

## [VICE-ADMIRALTY COURT.]

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Dec. 9, 10.

## THE QUEEN v. THE EMMA FISHER.

*Jurisdiction—Forfeiture of vessel and cargo—License to “carry” labourers—Breach of Pacific Islanders Protection Acts, 1872, s. 9, and 1875, s. 6—Western Pacific Order in Council, 1877: Art. 17, 90.*

The Vice-Admiralty Court of Fiji has jurisdiction to entertain proceedings for forfeiture of a vessel brought to Fiji for condemnation for breach of the Pacific Islanders Protection Acts, 1872 and 1875, notwithstanding that by those Acts and the Western Pacific Order in Council, 1877, the High Commissioner's Court is constituted a Court of Admiralty and that the alleged offence occurred within the jurisdiction of the High Commissioner.

And it makes no difference in the offence of “carrying” labourers without a license that the vessel was anchored at the time of her inspection.

*Quere*, whether such jurisdiction extends to vessels or cargo not brought to Fiji for condemnation.

This was an action brought in the Vice-Admiralty Court of Fiji, in which Captain Davis, of H.M.S. *Royalist*, claimed the condemnation and forfeiture to Her Majesty of the British schooner, the *Emma Fisher*, owned by Messrs. Kelly & Williams of Sydney New South Wales, and her cargo, for violation of the Pacific Islanders Protection Acts, 1872 and 1875.

*The Admiralty-Advocate* for the Colony (Mr. Udal) for the Crown.

*Mr. Garrick* for the owners of the *Emma Fisher*.

From the evidence (most of which had been taken on commission) it appeared that in the month of October last H.M.S. *Royalist* was cruising in the Solomon Islands group, and on the 11th of that month Captain Davis boarded the *Emma Fisher*, which was then lying

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at anchor at Nososoqo, Rubiana, one of the trading stations belonging to Messrs. Kelly & Williams, and examined her papers. From this examination it appeared that one Robert Cable was her then master, the master Thomas Woodhouse—whose name was on the ship's articles—being then in Sydney. There were found on board about a dozen Pacific Islanders, not being part of the crew, and another half-dozen were stated by Cable to be on board the schooner *Freak*, which acted as a tender amongst the Islands to the *Emma Fisher*. There were in addition some fourteen other natives on shore at Nososoqo, who were alleged to be part of the complement of the latter. The only authority that appeared amongst the ship's papers for the carrying and employment of these natives was a license to carry and employ twenty-five natives issued to Thomas Woodhouse, but which had expired on the 1st March last; and Robert Cable having no license of his own Captain Davis considered he had no alternative but to bring the vessel to Fiji for the purpose of having her adjudicated upon in the Vice-Admiralty Court of that Colony, and declared forfeited to Her Majesty on the ground that she was carrying natives contrary to the provisions of the Pacific Islanders Protection Acts, 1872 and 1875. It further appeared from the evidence that for the purpose of lightening the *Emma Fisher* so as to enable her to be brought to Fiji, some of her cargo, consisting of copra and bêche-de-mer, had been landed at Nososoqo, under an arrangement to await the result of the decision of the Court at Fiji. The *Freak* also, which had no license of its own, being unfit to make the voyage to Fiji, was ordered to be laid-up at Nososoqo pending the like decision. The natives on board the two vessels were ordered to be landed at Nososoqo, with instructions

from Captain Davis that they should be returned to their homes by Woodhouse on his return from Sydney.

*The Admiralty-Advocate*, in opening the case for the Crown, said he did not ask for any penalty against the present master of the *Emma Fisher*, Robert Cable, who was only acting under the orders of his superiors in the Islands, but merely for a decree for the condemnation and forfeiture to Her Majesty of the vessel and cargo as provided for under the Pacific Islanders Protection Acts, 1872 and 1875. The learned counsel referred at some length to the provisions of these Acts, as authorising the proceedings that had been taken, and submitted that the evidence of Captain Davis and the entries in the ship's official log conclusively showed that at the time of the seizure by H.M.S. *Royalist* on the 11th October the *Emma Fisher* was not only without a license at all but that the number of natives found in her employ was greatly in excess of that allowed by the license that had expired. Under these circumstances the Crown could only ask for the unconditional condemnation and forfeiture of the vessel together with her cargo and effects.

*Mr. Garrick* on behalf of the owners took the preliminary objection that the Vice-Admiralty Court of Fiji had no jurisdiction in this case, on the ground that by s. 6\* of the Pacific Islanders Protection Act, 1875, and

\* S. 6 is as follows:—

“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 civilized power, in the same and as ample

a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them, and by the same or any other Order in Council to

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confer upon such High Commissioner power and authority, in Her name and on Her behalf, to make regulations for the government of Her subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations.

“It shall be lawful for Her Majesty, by Order in Council, to create a court of justice with civil, criminal, and Admiralty jurisdiction over Her Majesty’s subjects within the islands and places to which the authority of the said High Commissioner shall extend, and with power to take cognizance of all crimes and offences committed by Her Majesty’s subjects within any of the said islands and places, or upon the sea, or in any haven, river, creek, or place within the jurisdiction of the Admiralty; and Her Majesty may, by Order in Council, from time to time direct that all the powers and jurisdiction aforesaid, or any part thereof, shall be vested in and may be exercised by the court of any British colony designated in such Order, concurrently with the High Commissioner’s court, or otherwise, and may provide for the transmission of offenders to any such colony for trial and punishment, and for the admission in evidence on such trial of the depositions of witnesses taken in such islands and places as afore-

said, and for all other matters necessary for carrying out the provisions of such Order in Council.

“It shall also be lawful for Her Majesty, by any Order or Orders in Council, from time to time to ordain for the government of Her Majesty’s subjects, being within such islands and places, any law or ordinance which to Her Majesty in Council may seem meet, as fully and effectually as any such law or ordinance could be made by Her Majesty in Council for the government of Her Majesty’s subjects within any territory acquired by cession or conquest.

“The person for the time being lawfully acting in the capacity of High Commissioner, and any Deputy Commissioner duly appointed and empowered under the provisions of any such Order in Council as aforesaid, and acting under the directions of the High Commissioner, shall have and may exercise and perform any power, authority, jurisdiction, and duty vested in or imposed upon any British consular officer by the principal Act or by any other Act having reference to such consular officers, passed either before or after the passing of this Act; and every such Act shall be construed as if the said High Commissioner and Deputy Commissioner were named therein in addition to a British consular officer.”

Art. 17\* and 90† of the Western Pacific Orders in Council, 1877, issued under that Act, which constituted the High Commissioner's Court a Court of Vice-Admiralty, the jurisdiction of the Vice-Admiralty Court of Fiji was transferred to that of the High Commissioner.

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After hearing the Admiralty Advocate on this point, his Honour intimated that he did not consider that the Vice-Admiralty Court of Fiji was ousted by the Western Pacific Orders in Council, which only, in his opinion, added one more Vice-Admiralty Court to those already existing.

*Mr. Garrick* then contended that the Crown had made out no case, and referring to the Pacific Islanders Protection Acts argued that the *Emma Fisher* had been guilty of no violation of these Acts inasmuch as the evidence showed at the time that she was boarded by H.M.S. *Royalist* she was at anchor, and could not therefore be said to be "carrying" natives within the meaning of the Acts. He further argued that on the construction of the above Acts the penalty of the forfeiture of the vessel did not apply to cases of merely carrying natives without a license but only to cases of "kidnapping" under s. 9 of the Act of 1872 which constituted such an offence a felony, and that the present case could only be dealt with by proceedings for the forfeiture of the master's bond. With regard to the merits of the case the learned counsel contended that the master had been guilty of no wilful infringe-

\* Art. 17 is as follows:—

"All Her Majesty's jurisdiction, exerciseable 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."

† Art. 90 is as follows:—

"The Court, by a Judicial Commissioner, shall be a Court of Vice-Admiralty."

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ment of the spirit of the Acts, though no doubt the license had expired in March previously, but a fresh license had been taken out in ignorance of these proceedings whilst the master, Woodhouse, was in Sydney in October last, and which only missed covering the time at which the vessel was seized by a very few days. The granting of this license was proved by Mr. Riemen-schneider who now appeared as agent for the owners and stated that he had received it by the last Sydney mail, since the *Emma Fisher* had been in Suva. He also proposed to put in evidence a sworn declaration sent down by the owners from Sydney, but this was objected to by the Attorney-General, and rejected by his Honour. The learned counsel further argued the question of jurisdiction, and contended that no proclamation in the Colony of the Pacific Islanders Act had been shown to exist. [The Admiralty Advocate submitted that the fact of the proclamation must be assumed until the contrary was shown; but that if it was necessary to show it affirmatively, he proposed to put in No. 13 of the *Royal Gazette*, 1875, to prove it.] Under these circumstances he asked that the *Emma Fisher* should not be condemned as forfeited but should be restored to the owners, as undoubtedly the Court had power to direct.

*The Admiralty Advocate*, in reply, contended that with reference to the objection raised as to jurisdiction the words of the Western Pacific Orders in Council of 1877 were not capable of the construction sought to be put upon them by Mr. Garrick; that at the most they only conferred a concurrent jurisdiction in Admiralty upon the High Commissioner's Court; and that if they went further than this they were *ultra vires*, as no power to deprive the Vice-Admiralty Court of Fiji of

its jurisdiction was conferred by the Pacific Islanders Protection Act of 1875 under which these Orders in Council were issued; and by which very Act, Fiji was made one of the Australasian Colonies having a Vice-Admiralty Court. With regard to the contention that the *Emma Fisher* was not "carrying" natives at the time she was seized, if this argument was to hold good a vessel had only to drop her anchor or run for a port whenever a man-of-war appeared in sight. He pointed out that the penalties against the master were cumulative, and that the owners were also liable to be punished under the circumstances that had happened by the forfeiture of their vessel. With regard to the merits of the case, it should be remembered that the claim of the Crown was not only on the ground that the vessel was carrying natives without a license but also that she was employing more than she was entitled to under the license she had held. He also referred to the ship's log, which he contended clearly showed that the labourers had been carried in contravention of the terms of the license; as during the period for which the license was good, entries appeared accounting for forty-eight natives having been recruited, and this without any reference to a period of thirteen months during which no entry at all appeared in the log. Although the vessel was at the Solomon Islands and it was only reasonable to assume, in the absence of any evidence called by the defendants to the contrary, that such recruiting went on during that interval although not entered in the log as required by the above Acts. There was no evidence to show under what circumstance the second license had been obtained in Sydney; but it was clearly incorrect to state in it that the vessel was then "bound from Sydney to the Solomon Islands," when at that

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very time she was in the hands of H.M.S. *Royalist*. Unless it was held that the license must be on board the vessel at the time of inspection by any of Her Majesty's ships the protection sought to be provided by the above Acts was entirely thrown away if masters were allowed afterwards to obtain their licenses antedated to cover any period they might choose. On these grounds he submitted that even if the Court had any discretion not to condemn a vessel when such an offence against the Acts had been committed as had been proved here, which he did not admit, yet under the circumstances which had been shown here the Court would not order the vessel to be restored to its owners as asked for by the other side, but would declare it forfeited to Her Majesty.

H. S. BERKELEY, C.J., Judge. A decree for condemnation must be made, and the *Emma Fisher* must be declared forfeited to Her Majesty for breach of the Pacific Islanders Protection Acts, 1872 and 1875. Those Acts render it an offence to carry labourers without a license. The master of the *Emma Fisher*, Thomas Woodhouse, had obtained in 1888 a license to carry on and employ in connection with the *Emma Fisher* twenty-five native labourers. That license expired in March, 1891; from that time down to October of the same year there was no license. It appeared from her log that during that interval labourers were carried on the vessel. On that evidence alone therefore it was shown that she carried labourers without a license. That was sufficient to constitute an offence under these Acts—the number was immaterial.

On the 11th October last Captain Davis of H.M.S. *Royalist* boarded her and found on her twelve natives



who were admitted by Robert Cable, her then master, to be employed in the industry connected with the vessel. There was abundant evidence therefore that the *Emma Fisher* carried natives contrary to the Pacific Islanders Protection Acts. It was also established upon the evidence that during the time that license was in force she carried more natives than she was authorised by that license to do. She must therefore take the consequence of what follows as the result of this, and that consequence is that she must be condemned and forfeited to Her Majesty having been found carrying natives without a license and also in contravention of the terms of her license.

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[His Honour then referred to the question which had been raised during the argument as to the jurisdiction of the Court, when it was contended on the part of the defendants that the proper court in this case was the High Commissioner's Court for the Western Pacific, which is a Court of Vice-Admiralty.]

I have already, during the argument, expressed an opinion contrary to that contention, and to that opinion I now adhere. The jurisdiction of the various Vice-Admiralty Courts is a concurrent one; and although the offence alleged might have been committed within the jurisdiction of the High Commissioner, the vessel having been brought to Fiji the Vice-Admiralty Court of that Colony had jurisdiction.

It was also argued on behalf of the defendants that there was no evidence of any natives having been "carried" as required by the Acts. He held that the word "carried" included having them on board for any purposes of employment in connection with the vessel. This would have been sufficient had there been no evidence of the vessel having been in motion, but clear

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evidence of this is furnished by the log. As to the contention that the spirit of the Acts has not been broken in this case, though possibly the letter might have been, I have not to consider that question, but only whether an offence has been committed by the vessel against the provisions of the Acts, and that I consider has been done. If it was necessary for me to express any opinion as to the conduct of the master (Woodhouse), I should not consider that he had been entirely free from blame; but without expressing any opinion as to this I hold that the master, having carried natives in the manner in which it has been proved he has, has rendered his vessel liable to be forfeited. I therefore decree accordingly, and make an order for the forfeiture to Her Majesty of the vessel with her cargo and effects. No order will be made as to the *Freak*. The costs of the Crown are to be paid out of the proceeds of the forfeiture.

*Judgment for plaintiff.*