

[HIGH COURT OF AUSTRALIA.]

ALICE S. H. STRACHAN PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANTS.

Action against Commonwealth—Liability for tortious acts of officials of British New Guinea—Territory placed under administrative control of Governor-General—Crown colony—Acceptance of territory by Commonwealth—The Constitution (63 & 64 Vict.), sec. 122—Order in Council of March 1902.

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SYDNEY,

July, 30, 31 ;

Aug. 14.

Griffith C.J.
and
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Prior to 6th March 1902, British New Guinea was a Crown Colony under an administrator, who was subject to the control of the Governor of Queensland, acting with the advice of his ministers, in the same way as ordinary Crown Colonies are to that of the Secretary of State. By Order in Council of 6th March 1902 and Letters Patent of the 18th of the same month, the Possession was placed under the authority of the Commonwealth, and the Governor-General was authorized, as soon as the Parliament should make laws for the government of the Possession, to issue a proclamation declaring that that had been done, and from that date the Letters Patent dealing with the administration of the Possession and the instructions issued thereunder should be revoked, and until the appointed day the Governor-General was invested with the powers and duties formerly entrusted to the Governor of Queensland.

The plaintiff brought an action in the High Court against the Commonwealth to recover damages in respect of alleged wrongful acts of officers of the Possession, committed at a date prior to any legislation by the Commonwealth on the subject of New Guinea.

Held, that until such legislation took place, and the proclamation consequent thereon was made, no such relationship of master and servant existed between the Commonwealth Government and the officials of the possession as would render the Commonwealth liable in an action of tort for wrongful acts of such officers.

Tobin v. The Queen, 16 C.B.N.S., 310, applied.

CASE referred for consideration of the Full Court.

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This was an action brought by the plaintiff, who was the owner of a British ship called the "Envy," against the Commonwealth, seeking to make the defendants liable for certain wrongful acts alleged to have been committed by officers of the Possession of British New Guinea within the territory of that possession.

The statement of claim—after referring to the Royal Letters Patent of 8th June 1888 erecting British New Guinea into a separate British Possession and providing for the government of the country, Order in Council of 8th February 1896 defining the boundaries of the Possession, and Order in Council of 18th March 1902 placing the Possession under the authority of the Commonwealth and revoking the Letters Patent of 8th June 1888 as from the date when the Governor-General of the Commonwealth should proclaim that the Commonwealth had made laws for British New Guinea and making other provisions—went on to allege that the Governor-General had not made such proclamation at the time this action was begun, and then set out the circumstances under which the claim arose, which were shortly as follows:—At the time when the alleged wrongs were committed the positions of Resident Magistrate and sub-collector of Customs at Daru in British New Guinea were filled by persons named Jear and Fitzgerald respectively, who it was alleged were confirmed in their offices by the Commonwealth after 18th March 1902. The plaintiff's schooner "Envy" was on 2nd May 1905 on a trading cruise among the islands near New Guinea, and being in distress and leaking fast put in at the mouth of the Katau River near Daru and anchored beyond the three mile limit. The master, the husband of the plaintiff, went in a ship's boat to the shore and asked permission to beach the schooner, but the natives, acting under the alleged instructions of the Commonwealth officers, refused to allow him to land, and directed him to proceed to Daru, which was about 16 miles away. He therefore went to Daru and informed Jear and Fitzgerald of the condition of the schooner. Fitzgerald demanded to see the ship's papers, which were handed to him accordingly, and by his orders the schooner was searched and the papers detained without any lawful excuse, and the schooner prevented from putting into Katau. The plaintiff alleged that by reason of these acts she was injured in her busi-

ness of trading with the schooner, and put to great expense in sailing away elsewhere to have the schooner repaired, and injured in her credit and reputation. It was also alleged that afterwards the servants of the Commonwealth wrongfully detained the schooner at Samarai, and refused to allow her to be cleared at the Customs because of the absence of the ship's papers, which were detained by the defendants' servants. There was also a claim for remuneration for carrying the Royal mails and for loss of time in connection therewith. The plaintiff claimed £7,900.

The statement of defence denied that Jear and Fitzgerald were appointed or acting under the authority of the Commonwealth as alleged, and either denied, or did not admit, all the material allegations of fact in the statement of claim, and, as to the claim for carrying the mails, said that British New Guinea was not at that time a State or part of the Commonwealth, and therefore the Commonwealth was not liable to pay any remuneration to the plaintiff in respect of it. It was also alleged that anything done by Jear or Fitzgerald with reference to the schooner was done in the execution of their duty and in pursuance of powers vested in them by the Laws and Ordinances of British New Guinea and the *Merchant Shipping Act* 1894.

Issue having been joined, a summons was taken out by the defendants for directions for the trial of the preliminary issue whether Jear and Fitzgerald and other persons, who did the alleged acts in respect of which the action was brought, were at the times in question servants of the Commonwealth so as to make the Commonwealth liable for their acts, and *Griffith C.J.*, before whom the matter came, ordered that that issue be determined before the trial of any issues of fact, and referred the question to the Full Court.

The material portions of the Letters Patent, Orders in Council, and other documents referred to are sufficiently stated in the judgments.

L. Armstrong, for the plaintiff. The Commonwealth are responsible for the wrongful acts of the officers of British New Guinea by virtue of the acceptance by the Commonwealth Parliament of the territory of the possession from His Majesty. By

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Order in Council of 6th March 1902 it was provided that, on a proclamation by the Governor-General of the Commonwealth that the Parliament had made laws for the hearing of appeals from the Courts of British New Guinea, the Orders in Council of 17th May 1888 and 24th November 1891, which provided for such appeals, should be revoked. The Letters Patent of 18th March 1902 placed the Possession under the authority of the Commonwealth, and provided that the Governor-General should, so soon as Parliament had made laws for the Government of the Possession, issue a proclamation to that effect, and thereupon the Letters Patent of 8th June 1888 and instructions issued under it to the Administrator should be revoked, and in the meantime the Governor-General should exercise the powers in regard to the Possession that were formerly vested in the Governor of Queensland. Previously, in November 1901, the Commonwealth Parliament had passed resolutions through both houses signifying their willingness to accept the Possession as territory of the Commonwealth. Therefore when the Letters Patent of 18th March were issued the Possession became part of the Commonwealth. The *Papua Act* 1905 has ratified that acceptance. The officers of British New Guinea were therefore officers of the Commonwealth when the wrongful acts were committed. For their torts the Commonwealth may be sued (sec. 56 of the *Judiciary Act* 1903), unless as a matter of fact the officers were not acting as servants of the Commonwealth. The question of law now to be decided is whether there was such a binding offer and acceptance as to make the administrative officers of the Possession servants of the Commonwealth. The questions as to the particular terms of the employment, and the official nature of the acts complained of will arise on the trial. Until then the case cannot be brought within the principle laid down in *Enever v. The King* (1), and *Tobin v. The Queen* (2). [He referred also to *Delacauw v. Fosbery* (3).] These officers were under the control of the Commonwealth. As a matter of fact Strachan received the ship's papers back from the Commonwealth. Instead of being servants of the King as they were under the old administration they became servants of the

(1) 3 C.L.R., 969.

(2) 16 C.B.N.S., 310.

(3) 13 N.S.W. W.N., 49.

Commonwealth. Otherwise they were responsible to nobody in the world. It must be presumed that the Royal gift of territory was accepted, in the absence of a definite refusal: *Mallott v. Wilson* (1); *The King v. Hughes* (2). [He referred also to *Fourteen Diamond Rings v. United States* (3); *De Lima v. Bidwell* (4).]

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Shand K.C. and *Bavin*, for the defendants. The resolutions of the Commonwealth Parliament of November 1901 merely stated that the Commonwealth were prepared to join in measures for the acceptance of the territory, but no such measures were taken until the *Papua Act* 1905, which was subsequent to the alleged wrongful acts. After the Letters Patent and Order in Council of March 1902 the Possession remained under the Imperial control until the proclamation should be issued. In April 1902 the commission of the Lieutenant-Governor, dated August 1898, was revoked by His Majesty, and in April 1904 an Administrator was appointed by the same authority, showing that the Imperial Government still retained control of the administration. Even if acceptance of the territory must be presumed, that is not sufficient to establish the liability of the Commonwealth in this case. There must also be a controlling power in the Commonwealth. There was no acceptance in fact until the *Papua Act* 1905. Even if there was in one sense an acceptance, there was not such an acceptance as to justify the inference that the Commonwealth took over responsibility for the acts of the officers of the Possession. The control was originally in the Administrator, with superintendence by the Governor of Queensland, and after the change the Governor-General was substituted for the Governor of Queensland. The Governor-General therefore was the *persona designata* in whom the control formerly exercised by the Governor of Queensland became vested, but in this capacity he was not representing the Commonwealth; the latter is therefore not responsible for the acts of officers who are really officers of His Majesty under the control of the Governor-General. [They referred to *Enever v. The King* (5).] The acceptance contem-

(1) (1903) 2 Ch., 494.

(2) 7 B. & C., 708.

(3) 183 U.S., 176.

(4) 182 U.S., 1.

(5) 3 C.L.R., 969.

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plated in sec. 122 of the Constitution is either a legislative act, or a formal executive act; and at the date of the alleged grievances there had been neither. Even if there had been such an acceptance the Commonwealth would not have been liable under the circumstances. The officers were exercising an official discretion, with which the authority which appointed them could not interfere. The officers alone were liable.

L. Armstrong, in reply, referred to Commission of Inquiry of 26th July 1904 issued by the Executive of the Commonwealth. That was an executive act showing that the Commonwealth had actually taken over the control of the officials of the Possession.

Cur. adv. vult.

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GRIFFITH C.J. This is an action brought by the plaintiff, who is the owner of a British ship called the "Envy," against the Commonwealth, seeking to make the defendants responsible for certain wrongful acts alleged to have been committed by officers of the Possession of British New Guinea within the territory of that Possession. These acts relate to the seizure of the ship and to wrongful dealings with the ship's papers, which have resulted in a loss to the plaintiff.

On a summons for directions it was ordered that the question whether the persons who did the alleged acts were at the time in question servants of the defendants in a way that would make the defendants liable should be referred to the Full Court. The alleged wrongful acts were committed in March 1905. Now the principle upon which the Government is responsible for the acts of its servants is the same as that which arises from the relations which exist between a master and his servant, and is stated by *Erle C.J.* in the well-known case of *Tobin v. The Queen* (1), in which, after referring to some arguments used to show that the Queen should be held responsible, he says (2):—"But the argument for the suppliant fails, because in our judgment there is no analogy between the relation of the captain of a Queen's ship to the Queen, and the relation

(1) 16 C.B.N.S., 310.

(2) 16 C.B.N.S., 310, at p. 350.

of servant to master or bailiff to sheriff, so as to create the liability here in question. The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it. The act of the servant is then held to be the act of the master; and the servant acting in the course of his employment, is a general agent in that employment, and makes his principal liable for all that he does within the scope of his authority as such general agent; and, further, in respect of all his acts within the scope of that authority, they are the acts of the principal notwithstanding any private arrangement to the contrary between the principal and such agent."

The territory of British New Guinea was constituted by Letters Patent, dated 8th June 1888, into a separate Possession and government under the name of British New Guinea, the administration of which was entrusted to an officer called the Administrator, who was to act in accordance with instructions given him under the Sign Manual and Signet, or by Order in Council, or through one of the principal Secretaries of State. Provision was also made for the appointment of an Executive Council to advise and assist the Administrator, and also for a Legislative Council, which was empowered to make laws, establish Courts, and provide for the administration of justice generally, subject to any conditions and limitations prescribed from time to time by Order in Council, &c. The right of disallowing any law and of signifying such disallowance through one of the principal Secretaries of State was expressly reserved. The Administrator was also empowered to make grants of land and to appoint Judges and other officers.

The result of these letters patent was that British New Guinea became a Crown Colony which, however, differed from other Crown Colonies in respect of certain matters to which I will presently refer. By instructions of the same date the Administrator was directed to correspond with the Governor of Queensland on all subjects connected with his office, to transmit to him all official reports touching the same, and to apply to him for such instructions as he might require for guidance in the discharge of the duties of his office. The result was that the Governor of Queens-

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land became the *persona designata* to exercise a control analogous to that exercised by the Secretary of State in the government of Crown Colonies properly so called. I should mention that under contemporaneous arrangement (recorded in the Statutes of Queensland) the Governor was instructed to consult his Ministers with respect to directions given to the Administrator. The net result was that British New Guinea became a Crown Colony, subject to such control by the Governor of Queensland as *persona designata* as Crown Colonies were subject to by the Secretary of State. It was not suggested that under such circumstances officers of British New Guinea or of the King would be officers of the Government of Queensland, or that the relation of master and servant existed between the Governor of Queensland and the Administrator of British New Guinea. Matters stood thus until 5th March 1902, when another Order in Council was made, and on 18th March further Letters Patent were issued reciting that the Senate and the House of Representatives had passed resolutions authorizing the acceptance of British New Guinea as territory of the Commonwealth. In the *Papua Act* 1905 these resolutions are more fully stated. The Letters Patent then went on to recite as follows:—“ We do hereby place our Possession of British New Guinea under the authority of the Commonwealth of Australia. The Governor-General of our Commonwealth of Australia shall, so soon as the Parliament of the Commonwealth has made laws for the government of our Possession of British New Guinea, issue a proclamation signifying and declaring that the Parliament of the Commonwealth of Australia has made laws for the government of that Possession, and from and after the date of such proclamation (hereinafter referred to as the appointed day) the aforesaid Letters Patent of 8th June 1888 and any instructions which may from time to time have been given to any officer administering the government of British New Guinea, either under the Royal Sign Manual and Signet of Her late Majesty Queen Victoria or by the order of Her late Majesty Queen Victoria in her Privy Council or by her through one of her principal Secretaries of State with respect to the execution of any things that belong to the said office of Administrator of British New Guinea shall cease to have effect and shall

be revoked without prejudice to anything lawfully done thereunder. The powers and authorities conferred by the said Letters Patent of 8th June 1888 and any instructions as aforesaid shall, until the appointed day, be read and construed as though any powers, authorities and duties thereby conferred or imposed upon the Governor of Queensland were conferred and imposed upon the Governor-General of our Commonwealth of Australia, and the said Letters Patent and instructions shall be construed and take effect with the substitution of the Governor-General of our Commonwealth of Australia for the Governor of Queensland." The proclamation referred to has not yet been issued, and the Letters Patent of 8th June 1888 remain in full force, with the substitution, in the instructions, of the Governor-General of the Commonwealth for the Governor of Queensland.

That, then, is the constitution of British New Guinea, and its relations to the Commonwealth are the same as those which it formerly bore to the Colony of Queensland. The relation is to the Governor-General, and not to the Commonwealth, strictly speaking. And the Governor-General consults his Ministers before giving any directions. Under these circumstances it is quite impossible to say that the officers of the Government of British New Guinea are in any way officers of the Commonwealth, or that the relation of master and servant exists between them. It was suggested by counsel for the plaintiff that the words in the Letters Patent of 18th March 1902, "We do hereby place our Possession of British New Guinea under the authority of the Commonwealth of Australia," do bring about such a relation. But these words can only be construed as enabling the Parliament of the Commonwealth to make laws for the government of that Possession. Up to the present, however, they have not done so. It has never been suggested that the relation of master and servant or principal and agent existed between the officers of the Government of a Crown Colony and the Sovereign in his capacity of Sovereign of the Empire, except perhaps in one case where a petition of right was brought in England against the Sovereign in respect of something done by officers of the Government of Upper Canada, and it was held that the petition did not lie:

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Holmes v. The Queen (1). I think it is quite clear that a petition of right would not lie against the Sovereign in respect of an act done by a servant of a Crown Colony. Nor could the Governor-General of the Commonwealth be sued in the present form of action for an act done by officers of the Government of a British Possession, notwithstanding that the Possession is governed under the authority of a constitution made by the Parliament of the Commonwealth. In my opinion, this case is hopeless from every point of view. The defendants are not in any way responsible, in the sense in which that word is used in Courts of law, for the acts of the Government of British New Guinea. It is like the case of a dispute between nation and nation. If the subjects of one nation wrong the subjects of another, the matter is purely one for adjustment by diplomacy. Therefore the question submitted to us must be answered adversely to the plaintiff, and the action must be dismissed with costs.

O'CONNOR J. It is sought to make the Commonwealth liable for certain acts of two officials of the Government of British New Guinea, committed in 1905. Mr. Armstrong has properly admitted that the liability of the Commonwealth for the acts of these officials rests upon the obligations, if any, which are imposed upon the Commonwealth by Letters Patent of 18th March 1902. The liability of the Commonwealth in such a case must be determined by the application of precisely the same principles as are applied in determining the liability of a master for the acts of his servant in any of the ordinary relations of life. These principles are laid down clearly in the case of *Tobin v. The Queen* (2), which has been cited by the Chief Justice, and it is only by the application of them that we can determine whether or not the Commonwealth is liable for the acts of these officials.

The effect of the Letters Patent of 18th March 1902 may be stated in a very few words. After some recitals, to which it is not necessary to refer, the first clause reads:—"We do hereby place our Possession of British New Guinea under the authority of the Commonwealth of Australia." That in itself creates no relation between the officials of the Government of British New

(1) 31 L.J. Ch., 58.

(2) 16 C.B.N.S., 310, at p. 350.

Guinea and the Commonwealth. It is, apparently, a step taken by the British Government as preparatory to action by the Commonwealth under sec. 122 of the Constitution, which empowers the Parliament of the Commonwealth to make laws for the government of any territory placed by the Queen under the authority of, and accepted by, the Commonwealth. These Letters Patent thus placed the Possession of British New Guinea under the authority of the Commonwealth of Australia. But before the power arises to make laws for the territory, it must be accepted by the Commonwealth. The acceptance, of course, must follow the terms of the offer, and consequently it becomes necessary to see the terms on which the Possession of British New Guinea is placed under the authority of the Commonwealth. The second paragraph of the Letters Patent directs that the Governor-General of the Commonwealth shall, as soon as Parliament has made laws for the government of British New Guinea, issue a proclamation signifying and declaring that the Parliament of the Commonwealth has made laws for the government of that Possession, it being assumed that the laws made by the Parliament will be substituted for the laws of the Crown Colony constituted by Letters Patent of 8th June 1888. The third paragraph provides that the powers and authorities conferred by the Letters Patent of 8th June 1888, and any instructions thereunder, shall be read as if the powers therein conferred upon the Governor of Queensland were conferred upon the Governor-General. In other words, it substitutes the Governor-General of the Commonwealth for the Governor of Queensland in the Letters Patent and instructions. The fourth paragraph states that, whereas it is expedient that the provisions relating to this substitution should come into operation without delay, it is ordained and declared that these Letters Patent shall come into force forthwith.

The whole meaning of this document is that the Possession of British New Guinea is placed under the authority of the Commonwealth, but is nevertheless to maintain its own Constitution as created by the Letters Patent of 8th June 1888 until the Parliament makes laws conferring a Constitution upon it; and in the meantime the Governor-General is to be the *persona designata* on behalf of the British Government to correspond with and

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instruct the Administrator of British New Guinea. But the only power given to the Governor-General is that previously given to the Governor of Queensland. It becomes necessary, therefore, to refer to the position of the latter in the Constitution of British New Guinea under the Letters Patent of 8th June 1888. These Letters Patent embody no reference to any power or authority conferred upon the Governor of Queensland. They simply constitute British New Guinea a Crown Colony of the ordinary type presided over by a Governor or Administrator. An Administrator is appointed, and provision is also made for the appointment of a Governor or Lieutenant-Governor at any time the Crown may think proper. The Administrator is to act under instructions given him under the Sign Manual and Signet, or Order in Council, or by one of the principal Secretaries of State. The Letters Patent further provide for an Executive Council to advise the Administrator and for a Legislative Council. Within the terms of the Letters Patent the Colony is self-contained and has sufficient powers for its own needs, with the proviso that it has to communicate with the Secretary of State. Accompanying that Constitution, however, are the instructions to the Administrator, which provide for a reference to the Governor of Queensland; and the whole of the latter's authority under the instructions is defined by the second paragraph in the following terms:—"The Administrator shall correspond with the Governor on all subjects connected with his office, and shall transmit to him all official reports and information touching the same, and shall apply to the Governor for all such instructions as he may require for his guidance in the discharge of his office." The ninth paragraph further provides that minutes shall be regularly kept of all the proceedings of the Executive Council, and that a copy of such minutes shall be forwarded half yearly to the Governor for transmission to the Secretary of State.

The only object, apparently, for such a departure from the usual Constitution of a Crown Colony is that Australia, particularly that portion of it adjoining British New Guinea, is so vitally interested in the development of this Possession that, for the purpose of advising and instructing the Administrator on behalf of the British Government, it was felt to be desirable that

there should always be at hand some person having that knowledge of local conditions, which it would be impossible for the Government in Downing Street to have always available. Save to the extent thus provided for, the Governor of Queensland has no authority over the Administrator or over the acts of officials of British New Guinea.

The Letters Patent of 18th March 1902 substitute the Governor-General for the Governor of Queensland in respect of the authority exercised by the latter; and there is no connection whatsoever between the Governor-General of the Commonwealth and the officials of this Crown Colony other than that defined by the paragraph referred to—that is to say, a directing or supervising authority, or an authority which makes the Governor-General the medium of communication between the Government of New Guinea and the Secretary of State for the British Government. But it is impossible from a relation of that kind to infer anything approaching that relation of a master and servant on which alone can rest any liability of the Commonwealth for the acts of these officials. I therefore agree with the Chief Justice that in this case it is clear that from the documents before us no liability on the part of the Commonwealth for the acts of these officials can be inferred. The two documents referred to by Mr. Shand bear out very strongly the position for which he contends. It appears that there are two commissions relating to the office of Administrator which show that, even after the proclamation, the British Government were treating officials of British New Guinea as being still under their control. By a commission dated 12th August 1898, Sir G. Le Hunte had been appointed Lieutenant-Governor in accordance with the Constitution created by the Letters Patent of 8th June 1888. Then by a revocation under the Royal Sign Manual and Signet, dated 9th April 1902, which recites the commission appointing Sir G. Le Hunte and the Letters Patent of 18th March 1902, it is provided that from and after the date of the issue by the Governor-General of a proclamation signifying and declaring that the Parliament had made laws for the government of British New Guinea, the commission of 12th August 1898 should be revoked and determined. The revocation is not to take effect immediately, but only

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Action dismissed with costs.

Solicitor, for plaintiff, *A. J. McDonald.*

Solicitors, for defendants, *Macnamara & Smith* for *Crown Solicitor of Commonwealth.*

C. A. W.