EDITOR'S NOTE

The decision of the Privy Council in McARTHUR & CO. v. CORNWALL ET AL. [1892] A.C. 75 is reproduced at the commencement of this Volume for its historic significance in the development of the law in the Pacific Islands.

[PRIVY COUNCIL.]

McARTHUR & Co. . . . . DEFENDANTS; J. C.*

AND 1891

CORNWALL AND ANOTHER . . . . . PLAINTIFFS. *July* 17, 18, 21, 24; *Nov.* 14.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Pacific Islanders Protection Acts, 1872, 1875—*Order in Council, August* 13, 1877—*Jurisdiction of High Commissioner's Court—Suit relating to Land in Samoa—Measure of Damages for Trespass.*

By an Order in Council of the 13th of August, 1877, issued under the Pacific Islanders Protection Acts, 1872 to 1875, and the Foreign Jurisdiction Acts, 1843 to 1875, a High Commissioner's Court was established which by sect. 6 of the Order applied to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." By treaty between Her Majesty and the King of Samoa, dated the 28th of August, 1879, it was provided that civil suits in Samoa should be tried by the High Commissioner.

In a suit in that Court for the recovery of land in Samoa, and for damages for conversion of its produce, it appeared that the defendants did not dwell within the bounds of the said islands, but that they had a store in Samoa, affixed to which was a signboard with the name of their firm, where they carried on business by servants and agents:—

Held, that by the true construction of the above Acts, Order, and treaty, the defendants were within the jurisdiction of the Court, and that the latter was competent to grant the relief prayed:

Held, further, that the measure of damages was the value of the produce

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. However wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff.

CONSOLIDATED appeals from a decree of the Supreme Court (March 13, 1890) by the defendants so far as it affirmed a decree of Her Majesty's High Commissioner's Court for the Western Pacific at Samoa (May 25, 1889), and by the plaintiffs so far as it directed a new trial as to damages.

The facts of the case and the proceedings in the suit are set out in the judgment of their Lordships.

The opinion of the Chief Justice with regard to the question of jurisdiction was as follows. In reference to the treaty of 1879, particularly art. 5 thereof, he says: "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 the High Commissioner for the Western Pacific as 'the officer duly authorized' in that behalf. I think that 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 cognizable by the Court below, for by the Western Pacific Order in Council, 1877, the High Commissioner's Court for the Western Pacific is duly authorized to exercise 'all Her Majesty's jurisdiction' exerciseable 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,' and 'for recovery of damages,' or otherwise concerning any civil right or other matter of a civil nature at issue, are authorized to be taken in the High Commissioner's Court.

"It was contended at the bar that so much of the Order in Council as authorized proceedings relative to land to be taken was ultra vires, and not warranted by the Pacific Islanders Protection Acts, under which it was agreed 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 Order in Council of 1877 shews 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 powers 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. *Lafontaine*. (1)"

Mark Napier, *Campbell* of the New Zealand Bar, and *McArthur*, for the appellants:—

The High Commissioner's Court had no jurisdiction to entertain this action, being one for trespass to lands in Samoa. Reference was made to the Western Pacific Order in Council, 1877, and to 38 & 39 Vict. c. 51, s. 6; and it was contended generally that suits relating to land did not fall within the jurisdiction thereby created. If a general jurisdiction to entertain

(1) 5 App. Cas. 581.

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actions of this kind was possessed by the Court, it only existed by virtue of the treaty of 1879, and in favour of British subjects in possession of land purchased from Samoans prior to the treaty. In this case there was no evidence of such purchase. According to that evidence the lands in suit became vested in the respondent, Manaema, a native of Samoa, in February, 1879, and were not subsequently divested. If, on the other hand, there is a general jurisdiction to entertain suits of this character, still it should be shewn that the plaintiff was resident within the jurisdiction at the time the writ was issued; and secondly, that the defendants, or one of them, were so resident at the time the cause of action accrued. Neither is the case here. With regard to damages, they ought to be assessed on such a principle as would compensate the plaintiffs in respect of their dispossession, and no further. The Chief Justice has treated the appellants as in contempt of his Court, and has allowed a consideration of such contempt to affect his ruling as to damages. The First Court did so to a still greater extent. No such contempt was either alleged or proved; nor was any case made for penal damages.

Fullarton, Q.C., *Lynch*, and *Hohler*, for the respondents:—

On the true construction of the Acts and Order in Council referred to on the other side, the Court has jurisdiction to entertain this suit, and to make the decree appealed from. The reasons given by the Chief Justice are adequate and correct. This is a cross-appeal from the order directing a new trial. There was evidence shewing that the Court could reasonably find that the damages suffered equalled the amount decreed. Vindictive damages may be given in a proper case, and were justified in this: see *Merest* v. *Harvey* (1); *Emblen* v. *Myers* (2); *Livingstone* v. *Rawyards Coal Company* (3); *Holmes* v. *Wilson* (4); *Martin* v. *Porter* (5); *Trotter* v. *Maclean* (6). See also the cases collected in Mayne on Damages (4th ed. p. 414), and *Goodtitle* v. *Tombs* (7).

(1) 5 Taunt. 442.
(2) 30 L. J. (Ex.) 71.
(3) 5 App. Cas. 35.
(4) 10 A. & E. 503.
(5) 5 M. & W. 351, 354.
(6) 13 Ch. D. 574.
(7) 3 Wils. 121.

Napier, replied, asking that their Lordships would assess the damages finally, even though on a liberal scale, so as to end the litigation. Reference was made to *Raja Burdakanth Roy* v. *Aluk Munjooree Dasiah* (1).

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

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The suit in which these appeals are presented was brought in January, 1887, by Frank Cornwall and Manaema against the defendants in their partnership name of McArthur & Co. Cornwall is a British subject, and is described as a planter and trader of Samoa. Manaema, a native of Samoa, is the wife of Cornwall, or has lived with him as such. The defendants are British subjects carrying on business in Samoa as traders and planters. The suit was brought in the High Commissioner's Court for the Western Pacific. The wrongs alleged are, first, that on the 27th of March, 1882, the defendants dispossessed the plaintiffs of lands in Samoa, which were specified in Schedule A, and have since that time taken the produce and have neglected or injured the land; and secondly, that on the same day the defendants dispossessed Cornwall of other lands in Samoa which are specified in Schedule B, and have since that time taken the produce. The relief prayed is, first (as to both plaintiffs and as to Schedule A), £30,000 damages for conversion of the produce, and £20,000 for injury to the land; and secondly (as to Cornwall and as to Schedule B), £10,000 damages for conversion of the produce, and recovery of the land.

The defendants filed statements of defence in the months of March and April, 1889. The effect of these statements is to deny the title of the plaintiffs and to allege the lawful ownership and possession of the defendants. They set up a title under the bankruptcy of Cornwall and a sale to them by his trustee in the year 1888; but that title is not now relied on. As regards Manaema, they plead that she had previously brought an action in the High Commissioner's Court in respect of the same matters for which she now sues; that the Supreme Court of Fiji,

(1) 4 Moo. Ind. App. 321, 338.

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sitting in Appeal, made a decree dated the 25th of September, 1886, awarding her £50 damages and her costs, and that she cannot recover anything further.

The action was tried in April and May, 1889, before the Deputy Commissioner, Mr. De Coëtlogon, sitting with two assessors, of whom one retired during the trial on account of ill-health; and on the 25th of May, 1889, the Court pronounced a decree declaring that the plaintiffs were entitled to recover the sum of £11,276 for damages, and the costs of suit, and that Cornwall was entitled to recover possession of the lands in Schedule B, and ordering accordingly.

The defendants appealed to the Supreme Court of Fiji, which, by a decree dated the 13th of March, 1890, affirmed the decree below so far as it declared Cornwall entitled to recover possession of the lands in Schedule B; but in other respects reversed it, adjudging that Manaema was not entitled to any damages, and that as between Cornwall and the defendants there must be a new trial on the question of damages.

Both sides now appeal from the decree of the Supreme Court of Fiji, the plaintiffs contending that the decree of May, 1889, is right and should be restored; and the defendants contending that the action should be wholly dismissed for want of jurisdiction in the Court, and (as regards Schedule A) for want of proof that Cornwall had possession at the time of the alleged trespass, and (as regards Schedule B) for want of proof that Cornwall ever had any title to the lands, or that the defendants had ever entered upon them.

As regards the possession and ownership of Cornwall and the possession of the defendants, it may be at once stated that their present pleas are in contradiction to their previous contentions and conduct, and to the facts established in evidence; and that it is difficult to understand why such pleas were put upon record. Mr. Napier has hardly endeavoured to support them at the bar, though they appear to have been seriously contested in the Court below. The questions for their Lordships to decide are: first, whether there is ground for any decree against the defendants; and, secondly, if there is, whether the decree of the High Commissioner's Court can be maintained. If there must be a decree,

and the decree of the 25th of May, 1889, cannot stand, the Chief Justice of Fiji is clearly right in directing a new trial.

As regards procedure and the jurisdiction of Her Majesty in Council, the case stands in a singular position. In May, 1889, the ordinary course of appeal from the High Commissioner's Court was first to the Supreme Court of Fiji and then to Her Majesty in Council. But on the 14th of June, 1889, a treaty was made between Her Majesty, the Emperor of Germany and the President of the United States of America, by which it is provided that there shall be established in Samoa a Supreme Court, consisting of one judge, who is to be named by the three signatory powers, or, failing their agreement, by the King of Sweden and Norway; and that his decision upon questions within his jurisdiction shall be final. Upon the organization of the Supreme Court all civil suits concerning real property situate in Samoa, and all rights affecting the same, are to be transferred to its exclusive jurisdiction. Their Lordships have been given to understand that the Supreme Court contemplated by the treaty is in working order; but they have no information as to the time when it was organized so as to take exclusive jurisdiction of all civil suits. The hearing in Fiji, though subsequent to the treaty, has been conducted without any reference to it. But then the ratifications of the treaty were not completed till the 12th of April, 1890. Both parties have conducted this appeal as though the treaty would not affect the case until it had been disposed of by Her Majesty in Council. In some views of the case it would have been necessary for their Lordships to pause until they were better informed as to the organization of the Court, for no provision is made by the treaty for cases under hearing or under appeal. But as they have come to the conclusion that both appeals should be dismissed, and that the existing decree should remain intact, there is nothing in the treaty which, in any state of the facts, can render it incompetent for Her Majesty in Council, acting on the advice of this Board, to pronounce such a decree as that, or which can make such a decree inconvenient or embarrassing to the new Court before which the case, if further prosecuted, must come. And their Lordships have thought it best to deliver reasons for their judgment exactly as they would

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if the case had to go back in the ordinary way to Courts subordinate to Her Majesty in Council. They think that such a course is the most respectful to the Supreme Court of Fiji, and also to the Supreme Court of Samoa, and also the most likely to be of use to the litigant parties. It may also possibly be of some use to the Supreme Court of Samoa, seeing that the litigants are British subjects; that their disputes have hitherto been tried according to English law and procedure; and that the treaty contemplates the use of English procedure until the Supreme Court sees fit to make new arrangements.

The transactions of the parties prior to the present suit are numerous and complicated; but, in the view their Lordships take of the case, it is not necessary to state them in more detail than suffices to exhibit their bearing on the questions of jurisdiction, and of the plea of res judicata in bar to Manaema's claim, and of the principles on which damages should be estimated.

It appears that in the year 1877 and afterwards Cornwall and the defendants were carrying on trade in Samoa. Cornwall was in possession of considerable tracts of land, and the defendants advanced him money to pay his labourers. On the 5th of February, 1879, Cornwall, who then owed the defendants £5664, made a voluntary conveyance to Manaema of the lands comprised in Schedule A; and on the next day he executed a mortgage of other lands to one Nelson, ostensibly to secure a debt of 16,000 dollars, but really without any consideration at all. In the month of August, 1881, the defendants recovered judgment in the High Commissioner's Court against Cornwall for the sum of £5500 then owing by him. Upon this Cornwall left Samoa, as he says, to prosecute an appeal in Fiji against the defendants' judgment; and he did go to Fiji and prosecute his appeal, which was dismissed in January, 1882; but he left Samoa suddenly and clandestinely. He has never returned thither, nor did he prefer any claim in respect of his land till this action was brought.

In the month of November, 1881, the labourers on Cornwall's land, being unpaid, sued Cornwall in the High Commissioner's Court, and obtained a decree for £900, in granting which the

Court made severe remarks on the misconduct of Cornwall in leaving his labourers without supplies or provision for returning home.

Under both these judgments writs of fi. fa. were issued. The goods and chattels of Cornwall were sold, but failed to satisfy the claim of the labourers, to which priority was accorded. Under the judgment obtained by the defendants the lands comprised in Schedules A and B, or large parts of them, were put up to public auction, and were knocked down to the defendants for sums amounting to 8565 dollars. It is not alleged that the defendants paid any of the purchase-money. It is not necessary to go into the details of these execution sales. It has been held by the Courts below, and is not now disputed by the defendants, that they were unauthorized and could not confer any title. The defendants, however, took possession in pursuance of them, and that is the trespass complained of in the present action.

In December, 1885, a document was executed by Cornwall, ostensibly as the attorney of Manaema, purporting to be a lease of the lands in Schedule A to Sinclair and others for a term ending the 8th of December, 1886. And in the month of March, 1886, Manaema and the lessees brought an action for the recovery of the same lands, and for damages amounting to £22,000. The Court of the High Commissioner dismissed the action, on what ground does not appear. But, on appeal, the Supreme Court of Fiji decided that the lessees were entitled to have possession of the lands, and to £50 damages; and that Manaema was entitled to £50 damages. The view of the Chief Justice was that Cornwall's conveyance to Manaema in 1881 was colourable and fraudulent, and that he remained the owner of the land; that Manaema was entitled to damages because she was in actual occupation of a house, and was illegally turned out by the defendants; and that the lease of December, 1885, was executed by Cornwall as principal and passed the property to the lessees for the term of the lease. This decree bears date the 25th of September, 1886.

It appears to their Lordships that, as between Manaema and the defendants, the present action raises precisely the same points as were tried and decided in the action of 1886, and therefore that the Supreme Court of Fiji was quite right in

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holding, on this ground, that Manaema can recover nothing further in the present action.

Of the transactions after the decree of September, 1886, very little need be said. The plaintiffs' writ of summons was issued and their statement of claim filed in June, 1887. The defendants did not file their defence till March, 1889. In the meantime they made an ineffectual attempt to appeal to Her Majesty in Council from the decree of September, 1886. They illegally retained possession of the land against the lessees. In 1887 an attempt made by Sinclair to obtain a writ of possession was refused by the Acting Deputy Commissioner. Some renewals of the lease to Sinclair and others were made. But (Cornwall's bankruptcy being placed out of the question) nothing occurred to alter the position of the parties before the trial, except the persistent refusal of the defendants to recognise the rights established by the suit of 1886.

It has been stated above that the defences resting on the allegations that Cornwall has not any title, and that the defendants have not entered on the lands, are wholly unsubstantial. No defence remains, therefore, except that the High Commissioner's Court had no jurisdiction to entertain the suit. It is contended, first, that the defendants personally do not fall within the jurisdiction; and, secondly, that suits relating to land are not within it.

The Court was created by an Order in Council dated the 13th of August, 1877, and made by virtue of the powers vested in Her Majesty by the Pacific Islanders Protection Acts, 1872 and 1875, and by the Foreign Jurisdiction Acts, 1843 to 1875; and by sect. 6 it is expressed to apply to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." These words are doubtless intended to cover as wide a class relating to Samoa as is allowed by the words used in the Pacific Islanders Protection Act of 1875, which gives power to the Crown to exercise jurisdiction over its subjects in those parts, and to create a High Commissioner and a Court of Justice. The persons over whom jurisdiction is given are described as "The 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." There is no doubt that the islands of Samoa, then called the Navigators' Islands, are among the places here mentioned. But it is contended that inasmuch as no one of the partners in the firm of McArthur & Co. has dwelt or is to be found within the bounds of the Islands, they are not "within" them as required by the statute and the Order in Council.

It certainly would be a very startling result if persons who had obtained the possession of lands through the processes of the High Commissioner's Court should be able to retain that possession and to prevent examination into the validity of those processes by alleging the incapacity of the Court to exercise jurisdiction over them. If it were necessary it would have to be considered whether those who set a Court of Justice in motion, and obtain the aid of its decrees and officers, are competent to deny its authority to enforce against them liabilities arising out of their misuse of those decrees and officers. But it is not necessary, because the defendants had a store in Samoa in which they carried on business by servants and agents, and affixed to which was a signboard with the words "Wm. McArthur & Co." in large letters. And their Lordships agree with the Supreme Court, which in the suit of 1886 held that this circumstance clearly brought the defendants within the statute and the Order in Council. Certainly, if it were not so, statutes and orders so framed would fail largely of their intended effect; for it is often the persons who live far off, but take profit from the spot by agents, who are least careful of the rights of those who are on the spot, and who most require the control of local authority.

It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to Her Majesty over land in Samoa. But the Order in Council is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and must be held to do so in all those places in which Her Majesty has been enabled to give it by the assent of the ruling power. So far as regards Samoa the matter is provided for by a treaty dated the 28th of August, 1879, between Her Majesty and the King and Government of Samoa. In that treaty art. 3 guarantees to British subjects full

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liberty for the free pursuit of commerce, trade, and agriculture, and creates a special tribunal for deciding disputes respecting purchases of land from Samoans. Then art. 5 provides that every civil suit which may be brought in Samoa against any subject of Her Britannic Majesty shall be brought before and shall be tried by Her Britannic Majesty's High Commissioner, or other authorized British officer. This treaty applies itself to the Order in Council of 1877, and appears to their Lordships to be sufficient without any fresh Order in Council to confer on the High Commissioner jurisdiction over such a suit as this.

The result so far is, that though the defendants can plead successfully that Manaema's claims have been disposed of, that plea only leaves them answerable to Cornwall. Against him their pleas fail, and he must be treated, as the decree appealed from treats him, as entitled to recover possession of the lands and damages for dispossession. Then comes the difficult question, what damages? The decree of the High Commissioner's Court, which Cornwall strives to retain, proceeds on the principle of ascertaining the number of cocoanut trees on the land, and assigning an average annual value per tree during seven years of illegal occupation. By this process the sum of £24,676 is brought out as the value of the produce. Then sums, amounting to £9600, are added for depreciation and neglect, and £7000 as "penal damages for illegally holding possession of the lands." These sums make up the total amount decreed, viz., £41,276.

Their Lordships concur with the Chief Justice of Fiji in thinking that such an amount is altogether disproportionate and excessive. The net profit of the estate is put at £3500 a year, or thereabouts. This is the property for the labour on which Cornwall was unable to pay a sum of £900 in the latter part of 1881, which he allowed to pass by an irregular process into the hands of his judgment creditors in 1882, without, apparently, any attempt to get it back, though he might have done so by raising some £6000, less than two years' income at the supposed rate. The method which leads to this result is a very dangerous one. It affords the widest scope for conjectures, which it is impossible to bring to any sure test except by examining actual transactions with the property and its produce, or with other properties in

exactly similar positions. No accounts have been produced nor has any other evidence been tendered on Cornwall's part to shew what profit accrued during his possession. Cornwall himself has kept at a distance from Samoa. The leases to Sinclair and others are at a rent of £50 only, and the sales upon the executions were for small sums, and those upon the bankruptcy for still smaller; but all these transactions were unreal ones, and no reliance can be placed on them. The defendants produced some accounts relating to one of the plantations, which were rejected by the First Court, the reason being, if the Supreme Court of Fiji was rightly informed, that they were mutilated. No doubt there has been great dearth of evidence, and it is the defendants who have been in possession who ought to produce the best evidence, and it is against them that presumptions must be made on points left in doubt. Still, the presumptions must not be so incredible as those adopted by the First Court. It appears to their Lordships, indeed, that, even if the method were right, the evidence does not warrant the conclusions of the First Court as regards either the number or the yield of the trees. The Court seems to have applied to large areas statements made with reference to very small ones favoured by position or by the attention of the cultivator. Notwithstanding some sanguine estimates of value, the impression made upon their Lordships by the whole evidence is that the property is one of very uncertain and fluctuating value, of very little value to one who cannot pay for labour; to one who can, dependent on the supply of labour from time to time; and that, during the period under review, there have been great difficulties in getting the desirable supply of labour. It is probably on this last ground that the Supreme Court of Fiji thought that the defendants ought not to be charged with the large sums awarded by the First Court for deterioration and neglect. The cultivation had gone back from the impossibility or extreme difficulty of getting labour.

The learned Chief Justice says that the safest measure of damage seems to be the value of the produce which the plantations may upon the evidence be taken to have been capable of yielding at the time they were taken possession of. He considers that there is evidence to warrant him in taking that value

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at £1200 a year, and, for the purpose of making an offer to the parties, calculates that a fair sum for damages would be £15,000; this sum being made up of eight years of the value of £1200, without allowing any deduction for expenses, and with the addition of £5400 for penal damages. Cornwall, however, would not accept the reduced sum; and so there was no course left but to direct a new trial. Their Lordships also have tried to bring about a compromise between the parties; but they have not been more successful than the Chief Justice of Fiji.

Their Lordships cannot find any better principle than that of the Chief Justice for the first step in ascertaining the amount of pecuniary damage. But they cannot see why the defendants should not be allowed a proper sum for expenses, nor why they should be fined in a further sum for Cornwall's benefit under the name of penal damages. These consequences are inflicted upon the defendants because, it is said, they have defied British law, and committed a trespass unauthorized and wilful in its inception, and persistent and definite in its continuance. Assuming in Cornwall's favour that such conduct would authorize what is in its nature a fine or penalty, and is not damage to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships cannot take so severe a view of the conduct of the defendants.

What was the position of the parties when the trespass was first committed? The defendants were creditors of Cornwall; he was legally bound to pay them to the extent of his whole property; he was especially bound in honour to let them have value out of his plantations because their money had gone to pay for the labour on those plantations. What he did was to execute a fraudulent conveyance to Manaema and a fraudulent mortgage to Nelson; to leave the islands directly a judgment was obtained against him, suddenly, secretly, in violation, as the solicitor in the action states, of his pledged word, and leaving his labourers to shift for themselves in a way which was highly discreditable to himself, and which must have been injurious to the property. When out of the islands he was busy in endeavouring to upset the judgment, apparently a perfectly just

judgment, obtained against him by the defendants. It is not shewn by anything in this record that the seizure and sale of the land effected by the defendants was more than a mistake of law. But even if the defendants did think that they could safely take a short cut to obtain one of their debtor's assets clearly available to make good their debt by some process, there was certainly much in Cornwall's conduct to provoke them to do so; and it is hardly for his sake that they should be visited with penalties greater than the loss which he has suffered.

The conduct of the defendants after the decree of 1886, or at least after their failure to get leave to appeal from it, is less excusable. The illegality of their possession, though disputed before, was then made manifest. It is true that Cornwall has never offered to repay the judgment debt, and that, for aught that appears, the defendants may still be found creditors on an account taken between them, when the profits of the land have been fixed. But that did not justify their retention of the land after a decree for its restoration. To say, however, that for such a piece of disobedience to the law they shall be disentitled to charge their expenses on the land against their receipts from it, and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships. The defendants have been, at least, very imprudent in the first instance, and afterwards more than imprudent, have been wrongheaded and obstinate. For that they will suffer in at least part of the costs of this expensive and harassing litigation, and in all those reasonable presumptions which will be made against them in questions respecting their receipts and expenses which they ought to clear up and do not.

The nature of the advice which their Lordships will humbly tender to Her Majesty has been before indicated. It is that both appeals should be dismissed, so that the decree will stand affirmed. There will be no costs of these appeals.

Solicitor for the appellants: *F. B. Carritt.*
Solicitor for the respondents: *C. O. Green.*