

the subject-matter from which those costs arose. The subject-matter has again been inquired into by a competent authority and decided as if no such judgment of the so-called Supreme Court of the Kingdom of Fiji had existed; and if that be so with regard to the principal matter at issue between these parties I find myself unable to regard as a sufficient ground of action a claim for unpaid costs under such a judgment, either as costs, as debt, or as damages.

But, on the whole circumstances, although for the reasons stated Harman has failed in his suit, I cannot allow Cudlip his costs in this action.

Judgment for defendant without costs.

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[CIVIL JURISDICTION.]

October 25.

HARDING v. LIARDET.*

*Action for assault and wrongful arrest and imprisonment in Samoa—
Jurisdiction—Privilege of Consul.*

The Supreme Court of Fiji has jurisdiction to entertain an action between two British subjects for a tort committed in a foreign country such as Samoa; and the fact that the defendant was the British consul for Samoa and that the act charged against him was done in such capacity as consul, affords no defence to the action, there being no suggestion that such act had been sanctioned by the Government or chiefs of Samoa.

Mr. Solomon for the plaintiff.

Mr. Forwood and *Mr. Truscott* for the defendant.

On the conclusion of the case, the facts and arguments in which sufficiently appear from the judgment, His

* See next case.

1877 : Lordship took time to consider his decision, and on 30th
HARDING v. LIARDET. October, gave judgment as follows:—

J. GORRIE, C.J. In this case the plaintiff, Harding, claims damages to the amount of 2,000*l.* from Mr. E. Albert Liardet, Her Majesty's Consul at Samoa, for that he did with force and arms make an assault on him at Samoa, an island of the South Seas, and beat, wounded, and ill-treated him, and imprisoned him on board a vessel called the *Canterbury*, without reasonable or probable cause, for thirty-four hours, and for a further imprisonment of six hours on shore.

The defence was, first, That the Court had no jurisdiction; and, second, That the defendant was not guilty of the wrong with which he was charged.

As to the question of jurisdiction the defendant admitted that there could be no doubt of the jurisdiction if it were matter of contract which was being inquired into, but he contended that this Court could not inquire into or grant damages in consequence of a tort committed in Samoa; and at all events, as to the acts of a consul, he was only liable to answer in the courts of England.

But it seems, to me that the jurisdiction of Courts of justice is not limited to inquiries into contracts which may have been entered into abroad, but that they may competently inquire into civil remedies for alleged torts. In this case, for example, we are not asked to vindicate the laws of Samoa as regards assaults and batteries; but one of Her Majesty's subjects comes to this Court and complains that the defendant another British subject, who is at present within this Colony, did him a wrong in Samoa for which he seeks reparation. Is the mere fact that the wrong was done in Samoa a good reason

for the Court shutting its ears to the complaint and denying justice to the plaintiff even if he could establish his case?

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There are some actions which are in their nature local and could not be tried beyond the country in which the cause of action arose, but there are others which are equally in their nature transitory and may be tried elsewhere. They do not frequently occur, because the plaintiff may not always find the defendant within the same jurisdiction as himself, and, if he did, the difficulties of proving what happened in a foreign country are necessarily great. In England, formerly, when fictions were a favourite method with lawyers of overcoming difficulties, the venue in such cases was laid within the body of an English county, but that is no longer required, and we have no such difficulty in our mode of procedure. The resort to fiction, however, showed that such actions in England were not unknown even at an early period. If actions upon contracts entered into abroad can be tried elsewhere—which is admitted by the defendant—it almost necessarily follows that actions for damages arising from torts can be so tried. A contract is an obligation; and where one person undertakes to do, or pay, something to another, the agreement is binding between the two persons, not on account of the locality where the obligation was contracted but of the mutual undertaking of the parties to the bargain. The law of obligations is not peculiar to one country, but is common to all; and the enforcement is part of that universal law which all nations recognise. But the claim of damages which arises from a delict or tort, has, if traced back to its underlying principle, the same legal basis as an obligation.

There is no written contract between men that each

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shall give to the other his due and respect his person and his liberty, but there is an implied obligation to that effect, and the civil claim of damages for a tort arises from a breach of that implied obligation. The civil results of delicts form part of the general law of obligations in the Roman law and the laws derived from it; and in England such actions are personal actions, in the same general category as actions arising on contracts.

There is, therefore, no reason in the nature of the claims themselves why they should be treated differently from those arising from contracts as regards the place where the damages may be recovered, but every reason to place them on the same footing. There is one limitation, however, which must not be lost sight of in regard to torts committed abroad. If they are committed in a British colony where English law prevails, or in England itself, the principles of the law being the same, that which is a tort in the Colony will be a tort in England, and *vice versá*, so that there can be no inconvenience and no injustice in trying the case either in the Colonial courts or in the English courts according as the litigants are within the jurisdiction of the one or the other. But it may happen that what is a tort by English law is not so by the *lex loci*, and raises the very important question whether British subjects temporarily resident in a foreign country are to be so entirely governed by the *lex loci* that they cannot recover damages from each other for what are clearly torts by their own law, although they might not carry damages in the country of their sojourn. That question again subdivides itself into what is to be the rule with regard to civilised communities, and with regard to such islands as those by which we are surrounded where no

regular system of law prevails and where the *lex loci commissi delicti* might be nothing but the customary habits of barbarians.

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Now, as to the first of these questions, I take it that the law as to civilised communities is that British subjects can recover damages for torts committed in foreign countries, but that if the act was authorised by the law of the country it cannot be the foundation of an action in a British court. That was laid down in *Regina v. Lesley* (1) in regard to certain persons brought from Valparaiso to England in an English ship by order of the Chilian Government. The acts of the master were held to be justifiable for what he did in Chilian waters at the request or by the order of the Chilian Government, but not beyond. That case was commented on and accepted as the law on the subject in *Phillips v. Eyre*. (2)

With regard to savage communities, or islands which have been Christianised but not yet moulded into a law-abiding state, acts done by one British subject to another which are torts by their own law will all the more be a good foundation for legal proceedings before a British Court of justice, as, if not inquired into there, they can scarcely be inquired into anywhere else. There is no question in this case as to any sanction of the Government or chiefs of Samoa to the act of the defendant. That is not alleged; and the only allegation that is made to take it out of the ordinary class of cases is that he is the British consul, and that his proceedings were in fulfilment of his duties as such. Such a plea can be best judged of in a British court, where the law as to assaults and false imprisonment is well known,

(1) 29 L. J. (M. C.) 97. (2) L. R. 4 Q. B. 225. Affirmed 6 Q. B. 1.

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and where the privileges of consuls under the law can be inquired into and decided.

But it is contended by the defendant that, being consul, he can only be sued in England. No authority was brought forward to support the proposition; and I think it untenable. By admitting such an exemption of the defendant from the jurisdiction of this Court I would practically be denying justice to the plaintiff; that justice, viz., which consists in having his suit heard and determined, whether in his favour or against him. The plaintiff in all probability may never be in England, and, if he were, the defendant might not be there to meet him before the courts. But fortunately British subjects do not require to be within the realm of England to obtain justice. The Queen has established courts with ample jurisdiction throughout the wide bounds of the empire, so that those who may never tread the precincts of Westminster Hall may yet enjoy all the benefit of those principles of justice which have founded and which sustain the fabric of the commonwealth. In the old law certain provisions were made for the security of persons in the service of the Crown, such as ambassadors, commanders of armies, and governors. But in modern times these privileges have been looked upon with great jealousy; and it has been held by the Privy Council in *Hill v. Brigge* (1), differing from the doctrine which Lord Mansfield seemed to lay down in *Mostyn v. Fabrigas* (2), which, however, was in a late case adopted, that a governor even may be sued in the courts of his own government, although probably no execution would be allowed to issue which might impair the efficient carrying out of his commission. Consuls are

(1) 3 Moo. P. C. C. 465.

(2) 1 Sm. L. C. 658.

not such a class of officers as to come within the category of the high officials I have named. If exceptions were to be made in their favour where would they end?

I recollect that in the colony I have just left,* the Supreme Court was one day asked to sanction the proposition (which had been listened to by one of the District Magistrates) that a person was not subject to arrest for debt because he was the clerk of the French consul! This Court, and all courts, will recognise the commission of the defendant and will aid him in executing that commission when they can do so with due regard to the interests of others; and thus it is that to enable him to return to the sphere of his duties I have given these causes a preference, but I cannot admit that he is above and beyond the jurisdiction of this Court because of his consul's commission, and I will therefore proceed to inquire into the merits of the cause.

[His Lordship then proceeded at some length to review the facts relating to the alleged wrongful arrest and imprisonment and then continued:—]

Now; had the defendant any authority under his consul's commission—any authority at all—to order such an arrest, for if he had no authority it would be of less consequence to inquire whether he had probable cause? This is a question by no means so easy to determine as the plaintiff's counsel seemed to imagine. The power and authority of consuls vary very much in different quarters of the globe. They are not as a rule recognised as judicial officers, and yet in some countries they have magisterial and judicial powers. The consul, for example, at Madagascar has the power to arrest and commit prisoners for trial to the Supreme Court of Mauritius. He has also civil judicial power. This is

* Mauritius.

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conferred by an Order in Council; and the right to establish such a jurisdiction over British subjects must rest upon the concessions in a treaty with a foreign power. The defendant is unable to refer us to any Order in Council giving him like powers; but on the other hand it is undoubted that the consuls in such places as Samoa have been accustomed to exercise an authority wider than elsewhere. Probably the extent to which this was carried depended a good deal upon the personal character of the consul himself, and the willingness of the resident British subjects that for the general good such a authority should be exercised. Mr. Thurston,* who was well acquainted with the mode in which the consular office had been executed in Fiji in former times, gave us the information that many persons had been arrested and deported from the group by the consul, although he would not venture to go the length of saying that such powers came within the consul's commission.

The consul's commission, as we see from that put in by the defendant, is simply by all lawful means to aid and protect merchants and other subjects of the Queen who may trade with, visit, or reside in the place to which the consul is accredited. The primary idea is to prevent merchants being imposed upon and interfered with by the foreign power; but Her Majesty has further ample powers under the Acts of Parliament 35 & 36 Vict. c. 19, and 38 & 39 Vict. c. 51, to confer much wider and comprehensive powers over her subjects in the islands of the Pacific. The consul indeed by the first of those Acts has power to seize a certain description of vessels and to bring them before a Vice-Admiralty Court. By the second of those

* Afterwards Sir John Bates Fiji, and High Commissioner for
 Thurston, K.C.M.G., Governor of the Western Pacific.

Acts Her Majesty has power to create and constitute the office of High Commissioner, to make regulations for the government of British subjects in the islands of the South Seas, and to impose penalties, forfeitures or imprisonments for breach of such regulations, and also to erect a Court of justice for British subjects in the islands of the Pacific, and to make Orders in Council for the government of such subjects. But no such High Commissioner has as yet been appointed, no such Court as yet has been created, no such Order in Council has been received,* and the consul's powers must be judged of as they stand. These have not been shown by defendant to be magisterial or judicial. He might have shown some strong necessity laid upon him to do as he had done as a justification of his acts, but I doubt if in this case he has been able to do so.

[His Lordship then further referred to the evidence and concluded by saying :—]

I must therefore hold the respondent responsible for the latter part of the arrest; and I regard it as having been done beyond the scope of the defendant's authority and without reasonable or probable cause. No malice is alleged, and doubtless the defendant is entitled to the presumption that he believed, however erroneously, that he was acting in the discharge of his duty. I believe that the justice of this case, however, will be fairly met by awarding a sum of 25*l.* in name of damages which will also carry the costs of the cause, which, however, I will reserve the right to modify, if necessary, when the bill is taxed.

Judgment for plaintiff.

* See now, however, the Western Pacific Orders in Council 1877—1893, by which the Office

and Court of the High Commissioner for the Western Pacific have been constituted.

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