Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Australian Insurance Company v. *Jackson, from the Supreme Court of New South Wales; delivered 29th June* 1875.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR HENRY S. KEATING.

THIS is an appeal from a judgment of the Supreme Court of New South Wales discharging a rule nisi for a new trial. The action in which the rule was obtained was brought by the Respondent, William Townley Jackson, as one of the co-owners of the ship "Chrishna," of which Walton was master, upon several policies of insurance upon that vessel for several amounts, the total being 3,750*l*. The loss was occasioned by the condemnation and sale of the vessel under the provisions of the 35th & 36th Victoria cap. 19, entitled "An Act for the Prevention "and Punishment of Criminal Outrages upon "Natives of the Islands in the Pacific Ocean." That Act received the royal assent on the 27th June 1872. By section 21 it was enacted that the Act should be proclaimed in the several Australian colonies by the respective governors thereof within six weeks after a copy thereof should have been received by such governors respectively; and should take effect in the several colonies from the day of such proclamation.

The 9th section of the Act enacts: "If any "British subject commits any of the following

" offences "—namely, decoys a native of any of the aforesaid islands, and so on, defining the offences,—" he shall, for each offence, be guilty " of felony, and shall be liable to be tried and " punished for such felony in any Supreme Court " of Justice in any of the Australian colonies, " and shall, upon conviction, be liable, at the " discretion of the Court, to the highest " punishment other than capital punishment." The 16th section enacts that " Any British " vessel which shall upon reasonable grounds " be suspected (1) of being employed in " the commission of any of the offences " enumerated in the 9th section of this Act, " or (2) of having been fitted out for such " employment, or (3) of having, during the " voyage on which such vessel is met, been " employed in the commission of any such " offence, may be detained, seized, and brought " in for adjudication, upon the charge of being " so employed or fitted out as aforesaid, before " any Vice-Admiralty Court in any of Her " Majesty's dominions by any of the following " officers," and then it describes the officers who are entitled to bring her in for condemnation. Section 18 says :—" The Vice-Admiralty " Court before which any vessel is so brought " for adjudication shall have full power and " authority to take cognizance of and try the " charge upon which such vessel is brought in, " and may, on proof thereof, condemn the vessel " and cargo, or either, as the case may be, as " forfeited to Her Majesty, or may order such " vessel and cargo, or either of them, to be " restored, with or without costs and damages " as to the Court shall seem fit."

By section 6 it is enacted that " All the " provisions with reference to the detention, " seizure, bringing in for adjudication before " any Vice-Admiralty Court, trial, condemnation,

" or restoration of vessels suspected of being " employed in the commission of any of the " offences enumerated in the 9th section of the " Act shall *mutatis mutandis* apply to any " British vessels which shall be found carrying " such native labourers without a license, or " in contravention of the terms of any license " which may have been granted to the master " thereof;" and by the seventh section a penalty is imposed on the master for carrying such natives.

One of the risks insured against by the policies of insurance was barratry by the master or crew of the vessel.

It appears that the master in the month of January 1873, took on board 30 Polynesian labourers, and that the ship was seized by one of Her Majesty's vessels, and carried into Brisbane, in Queensland, for the purpose of being condemned for a breach of the sixth section of the Act of Parliament on account of the master's carrying Polynesian labourers on board. The ship was condemned, and was afterwards sold by order of the Vice Admiralty Court at Brisbane for that offence.

It was contended that the case was not one of barratry unless the master knew that the Act of Parliament had been passed, and also that the Act had rendered it illegal to carry Polynesian labourers on board his ship.

It was proved that the vessel left Sydney on her voyage before the Act had received the royal assent or had been proclaimed in Queensland; but evidence was given to show that the master was aware of the Act, and that he knew, from information which he had received, that the Act rendered it illegal for him to carry Polynesian labourers on board. William Hoare, who was the first mate of the "Chrishna," said that they left suddenly on the 5th of April 1872,

that was before the Act was passed. Then he says "there were 30 Polynesian natives taken "on board this vessel. Captain Walton I "understood was to get 3*l.* a head for carrying "them to Sydney. He told me so. There was "a vessel called the 'Royal Duke,' which I "saw in Shelburn Bay, in Torres Straits; that "was about 2½ months to 3 months before "the seizure of the 'Crishna.' We were "lying in Shelburn Bay, about 90 miles "to southward of Cape York. I remember "the captain of the 'Royal Duke' telling Walton "and myself that there was a kidnapping Act out "which prohibited vessels carrying Polynesian "labourers unless they were part of the ship's "crew; that the vessels were liable to seizure; "and Walton made the remark that he was all "right as he had all his men in the articles. "That was before we had Delargy's natives on "board." Then he goes on later: "I remember in "January 1873 meeting a cutter called the "'Enchantress' at Cocoa-nut Island. She was 25 "tons. John McCaint was the captain's name. I "remember his telling Walton that the Act was "out which prohibited vessels carrying these "natives, and that all these vessels had left the "straits for licenses. McCaint and I advised "Walton to go to Cape York and see the Act "himself. Walton went with McCaint to Cape "York, where Mr. Jardine the police magistrate "had the Act. We were then 58 miles from "Cape York. The two captains in the cutter "'Enchantress,' and a boat with some natives "in it followed to bring Walton back. I am "sure Walton went on no other business than to "see the Act." Then he says, "Walton re-"turned in three or four days. A day or "two after Walton returned, Delargy's natives" —those were the 30 Polynesian natives—"came "on board. We started for Sydney on the 11th

" January 1873." Then it appears that the ship was seized by one of Her Majesty's vessels, and carried into Brisbane for condemnation; that she was there condemned and sold on account of the offence which this master had committed in carrying the natives on board.

Now, even assuming that under the peculiar circumstances of the case, the master having left on his voyage before the Act was proclaimed, it was necessary to prove that he was aware of the existence of the Act, and that it was thereby rendered unlawful for him to carry Polynesian labourers, their Lordships are of opinion that there was sufficient evidence to go to the jury, that the master was acquainted with the Act so far as to know that an Act had passed which rendered it unlawful for him to carry Polynesian labourers on board. The Chief Justice says:—"Stephen"—that is the counsel for the Defendant—"addresses the jury. I sum up in accor-" dance with *Earl* v. *Rowcroft* in 8 East, 126. " The jury retired, and after they had so retired, " Stephen asks me to reserve two points; 1st, " as to the reception of the printed copy of the " 'Queensland Gazette' without proof of it;"—that is not a matter which is now raised; "and " (2), as to the captain not having any knowledge " that the Act had passed making what he did " an offence." He could not have had liberty reserved to enter a nonsuit upon the ground of the captain's not having any knowledge that the Act had passed making what he did an offence, except upon the ground that there was no evidence to go to the jury as to that knowledge. Their Lordships have already pointed out that the evidence was sufficient, if the jury believed it, to prove that the captain had knowledge that the Act had passed, and that it rendered it unlawful for him to carry Polynesian labourers. The Chief Justice goes on,—"He contends that the

" act ought to be a wilful act. I reserve these " points. No evidence was called for the defence, " but counsel for the Defendants in his address " to the jury contended that the evidence was " not sufficient to show that the master had " become aware of the passing of the Kidnapping " Act, or at least of the nature of its provisions; " and that his taking the Polynesians on board " was not a breach of a law that he must be " taken to have known, and was an innocent " act, and therefore not barratry; and that " Defendants consequently were entitled to a " verdict." Now the learned counsel for the Defendants, when he addressed the jury and contended that the evidence was not sufficient to show that the master did in fact know of the Act, must have been fully alive to the fact that that question ought to be submitted to the jury.

The principal ground upon which the rule was moved for was that the Chief Justice ought under the circumstances to have directed the jury that the master was not guilty of barratry unless he wilfully violated the provisions of the Act, or at least acted with knowledge of the same and of its provisions.

The learned Chief Justice stated that he read the evidence to the jury as to the passing of the Act having been communicated to the captain (p. 37), but it is said that he did not in a sufficiently pointed manner call their attention to the question whether the master did or did not know that the Act had rendered it unlawful for him to carry the Polynesian labourers on board. He says in his judgment upon the rule (page 38): " I am of opinion that " there ought to be a new trial for this omission. " I think that the jury were very likely, because " I said nothing pointedly to them about the " materiality of knowledge by the captain of " the passing of the Act, to think that matter

" immaterial, it being, in fact, most material, " as it was necessary for them to say in effect " (if they found for the Plaintiff) that there " had been wrong conduct on the part of " the master, inasmuch as he knew the thing " which ultimately caused the condemnation to " be prohibited. It is very probable that if " the case goes down again for trial the jury " may think the master did know this, but that " is not a matter with which we have anything " to do now."

Now, their Lordships are of opinion that the question whether the master did or did not know of the Act was sufficiently left to the jury, and that they must have understood that that was, in fact, the only question which they had to try. Mr. Justice Faucett, at page 40, says: "It was contended for the Defen- " dants that such knowledge was not proved. " It was said that it was not shown that " the captain had ever seen Mr. Jardine, or " had ever seen a copy of the Act. Now, con- " sidering that the Defendants gave no evidence, " I do not think this latter argument of much " weight. But, however this may be, the fact " appears to be that the question whether or not " the captain had actual knowledge was fully " contested, and was, as I further collect, the " substantial and only question contested at the " trial. The want of proof of such knowledge " was in fact the defence, and, as now admitted, " the only defence relied on."

It appears to their Lordships that that view of the case was correct; they think that there was sufficient evidence to go to the jury, and that the question was substantially left by the Chief Justice to the jury, and that they must have understood that that was the principal if not the only question which they had to try; and, under these circumstances, their Lordships are of

opinion that the majority of the Court did right in discharging the rule *nisi* for a new trial. Under these circumstances they will humbly recommend Her Majesty that the decree of the Court below be affirmed, with the costs of this Appeal.