

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musgrave v. Pulido, from the Supreme Court, Jamaica; delivered Saturday, December 13th 1879.

Present:

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR HENRY S. KEATING.

TO an action of trespass brought against the Appellant, Sir Anthony Musgrave, in the Supreme Court of Jamaica, for seizing and detaining at Kingston in Jamaica a schooner called the "Florence," of which the Plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs, the Appellant pleaded the following plea:—

"The Defendant, Sir Anthony Musgrave, by his attorney, comes and says that he ought not to be compelled to answer in this action, because he saith that at the time of the grievances alleged in the said declaration, and at the time of the commencement of this action, he was and still is Captain General and Governor-in-Chief of the Island of Jamaica and its Dependencies, and was and still is as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the

“ said declaration were done by him as Governor
 “ of the said Island of Jamaica, and in the exercise
 “ of his reasonable discretion as such, and as acts
 “ of State; and this the Defendant is ready to
 “ verify, wherefore he prays judgment if he ought
 “ to be compelled to answer in this action.”

The Plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the Appellant to answer further to the writ and declaration.

The plea is in form a dilatory plea, and does not profess to contain a defence in bar of the action. It was advisedly pleaded as a plea of privilege, with the object of raising the question of the immunity of the Appellant as Governor from being impleaded and compelled to answer in the Courts of the Colony. That this was so is plain not only from the form of the plea, but from an arrangement come to between the parties before the argument of the demurrer. In an interlocutory proceeding to set aside a judgment of *non pros.* as irregularly obtained, an order was made by consent “ that all pleas of the Defendant, Sir Anthony Musgrave, except the
 “ plea of privilege by attorney, be struck out,
 “ together with replications and entry of judgment of *non pros.*, with liberty to the Plaintiff
 “ to demur, it being arranged that the demurrer
 “ be set down for hearing at the present term,
 “ and if a judgment Respondeat ouster the
 “ Defendant, Sir Anthony have liberty to plead
 “ Not guilty by statutes.”

The decision of the Supreme Court was accordingly given upon the plea, as a plea of privilege, and altogether upon this aspect of it, the judgment being one of Respondeat ouster.

Upon the hearing of the present appeal the Attorney General, on the part of the Appellant, whilst not giving up the plea in the shape in

which it was pleaded, insisted that if it disclosed a good defence in substance to the action, as he contended it did, its form and the arrangement of the parties might be disregarded, and a general judgment given for the Defendant; and, though under protest from the Respondents' Counsel, the discussion at their Lordships' bar was allowed to take the wider scope which the Attorney General's contention introduced into the case.

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the Governor from liability to be sued in the Courts of the Colony, their Lordships think that it cannot, in that aspect of it, be sustained.

The dictum attributed to Lord Mansfield in *Fabrigas v. Mostyn*, 1. Cowp. 161, that "the Governor of a Colony is in the nature of a Viceroy, and therefore locally during his Government no civil or criminal action will lie against him, the reason is, because upon process he would be subject to imprisonment," was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of *Hill v. Bigge* (3, Moore, P.C. 465). In that appeal their Lordships were of opinion that the plea of the the Lieutenant Governor of the Island of Trinidad to an action brought against him in the Civil Court of the island, claiming that whilst Lieutenant Governor he was not liable to be sued in that Court, could not be sustained. The action was for a private debt contracted by the Defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a Colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the Colony. The claim to such exemption is thus met:—"If it

“ be said that the Governor of a Colony is quasi
“ Sovereign, the answer is, that he does not even
“ represent the Sovereign generally, having only
“ the functions delegated to him by the terms of
“ his commission, and being only the officer to
“ execute the specific powers with which that
“ commission clothes him.”

The Defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him “ as Governor,” and “ as acts of State.” Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the Courts of the Colony in which he holds that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of State policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of State. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action, not only in the Courts of the Colony, but in all Courts; and therefore it would seem to be a consequence of the decision in *Hill v. Bigge* that the question of personal privilege cannot practically arise, being merged in the larger one, whether the facts pleaded show that the acts complained of were really such acts of State as are not cognizable by any Municipal Court.

In the case of the Nabob of the Carnatic *v.* the East India Company, Lord Thurlow said, that a plea pleaded in form to the jurisdiction of the Court, but which denied the jurisdiction of all Courtsover the matter, was absurd; and

that such a plea, if it meant anything, was a plea in bar (1 Ves. Jr. 388).

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney General, viz., that it discloses in substance a defence to the action.

Before adverting to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of Governors of Colonies has been considered. In the leading case of *Fabrigas v. Mostyn*, the action was brought against Mr. Mostyn, the Governor of Minorca, for imprisoning the Plaintiff, and removing him by force from that island. The Governor's special plea of justification alleged, that he was invested with all the powers, civil and military, belonging to the government of the island, that the Plaintiff was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants, in breach of the peace, and that, in order to preserve the peace and government of the island, he was forced to banish the Plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial the Governor failed to prove this plea, and the Plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the Judge, Lord Mansfield said his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the Governor to be sued was raised, and very fully discussed, one ground of objection being, that he could not be sued in England for an act done in a country beyond the seas, and upon this question Lord Mansfield declared that the action would, to use his own

phrase, "most emphatically" lie against the Governor. His judgment proceeds to show, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, "If he has acted right according to the authority with which he is invested, he may lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a proceeding."

In the case of *Cameron v. Kyte* (reported in 3 Knapp 332), which came before this Board on an appeal from the Colony of Berbice, the question was, whether the Governor had authority to reduce a commission of 5 per cent. upon all sales in the colony, granted to an officer called the Vendue Master by the Dutch West India Company before the capitulation of the colony to the British Crown. It was urged that the Governor was the King's representative, exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the Governor did not hold the position or possess the authority sought to be attributed to him, and that the act in question was beyond his powers. In the judgment of this Committee, delivered by Baron Parke, it is said:—

"There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of Governor. If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to

“ him as a Viceroy, and represented the King in
 “ the government of that colony, there would be
 “ good reason to contend that an act of sove-
 “ reignty done by him would be valid and
 “ obligatory upon the subject, living within his
 “ government, provided the act would be valid if
 “ done by the Sovereign himself, though such act
 “ might not be in conformity with the instructions
 “ which the Governor had received for the regu-
 “ lation of his own conduct. The breach of
 “ those instructions might well be contended on
 “ this supposition to be matter resting between
 “ the Sovereign and his deputy, rendering the
 “ latter liable to censure or punishment, but not
 “ affecting the validity of the act done. But if
 “ the Governor be an officer merely with a limited
 “ authority from the Crown, his assumption of
 “ an act of sovereign power, out of the limits of
 “ the authority so given to him, would be purely
 “ void, and the Courts of the colony over which
 “ he presided could not give it any legal effect.
 “ We think the office of Governor is of the latter
 “ description, for no authority or dictum has been
 “ cited before us to show that a Governor can be
 “ considered as having delegation of the whole
 “ royal power in any colony, as between him and
 “ the subject, when it is not expressly given by
 “ his commission. And we are not aware that
 “ any commission to Colonial Governors conveys
 “ such an extensive authority.”

Again, it is said :—“ All that we decide is that
 “ the simple act of the Governor alone, un-
 “ authorized by his commission, and not proved
 “ to be expressly or impliedly authorized by any
 “ instructions, is not equivalent to such an act
 “ done by the Crown itself.”

In the well known case of the action brought
 by Mr. Phillips against Mr. Eyre, the former
 Governor of Jamaica, for acts done by him,
 whilst he was Governor, in suppressing an

insurrection in that colony, the question raised was, whether the Colonial Act of Indemnity was an answer to an action brought in England. That such an Act was thought to be necessary, and that it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this Act, have been maintained. It is to be observed, however, that the facts of the rebellion and of its suppression were averred in the plea by way of introduction to the Act of Indemnity, and Mr. Justice Willes, in delivering the judgment of the Exchequer Chamber, after saying that the Court had discussed the validity of the defence upon the only question argued by Counsel, viz., the effect of the Colonial Act, adds,—“but we are not to be understood as “ thereby intimating that the plea might not be “ sustained upon more general grounds as showing that the acts complained of were incident “ to the enforcement of martial law.” (L. R., 6 Ex. 31.) It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shown by distinct averments in the plea.

It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Go-

vernor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from Ireland were cited by the Defendant's Counsel, in which the Irish Courts stayed proceedings in actions brought against the Lord Lieutenant of Ireland. In these cases the Lord Lieutenant appears to have been regarded as a Viceroy. In both the facts were brought before the Court, and in both it appeared that the acts complained of were political acts done by the Lord Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The Courts appear to have thought that under these circumstances no action would lie against the Lord Lieutenant in Ireland, and upon the facts brought to their notice it may well be that no action would have lain against him anywhere. (*Tandy v. Earl of Westmoreland*, 17 State Trials, 1246. *Luby v. Lord Wodehouse*, 17 Irish Common Law Reports, 618).

Several cases were cited during the argument of actions brought against the East India Company, and the Secretary of State for India, in which questions have arisen whether the acts of the Indian Government were or were not acts of Sovereignty or State, and so beyond the cognizance of the Municipal Courts. The East

India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the Municipal Courts in India, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated "acts of State," have been declared to be within the cognizance of those Courts. Thus, in the *Rajah of Tanjore's* case (13 Moore P. C., 22) the question to be decided was thus stated by Lord Kingsdown in giving the judgment of the Committee:—"What is the real character of the act done in this case? was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominion and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law, or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation." This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a Municipal Court. The answer of the East India Company in this case did not rest on the simple assertion that the seizure was an act of State, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into these treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company in trust for the Crown, the Company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of Great Britain, and that all the acts set forth in the answer "were acts and matters of State."

In the case of *Forester and others v. the*

Secretary of State for India, in which the judgment of this Committee was delivered on the 11th May 1872, a defence of the same nature as that in the last-mentioned case was set up; but the decision there was on this point against the Secretary of State. In this suit also the answer set out the facts which were relied on to show that the action of the Government complained of was a political act of State.

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shown, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the Courts. (*See the Nabob of the Carnatic v. the East India Company*, 2 Ves. Jr., 388; *ex-Rajah of Coorg v. the East India Company*, 27 Beavan 300; *Rajah Salig Ram v. the Secretary of State for India*, in which judgment was given by this Committee on 22nd August 1872.)

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the Courts, but that the Courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of State that it was decided they could not take further cognizance of them. It is to be observed that the sovereign authority conferred upon the East India Company appears in Acts of Parliament, and therefore, without being pleaded, the Courts would have judicial notice of it.

Coming to the present plea, we find that, after stating that the Defendant was Captain General and Governor-in-Chief of the Island of Jamaica, the

only averments in it are, that the acts complained of were done by him as Governor of the island, and in the exercise of his reasonable discretion as such, and as acts of State. There is no attempt to show the occasion on which the seizure of the Plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of State, became and was such an act. The plea does not aver, even generally, that the seizure was an act which the Defendant was empowered to do as Governor, nor even that it was an act of State. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the Defendant assumed to make the seizure as Governor, and assumed to do it as an act of State, without showing that the act itself was an act of State properly so called, and was within the limits of his authority. It was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their Lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the Governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of State, could be called on to show in the Courts of the Colony that the seizure complained of was really an act of State, of the nature and class of those which, as Governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the Court from entering upon such an inquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had been taken, for the Court must then have gone into the very inquiry which it

was the manifest purpose of the plea to avert. It appears to their Lordships that the Plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to the action.

It was contended that, under "The Supreme Court Procedure Law, 1872," of the Colony, which provides that defects in form shall be disregarded, and that, on demurrer, the Court shall give judgment according to the very right of the cause, the judgment should now be given for the Defendant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause cannot be pronounced.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the Court below, and with costs.

