firm has acquired no claim through the Court of the High Commissioner to Mr. Cornwall's alleged titles to land in Samoa." Now, whatever the defendants, appellants here, may have thought up to the date of the receipt of that letter from the head of the Court through which they say they thought they had bought, it is difficult to see how they could, after its receipt, have continued in that belief. It is pressed against the appellants that their seizure of Mr. Cornwall's lands was unlawful, and wilfully so, from the commencement, and that the continued possession has been wilful and defiant ever since. Undoubtedly their holding after their letter from the High Commissioner lays the conduct of the appellants open to severe comment.

Again, as against the plea of *bona fides* set up by the appellants, my attention is called to the fact that by a judgment of this Court, delivered by Chief Justice

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL

Clarke in September, 1886, the appellants, then defendants, were declared to be trespassers on the lands. In his judgment the Chief Justice says: "I may say at once that I think the seizure and sale under the writ was illegal, and does not in the least justify the defendants' present possession." Now, this is certainly very strong against the plea of *bona fides* set up here by way of mitigation of damages. First, then, we have the High Commissioner in May, 1884, warning the defendants that they had not bought the lands through the Court; then we have the Chief Justice of the Supreme Court of this Colony declaring that the writ under which they say they bought gave them no right to possession. Yet we find that, notwithstanding these authoritative declarations, the appellants, McArthur & Co., continue with force and arms to hold these plantations. It seems to me too late, now that a jury have given damages against them for their trespass up to 1889, to say they have been acting under a *bona fide* mistake of legal rights. I think the Court below was quite right to disregard such a plea in mitigation of damages. I think the evidence on this part of the case shows a determination on the part of the defendants to hold the lands they seized, the High Commissioner and Supreme Court of this Colony notwithstanding. Their general-manager, Fletcher, is proved to have said to one Sinclair, who had been declared by the Supreme Court to be entitled to possession as against the appellants, "We (McArthur & Co.) are stronger than you, and should you bring a force to take possession, we will raise a larger one"; and, again, there is the passage in the evidence of Skeen referring to a conversation with Fletcher: "He asked me where we (meaning Cornwall) found the money to send me down to Samoa. I

told him I did not know, but I personally was satisfied. He said it was no use for us to try and fight William McArthur & Co. as they had the most money, and would be sure to beat us eventually." This was attempted to be explained away as "chaff," but Skeen says he did not so regard it. Now all this evidence, and their explanation as to part of it, were before the Court below and assessors, and they apparently did not look upon either statement as "chaff" nor do I see any reason on the evidence why they should have done so. I do not think the appellants are entitled to any consideration on the ground of *bonā fide* mistake of legal rights. It seems to me rather that they knew all along that they were acting wrongly, but they relied on the assumed want of power in the High Commissioner's Court to control them. There is no other deduction than this from the words of Fletcher addressed to one whom the Supreme Court and the High Commissioner's Court, too, had declared entitled to possession. "We are stronger than you, and should you bring a force to take possession, we will raise a larger one." On the evidence before me, I cannot but regard the conduct of the appellants in the most unfavourable light. I think their original trespass was wilful, and that their continued trespass has been persistent and defiant, and that they have acted throughout in a manner wholly unauthorised and unlawful. I see nothing in this case to prevent them from being subjected to most exemplary damages, and I think that nothing but exemplary damages will meet the justice of the case. But even exemplary damages must bear a reasonable proportion to the injury sustained by the plaintiff; and while I think the evidence shows the plaintiff below to have suffered great personal wrong, and great pecuniary loss

1890

MCARTHUR
AND
COMPANY
".
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

by the acts of the defendants, I do on that same evidence think that the sum of 41,276*l.* was altogether disproportionate and excessive as damages for those personal wrongs and that pecuniary loss. I appreciate the extreme difficulty of accurately assessing the damages here, when the appellants appear to have kept no books of account except one relating to one of the plantations—*Magia*—and which, by reason of its mutilated condition, was rejected by the Court below. This difficulty was no doubt increased by the fact that one of the plantations, and that the largest, had been practically abandoned by the appellants for want of labour, and the others had deteriorated for a similar cause.

The safest measure of damages for the pecuniary loss sustained here seems to be the value of the produce which the plantations may on the evidence be taken to have yielded at the time they were taken possession of. I find, from a memorandum sent by the judge below, that his Honour and the assessors, before whom the case was tried, in assessing the damages, took the number of trees growing on the plantation, and fixing their annual value at one shilling, so arrived at the result. I think this is an arbitrary measure, which is not calculated to lead to a fair result. Moreover, I think there is evidence from which a fair estimate of the value of the yield of the plantations might have been arrived at, and that evidence is to be found in the judgment in the action *Manama and others v. McArthur & Co.*; which judgment was put in evidence at the trial. Therein occur the following words: “He (that is, Cornwall and *Manama*) 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"; and a little further on the words occur,—“ Cornwall returned in September, 1881.” It would therefore appear that the plantations at that time were capable of yielding, and did yield, in one year produce to the value of at least 1,200*l*. As I have said, I feel there is much difficulty in assessing the compensation to which the plaintiff below is fairly entitled; but I think that, in the absence of any evidence of greater value in yield of produce, 1,200*l*. might fairly have been taken by the Court below as the basis upon which to calculate the pecuniary loss suffered by the plaintiff. In estimating the damages here, I think the harsher rule of law, as applied in *Martin v. Porter* (1), referred to in the judgment of Fry, J., in *Trotter v. McLean* (2), should be applied; for I think, as there said, that the trespass was unauthorised and wilful in its inception, and persistent and defiant in its continuance up to the present time. In *Martin v. Porter*, which was an action for trespass in working a mine, it was held, the trespass having been wilful, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it. In that case Parke, B., said: “I am not sorry this rule is adopted, and it will tend to prevent trespasses of this kind, which are generally wilful.” I think that, in assessing the damage, the defendants were not entitled to be allowed to deduct any expenses they may have been put to in cultivating the plantations, but that the gross annual value of the produce should be paid by them. This gross annual value, I think, might fairly have been assessed at 1,200*l*., and I think the plaintiff was entitled to receive as damages, at least, that amount for eight years, or

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

(1) 5 M. & W. 351.

(2) L. R. 13 Ch. D. at p. 587.

1890
McARTHUR
AND
COMPANY
v.
CORNWALL.

9,600*l.* as damages for the produce taken from the plantations. I think the case of *Williams v. Currie* (1) warrants the adoption of this mode of assessing the damages, by assuming the value of the annual produce. From a note to that case (p. 848) it appears that there the jury took the *presumed* value of the hay on the land trespassed upon, and added damages for the unlicensed entry; and their verdict was upheld. In that case, too, Maule, J., said, "If we were to hold that the jury, in estimating the damages for an unlicensed trespass of this sort, are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would, in effect, be placing a wrong-doer upon precisely the same footing as one who enters with the owner's permission"; and his Lordship continued: "Besides, it is to be observed that this was not a case of a single act of trespass, but of a series of trespasses persisted in day after day and for several weeks, and this was done for the pecuniary profit of the defendant." Now, these remarks apply exactly here, if for the words "several weeks," with which they conclude, the words "several years" are read. In addition then to what I think might fairly have been allowed for loss of produce, I think the plaintiff was entitled to a substantial sum by way of penal damages for the personal wrongs and injuries he has sustained by a wrongful trespass by the defendants.

The behaviour of the defendants has been lawless and calculated to lead to tumult, and their evil example if unchecked would make impossible that peace and order among British subjects in Samoa, which it is the aim of the treaty between Her Majesty the Queen and the King of Samoa, and of the Western Pacific Order in Council to preserve. The appellants are themselves

(1) 1 C. B. 841.

British subjects trading in Samoa, and rely upon the arm of British power and justice being long enough and strong enough to protect them in all their lawful undertakings. As on the one hand they may properly so rely, on the other they must learn that that arm is also long enough and strong enough to punish them when they invade the property and wantonly violate the right of a fellow British subject in Samoa.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL

While, therefore, I think the damages should be reduced, yet I think they must still be left at such an amount as will adequately meet the justice of the case, and lead the defendants to hesitate ere they longer defy British law in Samoa. After careful consideration, I do not think the damages should be reduced below 15,000*l.*, and I think that for that sum the respondent, plaintiff below, is entitled to have judgment, if he consents to the damages which he has already recovered being so reduced. If he does not consent—and there is no compulsion on him to do so—there must be a new trial, on the ground that the damages in the Court below are excessive.

The respondent is also, in my opinion, entitled to possession, as against the appellants, of all the lands referred to in the statement of claim. There will therefore be a declaration to the effect that the plaintiff below is entitled to possession; there will be an order for possession, which the Court below must, on proper application made, take all proper steps within its jurisdiction to give effect to, and if the plaintiff consents to the damages being so reduced, he will also have judgment for 15,000*l.*

The appellants have not counter-claimed for any amount due to them by the respondent, under the judgment recovered against him in the High Commissioner's

1890
McARTHUR
AND
COMPANY
v.
CORNWALL.

Court in 1881. They may, however, deduct anything properly due to them under that judgment for anything they may have to pay under this judgment, paying to the respondent the balance.

The appellants must pay to the respondent, Cornwall, his costs of this appeal, as well as his costs of the proceedings in the Court below; but they will have their costs of appeal and in the Court below against the plaintiff Manæma.

On the following day, the respondent Cornwall having refused to consent to the damages received in the Court below being reduced, his Honour amended the decree in the following terms:—

(i) That so much of the judgment of the Court below as declares the plaintiff Manæma to be entitled to damages be reversed, and that judgment on her claim be entered for the defendants.

(ii) That so much of the judgment below as awards damages to the plaintiff Cornwall, be also reversed, and a new trial between the plaintiff Cornwall and the defendants McArthur & Co. be granted, on the ground that the damages are excessive.

(iii) That so much of the judgment of the Court below as decrees Cornwall entitled to possession and decrees an order for possession thereof be confirmed.

(iv) The question as to the payment of costs on this appeal and in the Court below is, at the request of counsel, reserved for argument.

On the 12th March the question of costs was argued by the same counsel and his Honour gave judgment as follows:—

H. S. BERKELEY, C.J. In considering the question of costs, I will commence with the proposition that as a general rule the successful appellant will get his costs (*per* Lord Chief Justice James, in a *Memorandum* as to the practice of the Court, reported in L. R. 1 C. D. 41). In applying that principle to this case, it will be necessary to consider separately the position of the respondent Manæma and the respondent Cornwall; and to the above enumerated rule there must be added this rule, "That the costs are to follow the event, and the event is the result of the entire litigation," *per* Mellor, J., in *Field v. Great Northern Railway Company*, (1) Well, as to Manæma, I have decided that her claim was *res judicata*, and have given final judgment against her accordingly. In her case, therefore, the result of the entire litigation, which is composed of the action in the Court below and of the proceedings on this appeal, has ended in favour of the appellants. She must therefore pay to the appellants the costs of this appeal and of the action below, and any sum which may have been paid by the appellants, as her costs are to be repaid to them. Costs so paid will be apportioned on taxation.

With respect to the right to costs as between the appellants and the respondent Cornwall, in applying the principle that the successful appellant will in general have his costs, the first question to be settled is how far have the proceedings which were commenced by the action below ended in favour of the parties respectively. Well, as to the claim to possession of the lands, that has ended here in favour of the respondent Cornwall, and final judgment has been given in this respect for him. So far, therefore, he would be entitled to his costs of this appeal and to the costs of the action below. But

(1) L. R. 3 Ex. D. at p. 262.

1890

MCARTHUR
AND
COMPANY
v.
CORNWALL.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

as to the claim for damages for trespass to these lands and conversion of the crops thereon, in whose favour has the action commenced below ended, for costs are to follow the event? Well, I think this question can only be properly answered by first answering another question, viz., what is the meaning of the words "the event," which costs are to follow? Well, "the event" means the result of the entire litigation (*per* Mellor, J., in *Field v. Great Northern Railway Company*); "the conclusion of the whole matter, or proceeding, which commenced with the writ of summons and ended with the final judgment" (*per* Kelly, C.B., *ibid.*, p. 262). Well, there has been no final judgment yet on the claim for damages. There has been an order for a new trial, and final judgment cannot be given until after that new trial has been had. The conclusion of the whole proceedings, therefore, will not be reached till after the result of that second trial is known. The event, then, in this case, which the costs so far as they relate to the claim for damages are to follow, is the result of the final judgment which may be given on the new trial. A new trial has been ordered between the parties; the appeal, therefore, as regards damages, is now but one stage in the litigation which commenced by the writ of summons in the Court below, and which will not be concluded until after the new trial. So far, therefore, as the costs of this appeal and of the proceedings in the Court below relate to the claim for damages, my order will be that they abide the result of the new trial.

I have felt some doubt as to what I should do with respect to the appellants' application that, pending the result of the new trial, the costs already paid by the appellants as defendants below, on the order of the judge below, should be refunded to them on their

giving security to abide the result of the new trial, or to be paid into court to abide that result; or that the respondent, plaintiff below, should give security to repay them in case the result of the new trial is unfavourable to him. I do not view favourably the order of the judge below in this respect, but I am met with this difficulty, that by Art. 265, sub-art. 4, the judge below had a discretion to order stay of proceedings unless costs were paid, and he has exercised that discretion, and there has been no direct appeal against the exercising of that discretion. It is no doubt true that this appeal includes an appeal as to costs, and may perhaps include an appeal against the order for immediate payment of costs. But the judge, in exercising this discretion, was entitled to consider, generally, the conduct of the parties not only in relation to the proceedings actually taken before him, but to the whole circumstances of the case: *Harnett v. Vise*. (1) Now, it was in evidence before his Honour that the appellants, as defendants in an action previously had before his Court, had refused to recognise the order made by the Court, and had threatened the person holding that order with force if he attempted to exercise his rights thereunder. In those circumstances the judge below possibly thought it more prudent to secure obedience to this order by compelling the immediate payment of the costs, or, as it appears, a portion of them and security for the balance. On the whole, therefore, I am not inclined to interfere as requested by the appellants, but I shall leave them, if they are successful on the new trial, to recover anything they may have paid.

1890
MCARTHUR
AND
COMPANY
v.
CORNWALL.

Judgment accordingly.

(1) L. R. 5 Ex. D. 307.

P

1890

McARTHUR
AND
-COMPANY
v.
CORNWALL.

[From this judgment both sides appealed to the Judicial Committee of Her Majesty's Privy Council—the defendants, so far as it affirmed the decree of the High Commissioner's Court at Samoa—the plaintiffs, so far as it directed a new trial as to damages.

The appeal was argued on July 17th, 18th, 21st, and 24th, 1891, and on November 14th, their Lordships, after unsuccessfully endeavouring to effect a compromise between the parties, (*per* Lord Hobhouse) gave judgment* and advised that both appeals should be dismissed, with no costs,—and the decree appealed from affirmed. Their Lordships, however, intimated that whilst accepting the Chief Justice of Fiji's principle as to the measure of damages for the pecuniary loss suffered by the plaintiffs, namely, the value of the produce which the lands were capable of yielding at the time they were taken possession of, they could not see why the defendants should not be allowed a proper sum for expenses, nor why they should be fined a further sum under the name of penal damages.

The effect of this decision was that the order of the Supreme Court of Fiji directing a new trial on the ground that the damages were excessive stood affirmed, and the case was eventually, under the provisions of the recent Treaty of Berlin, set down for hearing before the Chief Justice of Samoa (Baron Cedercrantz), but ultimately settled out of court in 1893.]

* L. R. [1892] App. Cas. 75.