Cameron v Campbell [1911] FJHCWP 1; [1911] 2 FLR 26 (18 August 1911)

[1911] 2 FLR 26

IN HIS BRITANNIC MAJESTY'S HIGH COMMISSIONER'S COURT FOR THE WESTERN PACIFIC.

CAMERON AND OTHERS *v.* CAMPBELL AND OTHERS.

1911, *Aug.* 18.

MAJOR, Chief Judicial Commissioner.

Trespass to goods - illegal seizure and detention - Act of State - ratification of the Crown, communicated to subordinate official, equivalent to prior command, and exempts from all liability the official who committed a trespass (*Buron v. Denman*, 2 Exch. 1848 p. 176) - jurisdiction of Court to entertain question as to whether the Government of Tonga had no power to order the seizure.

Held, seizure of property by officials of the Tongan Government under authority of that Government constitutes an act of State into which the Court has no jurisdiction to inquire.

This is an action in which the plaintiffs allege on the part of the defendants trespass to goods, illegal seizure and detention thereof and of premises, books, and other assets, the property of the plaintiffs, and claim damages as compensation. The facts of the case material to its decision, as gathered from the evidence, appear to me to be as follows:-

In the year 1909, the plaintiff, Alexander Donald Cameron, conceived the plan of forming an association of as many of the natives of Tonga as could be induced to join therein, to co-operate in the sale of their copra for export and in the importation and purchase of goods. On May 11th of that year a meeting of natives was held under Cameron's auspices at Nukualofa, at which, in language of that florid and hyperbolical character which it was, perhaps, necessary to use in order to compel the attention and ensure the co-operation of his audience, he explained the objects of the association, to be called the Toga m'a Toga Kautaha or the Tonga for the Tongans Association. He had drawn up a code containing what have been styled the Laws and Constitution of the Kautaha and laid it before the natives present at the meeting for consideration and adoption, explaining, in a long address, the advantages to be gained by membership of the Association. The Code of Laws and Constitution was adopted after discussion, Cameron was chosen President, Joshua Kaho General Secretary, and some seven other natives Trustees at headquarters. Appointment of Trustees followed in the neighbouring islands of Haapai and Vavau, where, in June and July, 1909, branches of the Kautaha were established, and the Association began operations.

Early in August, 1910 - I have not been supplied with the actual date - at the hearing of an action by Cameron against one Denny, claiming damages for libel on the plaintiff in connection with his management of the Kautaha, a state of things prevailing, or suspected to prevail, in the conduct of the business undertakings of the Association was disclosed by the evidence which induced Mr. Deputy-Commissioner Campbell, by whom the action was tried in this Court, to order certain books and documents of the Association to be detained in the custody of the Court. In June and July, 1910, some correspondence had passed between Mr. Campbell, who is the British Agent in Tonga, and the President and Secretary of the Kautaha with reference to the publication of the first annual report of the Association, and on August 19th Cameron wrote to the Premier of Tonga, Mr. J.T. Mateialona, requesting the Government of Tonga to audit the books of the Association and agreeing to accept the audit of the defendants Roberts and Humphreys. On the 26th August entry was made upon the premises of the Kautaha, and its property, stock-in-trade, goods and effects in Nukualofa were

seized. It is in respect of this seizure and subsequent acts that the plaintiffs' claim is made. The statement of claim alleges that the plaintiff Cameron, being the President, and the other plaintiffs (some forty-eight in number) being the Trustees of the Co-operative Association called the Kautaha, formed in 1909 for the objects I have already mentioned, in August, 1910, consisting of some four thousand members and having at that time a large stock of goods on hand and a business in active operation at its various branches in the Kingdom of Tonga, the defendants, on the 26th day of August, 1910, under a false and unfounded claim, entered the premises of the Kautaha at Nukualofa and other places in Tonga, ejected therefrom persons lawfully in possession and seized and carried away the Association's books, papers, and stock-in-trade, goods and effects, wrongfully depriving the plaintiffs thereof and converting the same to the defendants' use. These acts are charged as done at the instigation and counsel of the defendants, or one or more of them, and in the execution of a common purpose on their part, and the plaintiffs' claim a declaration that the acts of the defendants were and are without legal justification and excuse, the return of the property seized, or £4,500 the value thereof, and £7,000 damages for the trespass, the seizure and detention of goods, books, premises and effects, and estimated loss through the enforced cessation of business. At the conclusion of the plaintiffs' case I dismissed the defendant William Telfer Campbell from the action and ordered judgment to be entered for him with costs on the ground that no evidence had been adduced by the plaintiffs showing that he in any way instigated, ordered, counselled, procured, or participated in the seizure. With the answers, therefore, of the defendants Thomas Victor Roberts and George Brian Humphreys alone am I now concerned.

To the claim of the plaintiffs the defendants put forward several answers, all of them of considerable legal interest, the consideration of the majority of which, if it were necessary, would afford me much entertainment. The main points on the decision of which I think this case depends are contained in paragraphs 18, 19, 20, and 21, of the statement of defence. These paragraphs read as follows:-

[His Honour then read paragraphs 18, 19, 20 and 21 of the statement of claim.]

By these paragraphs it is to be observed the defendants allege-

(1) That, if they committed the alleged trespass, they did so in their respective capacities of Secretary to the Premier of Tonga and Auditor-General of the Kingdom and of Liquidator appointed by the Government of Tonga, in pursuance of authority given to them by that Government in the exercise of an act of state;

(2) That, if they themselves committed the alleged trespass without authority, their act in so doing was afterwards ratified by the Government of Tonga and thereby rendered an act of state; and

(3) That, therefore, this Court has no jurisdiction to inquire further into the matter.

First, as to the person or persons who committed the trespass. The evidence on this point seems to me quite clear, Mr. Scott and Mr. Stringer, the latter being then in the employ of the Association, both say that the Kautaha Association was closed by the, entry of the Tongan Minister of Police with constabulary assistance, and the sealing of the premises with the seals of the Government. Mr. Scott's words are:- "The Kautaha was seized by the Minister of Police, a Tongan Government official." And he adds later:- "The entry into possession of the Kautaha property in Nukualofa would, I suppose, be entry into possession of its properties at all its branches." Mr. Stringer says:- "I remember the Association being closed by the Tongan police coming and putting on the seals of the Government," and states that he (apparently on the next day) at the suggestion of Humphreys, went to the office, of the Premier of Tonga and there obtained the appointment of assistant liquidator. He also said in cross-examination:- "I saw possession taken by the Minister of Police and six constables." There is nothing else in the evidence regarding the seizure in Nukualofa. At Vavau, Mr. Lawton was the local manager of the Kautaha, and he said that on the 31st August, Messrs. Roberts and Humphreys came in with several policemen and the Government Sub-Treasurer, that Humphreys asked to see the books and that Roberts said, in answer to an inquiry by the witness, that it was quite unnecessary for him (Roberts) to have any paper authorising the entry into possession as he was a Minister of the Crown. The witness went on to say that Roberts and Humphreys told him that they had seized the Haapai premises. In cross-examination he stated that all the persons who entered into possession at Vavau, with the exception of Humphreys, were Government officials. Considering the allegations in the statement of claim, one would expect to find less mention of the Minister of Police, the constables, Tongan

Government officials and Government seals, and more direct testimony regarding the parts actually played by the defendants. On this issue therefore I think the evidence clearly shows the entry on the premises of the Kautaha and the seizure of its property to have been by the officials of the government in the first instance. But whether this was so, or whether the defendants, in the exercise of some imaginary powers did so on their own account with the assistance of the Ministers and police of the Government, seems to me, for reasons hereinafter given, to be immaterial.

The defendants justify their actions, first, by alleging the seizure of the property of the Kautaha to have been effected by the direct instructions of the Government of a foreign state, in whose service they are, in the performance by that State of an act of political power called an act of state. The term "act of state" is said by the learned author of *Pollock on Torts*, to signify "An act done or adopted by the prince or rulers of a foreign independent state in their political and Sovereign capacity," and he quotes from the judgment given in the *Secretary of State for India in Council v. Kamachee Boye Sahaba*, a case cited at the bar and to which I shall have occasion later on to refer, the words:-

The transactions of independent states between each other are governed by other laws than those which Municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

The defendants allege and prove the acts done to have been done in their official capacity by the express authority of the Government of a foreign power, I say "prove," because, in addition to the evidence which I have already mentioned given by the plaintiffs' witnesses the defendants called Mr. Mateialona, the Premier of Tonga, whose evidence shows quite clearly that that authority was given. He says:-

On the 26th August last, Mr. Roberts was Auditor-General of Tonga and Assistant Premier. Mr. Humphreys was in the employ of the Government of Tonga as Auditor. The Government of Tonga seized the Kautaha because of roguery being practised towards the Tongan people. It was an act of state by the Government of

Tonga. As Premier I authorised the Minister of Police on the 26th August to enter and take possession of the Kautaha property. The Government has ratified all the acts of Roberts and Humphreys and the responsibility lies on the Government.

In cross-examination the Premier said:- "I wished to close the Kautaha, I instructed the Minister of Police to carry out the seizure." The defendants rely on a further answer. They contend that, even if the act of seizure of the Kautaha property was made by them and made unjustifiably, that act was subsequently ratified and adopted by the Government of Tonga in whose interests they did it, and that, being so ratified, it became the act of the Government and therefore an act of state. Of the subsequent ratification which is alleged there can be no doubt whatever, and that quite apart from, and ignoring, the Premier's evidence. Immediately after the seizure there was published in the Tongan Government Gazette a notice of the appointment by the Government of the defendant Humphreys as Official Liquidator of the affairs of the Kautaha, moneys seized or collected were paid into the Tongan Treasury. Mr. Stringer, an employee of the Kautaha, was appointed by the Tongan Government to assist Mr. Humphreys and took orders on the Treasury for moneys for dividends, and tenders were opened in the Premier's office. The evidence of the Premier merely strengthens that which was abundantly plain before. Now, Mr. Moody has argued that the defendants cannot justify their acts as done by them officially and by the command of the Government which they represented because the Government itself had no power to order the seizure and its officials therefore are not discharged from their liability for their wrong-doing. That might be a good argument in an action by the plaintiffs against the defendant in the Courts of Tonga. It cannot succeed in this Court.

Before passing to the consideration of the authorities, cited at the bar, and although I am, for the most part, averse from reference to text books, I propose to quote a few remarks made by the learned authors of those works to whose pages Mr. Moody has during his argument so frequently resorted.

Mr. Foote, at page 165 of his valuable treatise on *Private International Jurisprudence*:- "Acts of Sovereignty do not create any civil right or liability whatever either in the nature of contract or of tort"; and the learned author refers to the case of *Buron v. Denman* as authority for the latter portion of the proposition. "Thus," he continues:-

acts done by agents of foreign Governments, either with express authority, or with the authority implied by subsequent ratification and adoption, give rise to no contractual relation between the agents of the Government on the one hand and the other person or personality affected by the act on the other.

The authority noted in support of this proposition is *Secretary of State for India in Council v. Kamachee Boye Sahaba*.

On page 485 of the same work, while discussing the question of the proper law applicable to an action based upon a tort committed abroad and of the proper forum in which the law should be applied, the author remarks:-

Deferring for the present the subject of the measure of the wrong done or of the remedy available, the question of jurisdiction seems to be put beyond all reasonable doubt, and it may therefore be assumed that an English Court has a right to entertain actions for personal wrongs wherever and by whomsoever committed; except, of course,

adds Mr. Foote in a note, and the exception is all important,

torts done, authorised, or sanctioned by a foreign power,

and *Buron v. Denman* is again noted as in point.

In Dr. Broom's work on *Legal Maxims*, when treating of the application of the maxim "*Respondeat Superior*," after remarking at page 670 that the maxim does not apply to the Sovereign nor to public servants in their official capacity, but pointing out that a subject sustaining a legal wrong at the hands of the Minister of the Crown is not without a remedy, for-

As the Sovereign cannot authorise wrong to be done the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown (*Feather v. Reginam*, 6 B. & S. 296);

it is added-

Lastly, assuming that an act which would *prima facie* be a trespass is done by lawful order of the Government, the party who commits the act is clearly exempted from liability, and

(and this is the important part)

where the injury is an act of state without remedy except by appeal to the justice of the State which inflicts it or by application of the individual sufferer to the Government of his country to insist upon compensation from the Government of this - in either view the wrong is no longer actionable.

These last words are again quoted from the judgment delivered in *Buron v. Denman*. Here it is seen very clearly the difference between a wrong committed by lawful order of the Crown, which is not an act of state, and a wrong committed not by lawful order but in the exercise of the Sovereign power, which is an act of state and affords no remedy. It is this difference which I venture to think has not been

appreciated by learned counsel for the plaintiffs, or which, if he has appreciated it, he has unsuccessfully endeavoured to abolish.

Of the authorities cited at the bar, *Blad's* case (2 Swanston, 603), *Dobree v. Napier* (2 Bingham, N.C. 781), *Phillips v. Eyre* (L.R. 6, Q.B. 1), *Carr v. Fracis Times Company* (L.R., (1902), App. Cases, 176) and *Regina v. Leslie* (Bell C.C. 220), support the well-known proposition that in order to found an action in an English Court for a wrong committed abroad, firstly, the wrong must be of such a character that it would have been actionable if committed in England, and secondly, the act must not have been justifiable by the law of the place where it was committed, and these would have been of value to this Court had it been necessary to decide whether the Law of Tonga, Ordinance No. 4 of 1911, declaring the existence of the Kautaha to be illegal and, according to the defendant's contention, justifying the seizure of its property, was or was not a valid law. I do not agree with Mr. Berkeley's contention that I could not inquire into this question, for, in *Carr v. Fracis Times Company*, Lord Lindley, in delivering his judgment, expressly said:-

No evidence was given to show that the document (this was a declaration or certificate of a Court of Muscat finding that the seizure of property in that case was in every respect legal) did not fully represent the law of Muscat applicable to this case,

showing that evidence whether what was alleged to be the law of Muscat was or was not so could be given. In this connection it seems to me worth while to make two observations: first, that I do not regard what has been called the decision of Mr. Chief Justice Skeen on the application of some members of the Kautaha for relief against the seizure of its property by the Government as evidence that the seizure, by whomever it was made, was lawful; still less as a declaration or exposition of the law of Tonga on the question. I do not think for a moment that the learned judge regarded or would now claim it as being either; second, that I am rather inclined to agree with Mr. Moody's contention that Ordinance No. 4 of 1911 was and is null and void, as being contrary to the Constitution of Tonga and not enacted as an amendment to that Constitution in valid manner.

In *Blad's* case the law of Denmark, in *Dobree's* case the law of Portugal, in *Phillips v. Eyre* the law of Jamaica, in *Lesley's* case the law of Chili [sic], and in *Carr's* case the law of Muscat, was proved to justify the wrong done and the question whether the wrong done was an act of state, without other excuse, or any indemnity for its infliction was not in issue as it is here.

The authorities remaining for consideration are those cited in the remarks I have quoted from the words of Dr. Broom and Mr. Foote, viz., *Buron v. Denman* (2 Exch. 176) and *Secretary of State for India, in Council v. Kamachee Boye Sahaba* (31 Moo P.C. 22).

In *Buron v. Denman*, Captain Denman, a British naval commander, in 1847, without lawful excuse at the time, burned certain barracoons of a slave trader on the West Coast of Africa and seized and released the slaves in them. This act of Captain Demnan, being afterwards approved and ratified by the Secretary of State for the Colonies, was held to have been converted into an act of state for which no action would lie. In summing up the case Parke, B, having dealt with the issue regarding the plaintiffs' property in the slaves, said:-

The principal question is, whether the conduct of the defendant, in carrying away the slaves and committing other alleged trespass can be justified as an act of state, done by authority of the Crown. It is not contended that there was any previous authority. If the defendant merely had instructions according to the terms of the Treaty set out in the Act of Parliament, these instructions would only have extended to the stopping of ships on the high seas, within the limits agreed by the Treaty with the Spanish Crown. Therefore, the justification of the defendant depends upon the subsequent ratification of his acts. A well known maxim of law between private individuals is *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*.

The learned Judge explained the application of the maxim as between subject and subject and proceeded:-

Such being the law between private individuals the question is, whether the act of the Sovereign, ratifying the act of one of his officers, can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent, but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged; it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who committed the trespass.

Baron Parke then makes use of the words I have quoted in the extract from Dr. Broom and added:-

Therefore, you have to take it as a direction of Court, that if the Crown, with knowledge of what has been done, ratified the defendants' act by the Secretaries of State, or the Lords of the Admiralty, this action cannot be maintained . . . . . We are clearly of an opinion that as the original act would have been an act of the Crown if communicated by a written or parol direction from the Board of the Admiralty, so this ratification, communicated in the way it has been, is equally good.

The case of *Secretary of State for India in Council v. Kamachee Boye Sahaba* is also in direct point. There a Mr. Forbes, an officer of the East India Company, had, in excess of his authority from the Government of Madras, seized the Raj of Tanjore and forcibly possessed himself of the property of the Rajah. This act, having been ratified arid adopted by the Government was held to have been done with previous authority.

A great deal of the argument in this case was directed to the issue whether the East India Company, the personality which, from motives of state, thought fit to make the seizure, was empowered to act as a Sovereign State. There is no question of the Sovereignty of the Tongan State. I find a Treaty, concluded in February, 1901, between Her late Majesty Queen Victoria and His Majesty the King of Tonga, containing, in its exordium, these words:- "Their Majesties being desirous of strengthening the relations of amity between their respective States," &c. When considering the allegation that there was some colour of title in the British Crown to make the seizure through its agents the East India Company, Lord Kingsdown, who delivered the judgment of the Judicial Committee of the Privy Council advising Her Majesty, said:-

It is extremely difficult to discover in these papers any ground of legal right on the part of the East India Company of the Crown of Great Britain to the possession of this Raj or of any part of the property of the Rajah on his death, and, indeed, the seizure was denounced by the Attorney-General as a most violent and unjustifiable measure.

I have quoted these words because the defendants have pleaded that the Kautaha was designed, formed, and controlled by the plaintiff Cameron for his own personal aggrandisement at the expense and from the contributions of a large section of the native community of Tonga. In the endeavour to support this plea they have proved out of the mouths of the plaintiffs' own witnesses, the existence of a state of things in connection with the books, the management and control, the financial transactions, and the manipulation of the funds, of the Kautaha by the plaintiff Cameron and his accountant Jervis which, they contend, loudly called for interference by the Government in its political capacity to protect a large proportion of the subjects of the King from what has been described as exploitation and spoliation.

I have also quoted these words because Mr. Moody has, more than once, thought fit to deprecate, almost passionately, what, he says, amounts to the re-trial of the plaintiff Cameron upon a criminal charge in respect of which he has been already acquitted. This language is loose and inaccurate. If it means what its terms imply, it

is improper. At best, it might be used to enlist the sympathies of a susceptible jury. It can have no attention from me. Mr. Crompton, who conducted the cross-examination on this issue would, with this plea on record, a plea to which no proper objection was urged or sustained, have been wanting in his duty to his clients had he not pursued his cross-examination of Messrs. Stringer, Lawton and Millar on a state of things alleged to exist upon investigation into the affairs of the Kautaha leading to the action of the Government of Tonga.

Further on in the judgment of Lord Kingsdown, he says:-

It is clear from Mr. Forbes' report to the Madras Government that, though no resistance was offered by the family of the Rajah or the inhabitants of the fort to the seizure of the Raj and of the palace and property of the Rajah, it was regarded on both sides as a mere act of power not resisted because resistance would have been in vain . . . What may be the consequence of any seizure in excess of authority we will consider under another head, but that the seizure was an exercise of the Sovereign power, effected at the arbitrary discretion of the Company by the aid of military force, can hardly admit of doubt.

The learned Judge then dealt with the contention that there was .a distinction between the public and private property of the Rajah and that the defendants could not justify the seizure of the latter class, and proceeded:-

Assuming this (the distinction), if the Company, in the exercise of their Sovereign power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at Madras? If the Court cannot inquire into the act at all because it is an act of state, how can it inquire into any part of it or afford relief on the ground that the Sovereign power has been exercised to an extent which municipal law will not sanction? With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole . . . . if (continues the judgment) there had been any doubt upon the original intention of the Government (to seize the whole property of the Rajah) it has clearly ratified and adopted the acts of its agent which, according to the principle of the decision in *Buron v.*

Denman, is equivalent to a previous authority. The result (concludes the judgment) in their Lordship's opinion is, that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company, and that the act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction.

From the above remarks it is obvious that consideration by me of the various other contentions of the defendants which, being established, they claim as answers to this suit - for instance, the alleged unlawful connection of the plaintiff Cameron with the Kautaha and his consequent inability to maintain his claim, the same inability on the part of the plaintiffs generally arising out of their alleged status under the so-called Constitution of the Kautaha, and the illegality of the Kautaha itself, is unnecessary.

I am, it seems to me, concluded by the cases to which I have referred, and I find:-

That, the seizure of the property of the Kautaha on the 26th August, 1910, if made by the Government of Tonga, was as contended by the defendants, an act of state by that Government, into which this Court cannot inquire;

That, if the seizure was made by the defendants, it was made by them under the authority of the Government of Tonga in the exercise of that act of state into which this Court cannot inquire;

That, if the seizure was made by the defendants without that authority, their act was subsequently ratified and adopted by the Government of Tonga and was thereby converted into an act of state into which this Court cannot inquire.

In so finding and deciding the case I adopt in their entirety the concluding words of Lord Kingsdown, in signifying the opinion of the Judicial Committee of the Privy Council for the Sovereign's guidance, in *Secretary of State for India in Council v. Kamachee Boye Sahaba*:-

Of the propriety or justice of that act this Court has not the means of forming, or the right of expressing if it had formed, an opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which I cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.

Let judgment be entered for defendants Thomas Victor Roberts and George Brian Humphrey, with costs.

Upon the application of Mr. Berkeley His Honour certified for two counsel.

Mr. Moody informed the Court that he was instructed to apply for a review of the decision of the Court in respect to all the defendants and asked if he could be afforded an opportunity of considering His Honour's judgment.

His Honour intimated that a copy of his judgment would be available for the learned counsel's use as soon as the same could be printed, and directed any application for review to be made to the Supreme Court of Fiji.

The Court was closed by proclamation.