[HIGH COURT OF AUSTRALIA.]

HAZELTON . . . . . APPELLANT;
PLAINTIFF,

AND

POTTER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907.

SYDNEY, *Nov.* 26, 27, 28. *Dec.* 9.

Griffith C.J., Barton and Isaacs JJ

Action for false imprisonment—Arrest by police officers on foreign warrant—Justification—Reasonable belief of defendant—Mistake of law—Notice of action—Act done under authority of law honestly believed to be in force—Law of British possession—Pacific Order in Council 1893, *Articles* 112, 139.

The Pacific Order in Council 1893 established a High Commissioner's Court with jurisdiction over the Pacific Ocean, and the islands and places therein which were British settlements or under British protection or were under no civilized government, but exclusive of any part of the British dominions or territorial waters within the jurisdiction of the legislature of any British possession. The jurisdiction of the Court was vested in a High Commissioner and Deputy Commissioners. Article 112 of the Order in Council provides that where a person is to be removed for trial or for the execution of a sentence the Judge of the High Commissioner's Court shall issue a warrant (in a prescribed form) under which the person may be put on board a British warship, or some other fit ship, and conveyed to the place named in the warrant and pending removal detained in custody, and that the warrant shall be sufficient authority to the person to whom the warrant is directed and every person acting under it or in aid of the person to whom it is directed, to take and keep the person named in it.

The appellant was convicted at Gizo in the Solomon Islands before a Deputy Commissioner and sentenced to a term of imprisonment at Fiji. The ship on which the appellant was put for the purpose of being conveyed to Fiji ended her voyage at Sydney, and while there the appellant was taken into

H. C. OF A. 1907.

HAZELTON v. POTTER.

custody by a Sydney police officer under a warrant purporting to have been made by the Deputy Commissioner at Gizo, but actually signed in Brisbane, directed to the supercargo of the ship by name, who was commanded to convey the appellant to Sydney, and "there to deliver him to the magistrate gaoler or other officer to whom it may appertain to give effect to any sentence passed by the Court there exercising criminal jurisdiction &c., that the said sentence may be carried into effect."

In an action in the Supreme Court of New South Wales by the appellant against the police officer for damages for false imprisonment:

Held, that the warrant, even if valid, afforded no justification for the arrest inasmuch as it did not authorize the conveyance of the appellant to Fiji but to Sydney, and whatever authority for the detention of the appellant it purported to confer terminated on the delivery of the appellant to the keeper of the prison in Sydney, and consequently his detention there was not a necessary act in aid of the execution of the warrant.

Held, further, that, although under a warrant duly addressed to the gaoler at Fiji, a temporary detention of the appellant by a Sydney officer for the purpose of aiding the execution of the warrant might be justified on the ground of necessity, the High Commissioner had no authority to address a warrant to the keeper of a prison in Sydney or to authorize a detention by him, and the warrant was therefore invalid on the face of it.

Leonard Watson's Case, 9 A. & E., 731, distinguished.

Article 139 provides that any suit or proceeding shall not be commenced "in any of Her Majesty's Courts" for anything done or omitted in pursuance of execution or intended execution of the Order in Council unless a month's notice of action in writing is given by the plaintiff to the defendant.

Held, that the defendant was not entitled to the benefit of this provision, because, even if it applied to actions brought in the Courts of New South Wales, which was doubtful, the arrest was not anything that could be done under the Order in Council. Article 112, under which the defendant assumed to act, was not in force in that State, and in order that advantage may be taken of such a provision, the defendant must establish that he honestly believed in a state of facts which, if it had existed, would have afforded him a justification under the *lex fori*.

Roberts v. *Orchard*, 2 H. & C., 769; 33 L. J. Ex., 65, applied.

Decision of the majority of the Supreme Court, *Hazelton* v. *Potter*, (1907) 7 S. R. (N.S.W.), 270 reversed.

APPEAL from a decision of the Supreme Court of New South Wales making absolute a rule *nisi* for entering a nonsuit.

The appellant had recovered a verdict for £229 damages against the respondent, an officer of the police force in Sydney, New South

Wales, in an action for false imprisonment. This verdict was set aside by the Full Court (consisting of *Simpson*, *Pring* and *Rogers* JJ.) by a majority, and a nonsuit ordered to be entered, on the grounds, that the defendant had acted under a warrant, good on its face, in the honest belief that it was a valid warrant, and that the defendant was entitled to notice of action under Article 139 of the Pacific Order in Council 1893. On both points *Pring* J. dissented from the majority of the Court: *Hazelton* v. *Potter* (1).

From this decision the present appeal was brought by special leave.

The facts and the material portions of the Order in Council sufficiently appear in the judgments hereunder.

D. G. Ferguson (*Windeyer* with him), for the appellant. The warrant was bad. The Deputy Commissioner had no jurisdiction to authorize a Sydney police officer to detain the appellant in Sydney. His jurisdiction is limited by the Pacific Order in Council 1893 to the islands and other places in the Pacific outside the limits of self-governing Colonies of the Empire. Moreover the warrant was not in the form prescribed by the Order in Council, Schedule Form C. 17. It should have specified Fiji as the place to which the appellant was to be removed. It was no warrant for anything after the conveyance to Sydney. (See Article 112 of the Order in Council.) These defects appeared on the face of the warrant, and consequently the person who acted under it was not protected. [He referred to *Pollock on Torts*, 5th ed., p. 112; *The Marshalsea* (2); *Clark* v. *Woods* (3); *Clerk and Lindsell on Torts*, 2nd ed., p. 643; *Andrews* v. *Marris* (4); *Carratt* v. *Morley* (5); *Watson* v. *Bodell* (6); *Dews* v. *Riley* (7).

[ISAACS J. referred to *Hill* v. *Bateman* (8); *Shergold* v. *Holloway* (9).]

Even if the warrant were good on its face but really bad, it would afford no protection to a person acting under it.

(1) (1907) 7 S.R. (N.S.W.), 270.
(2) 10 Rep., 69, at p. 76*a*.
(3) 2 Ex., 395; 17 L.J.M.C., 189.
(4) 1 Q.B., 3.
(5) 1 Q.B., 18.
(6) 14 M. & W., 57.
(7) 11 C.B., 434; 20 L.J.C.P., 264.
(8) 1 Stra., 710.
(9) 2 Stra., 1002.

H. C. OF A. 1907.

HAZELTON v. POTTER.

No notice of action was necessary. The warrant being bad on its face, the respondent had no reason to believe in the existence of a state of facts which would justify him in acting upon it. Even assuming the warrant to have been good on its face, Article 139 does not protect the respondent, because it has no application to proceedings in Courts of New South Wales, nor does it apply to acts done outside the territorial limits of the jurisdiction of the Western Pacific Court. If it had purported to apply to these Courts it would be *ultra vires*: see Articles 4, 7, 14, 19, 49. The meaning of the words "any of Her Majesty's Courts" may be gathered from a reference to Articles 109, 110. They may fairly be construed as referring to the High Commissioner's Court and Courts established under sec. 2 of the *British Settlements Act* 1887. The *lex fori* is to be applied in matters of procedure such as this. [He referred to *Macleod* v. *Attorney-General for New South Wales* (1); *British Settlements Act* 1887, secs. 2, 6; Preamble to Pacific Order in Council 1893.]

[GRIFFITH C.J. referred to *Leroux* v. *Brown* (2); *Scott* v. *Lord Seymour* (3).

ISAACS J. referred to *Westlake on International Law*, 3rd ed., pars. 238, 239.]

The British legislature has dealt with the same subject in sec. 13 of the *Foreign Jurisdiction Act* 1890, which renders Article 139 *ultra vires*: *Bentham* v. *Hoyle* (4); *Ferrier* v. *Wilson* (5). Even if Article 139 applies to an action in these Courts, the respondent is not entitled to the benefit of it, because the arrest was not made under the Order in Council within the meaning of that Article, but in pursuance of a warrant issued under the Order: *Shatwell* v. *Hall* (6), cited in *McLaughlin* v. *Fosbery* (7). Nor was there anything in the warrant that could lead the respondent to reasonably believe that he was acting under the Order. The warrant did not purport to direct the conveyance of the appellant to Fiji. Detention in Sydney could only be authorized by Imperial or New South Wales legislation, not by a warrant out

(1) (1891) A.C., 455, at p. 458.
(2) 12 C.B., 801; 22 L.J. C.P., 1.
(3) 1 H. & C., 219; 32 L.J. Ex., 61.
(4) 3 Q.B.D., 289, at p. 295.
(5) 4 C.L.R., 785.
(6) 10 M. & W., 523.
(7) 1 C.L.R., 546, at p. 565.

of the High Commissioner's Court. Article 112 is not law in this State. The respondent's belief that it was is immaterial.

Scholes and *Piddington*, for the respondent. The warrant was good on its face, as a warrant for the conveyance of a prisoner from Gizo to Fiji by an officer of the Court, signed at Gizo by a person who had jurisdiction to sign it. The ordinary and natural route between those places is through Sydney by transhipment, and the detention of the appellant in Sydney was ancillary to the execution of the warrant. Article 112 authorizes any person to aid in the execution. [They referred to *Leonard Watson's Case* (1)].

[GRIFFITH C.J. referred to *Attorney-General for Canada* v. *Cain and Gilhula* (2).]

The Order in Council takes effect in all parts of His Majesty's dominions, wherever it may be necessary that some act should be done for the purpose of carrying it out. Article 112 may be read as an express exception from the exclusion in Article 4. "Expressly provided" merely means clearly provided: *In re England* (3), and includes necessary implications.

It is a necessary implication in Article 112 that the conveyance of prisoners may be through the territory of other British legislatures when the only practicable route lies that way: *Robtelmes* v. *Brenan* (4). The warrant in this case, even if it cannot be read as a warrant to convey from Gizo to Fiji, could be read as a warrant to the respondent to assist in the conveyance by taking custody of the appellant in Sydney, and the respondent was entitled to assume that there was another warrant in existence for the complete journey. The warrant need not be in the exact Form C. 17.

If the warrant was good on its face the respondent could justify, under Article 112, being an officer of the law, acting as such in aid of the person who had the execution of the warrant. He knew nothing of the defect in Robertson's authority, and was not bound to inquire into that or into the validity of the warrant.

[They referred to *Carratt* v. *Morley* (5); *Painter* v. *Liverpool*

(1) 9 A. & E., 731.
(2) (1906) A.C., 542.
(3) 13 N.S.W.L.R., 121, at p. 122.
(4) 4 C.L.R., 395.
(5) 1 Q.B., 18.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Oil Gas Light Co. (1); *Henderson* v. *Preston* (2); *Demer* v. *Cook* (3); *Webb* v. *Batchelour* (4); *The Marshalsea* (5).]

[GRIFFITH C.J. referred to *Grant* v. *Bagge* (6).]

The appellant by his conduct before and after arriving in Sydney submitted to the jurisdiction of the High Commissioner's Court and to the detention by the respondent in furtherance of that Court's order, and is estopped from now denying the authority of the respondent to detain him in Sydney. This defence is open to the respondent under the plea of not guilty: *Heane* v. *Rogers* (7); *Pickard* v. *Sears* (8); *Goff's Case* (9).

[GRIFFITH C.J.—The representation, if any, made by the appellant was on a matter of law, as to which there can be no estoppel.]

The respondent was entitled to notice of action. The words "in any of Her Majesty's Courts" include the Courts of this State. They are not used elsewhere in the Order in Council, and must therefore be intended to mean something different from the High Commissioner's Court, which is always called "the Court." [They referred to Articles 25, 137 and 139.] The action for trespass is a personal one, and may be brought wherever the defendant happens to be. There is no reason why notice should be considered necessary in one Court and not in another. The defendant honestly and upon reasonable grounds believed that the warrant was valid and had been duly issued.

[GRIFFITH C.J.—But if Article 112 had no effect in New South Wales, it was immaterial whether the respondent thought that it had, or believed in a state of facts which, if it had, would have justified him.]

The Order as a whole is in force in New South Wales for the purpose of protecting persons acting under it, if the Order cannot reasonably be carried out without doing some act in New South Wales.

[ISAACS J.—Assuming that Article 139 purports to control the Courts of New South Wales, what authority had the Queen in Council to make such an Order?]

(1) 3 A. & E., 433.
(2) 21 Q.B.D., 362.
(3) 88 L.T., 629.
(4) Vent., 273.
(5) 10 Rep., 69, at 76*a*.
(6) 3 East., 128.
(7) 9 B. & C., 577, at p. 586.
(8) 6 A. & E., 469.
(9) 3 M. & S., 203.

The power conferred by the *Pacific Islanders Act* 1875, sec. 6. It was necessary for the administration of the islands that there should be such a provision. If the Article is in force here, then the respondent was justified in believing that he was acting lawfully. The Court should presume in his favour that his interpretation of the warrant was reasonable: *Crowley* v. *Glissan* (1). The facts, as they appeared to him, warranted him in believing that he was justified in detaining the appellant. [They referred to *Cook* v. *Leonard* (2); *Mason* v. *Newland* (3); *Roberts* v. *Orchard* (4); *Selmes* v. *Judge* (5); *Graves* v. *Arnold* (6).]

Ferguson in reply. In *Leonard Watson's Case* (7) the defendant justified under an Act which was in force in England where the action was brought. But there is no law in force in New South Wales under which the defendant could justify even if the warrant were valid. Detention in New South Wales is not justifiable under the Order in Council unless it is absolutely necessary for the purpose of carrying out the Order. There is no evidence of such necessity in this case.

Cur. adv. vult.

Dec. 9.

GRIFFITH C.J. This is an appeal from a judgment of the Full Court of New South Wales entering a nonsuit in an action brought by the appellant against the respondent, in which at the trial he had recovered a verdict for £229 damages. The action was for assault and false imprisonment. The defendant was an officer of the police in New South Wales, and the alleged wrongs were committed in Sydney.

The defendant sets up two defences. First, he justifies under the Pacific Order in Council of 1893, and says that under the authority of that Order he did the acts complained of in the action. His other defence is that under that Order in Council notice of action is necessary before any action can be brought for anything done or intended to be done under the Order in Council. He says he intended to act under the Order in Council.

(1) 2 C.L.R., 744.
(2) 6 B. & C., 351.
(3) 9 C. & P., 575, note *a*.
(4) 2 H. & C., 769; 33 L.J. Ex., 65.
(5) L.R. 6 Q.B., 724.
(6) 3 Camp., 242.
(7) 9 A. & E., 731.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Griffith C.J.

Before referring in detail to the facts of the case, which are in some respects remarkable—although their singularity, as it happens, is not relevant to the decision—I will refer to some of the provisions of the Order in Council. It was passed on 15th March 1893, and recites the *British Settlements Act* 1887, by which the Sovereign in Council is authorized to establish laws and Courts for the peace, order and good government of Her Majesty's subjects and others within any British possession. It recites also the *Pacific Islanders Protection Act* 1872, which authorized Her Majesty to exercise jurisdiction over her subjects in every part of the Pacific Ocean and any parts or places, &c., not within the jurisdiction of any civilized power. The Order further authorized establishment of Courts of Justice, and, moreover, provided that Her Majesty might by Order in Council direct that those powers and that jurisdiction might be vested in and exercised by the Court so to be established, and might also be exercised by the Court of any British Colony designated by the Order.

The 4th Article of the Order prescribes what are called the limits of the Order, which are thus defined:—"The limits of this Order shall be the Pacific Ocean and the islands and places therein, including (*a*) islands and places which are for the time being British Settlements; (*b*) islands and places which are for the time being under the protection of Her Majesty; (*c*) islands and places which are for the time being under no civilized government, but exclusive (except as in this Order expressly provided in relation to any particular matter) of (1) Any place within any part of Her Majesty's dominions, or the territorial waters thereof, which is for the time being within the jurisdiction of the legislature of any British possession; (2) Any place for the time being within the jurisdiction or protectorate of any civilized power."

The Order in Council, therefore, does not take effect within His Majesty's dominions in general, unless so expressly provided in relation to any particular matter. The Order in Council established a Court called the High Commissioner's Court, and by Article 60 that Court had authority to try persons subject to the jurisdiction of the Court who are charged with having committed any crime triable by the Court.

Article 78 provides that sentence of imprisonment shall be carried into effect "in such prisons and in such manner as the High Commissioner from time to time directs," and "if there be no such prison, or by reason of the condition of any such prison, or the state of health of the prisoner, or on any other ground, the Court thinks that the sentence ought not to be carried into effect in such prison, the prisoner shall, by warrant, be removed in custody to Fiji, there to undergo his sentence."

Article 112 provides for carrying the prisoner for the purpose of undergoing his sentence. I will read the first four paragraphs:—

"Where a person is to be removed either for trial or for the execution of a sentence, or under an order of deportation, a warrant for the purpose shall be issued by the Judge of the Court under his hand and seal, and the person may, under such warrant, be taken to and put on board of one of Her Majesty's ships or some other fit ship, and shall be conveyed in such ship or otherwise to the place named in the warrant.

"Pending removal, the person shall, if the Court so orders by endorsement on the warrant, be arrested and detained in custody or in prison until an opportunity for removal occurs.

"On arrival at the place named in the warrant, the person, if removed under an order of deportation, shall be discharged, or otherwise shall be handed over to the proper gaoler, constable, magistrate, or officer.

"A warrant of removal is sufficient authority to the person to whom it is directed or delivered for execution, and to the person in command of any ship, and to every person acting under the warrant or in aid of any such person, to take, receive, detain, convey, and deliver the person named therein in the manner thereby directed, and generally is sufficient authority for anything done in execution or intended execution of the warrant."

The form of warrant is given in the Schedule of the Order in Council, Form C. 17, as follows:—

"To X.Y. and other officers of the Court.

"The above-named A.B. having been on the . . . day of . . convicted before this Court for that, &c.

"The Court did thereupon sentence the said A.B. for his said offence . . . to be imprisoned for, &c.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Griffith C.J.

"You are hereby commanded, with proper assistance to convey the said A.B. to [ ] that the said sentence may there be carried into effect and you are there to deliver him to a magistrate, gaoler, or other officer to whom it may appertain to give effect to any sentence passed by the Court there exercising criminal jurisdiction, together with this warrant or a duplicate thereof.

(Seal)"

In the case of a person committed to Suva, that would be a warrant to take the man to Suva, and there "deliver him to the magistrate, gaoler, or other officer to whom it may appertain to give effect to any sentence passed by the Court." Those words are taken from Article 112, and they are words of general import, meaning, in substance, the person in charge of the gaol. There is one other provision of the Order in Council to which I must call attention, which is relied upon for the contention that notice of action should have been given.

Article 139 says:—"Any suit or proceeding shall not be commenced in any of Her Majesty's Courts against any person for anything done or omitted in pursuance or execution or intended execution of this Order, or of any regulation or rule made under it, unless notice in writing is given by the intending plaintiff or prosecutor to the intended defendant one clear month before the commencement of the suit or proceeding, nor unless it is commenced within three months," &c.

Now as to the facts. The plaintiff, it is alleged, was sentenced at Gizo, a place in the Solomon Islands, to be imprisoned for three months at Suva for an offence. For the purpose of taking him from Gizo to Suva, he was brought by a steamer trading between the Solomon Islands and Sydney to Sydney, that being, it is alleged, the necessary mode of transport to Suva, and when in Sydney, the officer of the High Commissioner's Court handed the plaintiff over to the defendant, who was, *pro hac vice*, acting as an officer in charge of a gaol. The defendant's pleas are justification and want of necessary notice of action. Now those defences depend upon whether the provisions of Articles 112 and 139 are part of the law of New South Wales. It is contended for the respondent that they are—that is to say, that the warrant,

issued in one part of the Western Pacific to be executed by taking the person named in it to another part of the Western Pacific, runs in New South Wales so as to authorize the detention of that person in New South Wales, for, I suppose, a definite period, for the purpose of transhipment. With respect to the other Article, the contention is that the Order in Council for the Western Pacific was intended to establish a rule of procedure to be followed by the Australian Courts and English Courts, or for that matter, all the Courts of Her Majesty's possessions.

I will first say a few words with respect to that contention. To begin with, it is exceedingly improbable that under the Order of 1893, or at the time when these Acts were passed, in the seventies, eighties, and nineties, it should have been intended by the Imperial legislature to authorize the Sovereign in Council to legislate for the internal affairs of self-governing communities. No doubt the Imperial legislature might have conferred such a power, but, *primâ facie*, it is highly improbable that they would. The improbability is confirmed by the manner in which they did pass enactments when they desired to interfere with the internal powers of self-governing communities.

For instance, the *Fugitive Offenders Act*, passed in 1881, relates to offenders going from one part of Her Majesty's dominions to another. In that Act careful provision is made for the detention of a person in a possession not under the authority of another. Sec. 25 got over any difficulty such as that which had been suggested, that the warrant of one possession did not extend beyond its own territorial boundary, not even at sea, or in transit between parts of its own possession. [His Honor read sec. 27 and continued.] I think it highly improbable, when the legislature were in the habit of dealing with such matters in such a way, that a general warrant issued in one part of the Western Pacific should be intended to have legal force in a part of Australia. The improbability is made further clear in the *Colonial Prisoners Removal Act* 1884, providing for the removal of prisoners and criminal lunatics from Her Majesty's possessions out of the United Kingdom. That Act provides that this can only be done under a warrant of the Governor, or Secretary of State.

These considerations lead me to the conclusion that it is

H. C. OF A. 1907.

HAZELTON v. POTTER.

Griffith C.J.

extremely improbable that it was intended by the legislature which had passed the Acts recited in the Order in Council, to confer on the Sovereign in Council authority to enact a law affecting the liberty of persons within a self-governing possession. The extreme improbability that it was intended that the Order in Council itself should embody such a law appears still greater on reference to Article 111, which provides for the case of persons who are deported from the Western Pacific. In that case they may be taken to a British possession and landed there, but only if the Government of that possession has consented to the reception of persons deported under the Order.

The contention of the respondent in this case is that, although a person may not be brought and set free on shore without consent of the Government of the possession, yet a person in custody may be brought and detained, and no Court here has power to release him. That is extremely improbable. The only serious argument addressed to us in respect to this contention was that it was necessary in order to give effect to the provision for removal from one part of the Pacific to another, and reliance was placed on *Leonard Watson's Case* (1).

Supposing that case was in point—I do not think it is—still it would be necessary to establish that it was necessary, in order to convey a person from the Solomon Islands to Suva, to imprison him in Sydney while in transit. To anyone acquainted with the geography of the Western Pacific, that is absurd. It is only lately that there have been steamers running between the Solomon Islands and Sydney. At present it is probably the most comfortable and convenient way to Suva to come by steamer to Sydney, but to suggest that a person may be brought two or three thousand miles for the sake of convenience, not absolute necessity, seems to be a straining of words. In my opinion there was no necessity to bring him by way of Sydney. In one year it might be convenient to go by way of New Caledonia, in another year perhaps by way of New Guinea. It seems to me for these reasons improbable that the section gives the powers contended for.

I turn to Article 139, which, it is said, imposes a rule binding

(1) 9 A. & E., 731.

on Courts of Justice in all Her Majesty's possessions. True the words of the Act are vague. The words are "any of Her Majesty's Courts," and the literal meaning of those words undoubtedly includes Courts of New South Wales, or any of Her Majesty's Courts. But, again, it seems improbable that the legislature intended that provision to apply to an action in Australia. My brother *Barton* pointed out that by the Pacific Order in Council the Supreme Court of any of the Australian Colonies might have jurisdiction conferred upon it co-extensive with that of the High Court, under the *Pacific Islanders Protection Act* 1875. In such a case the Australian Court would be a Court having jurisdiction over all British subjects within the Western Pacific, and in that case might very well be said to come within the terms "any of Her Majesty's Courts" in Article 139. I think that is very probable, and it gets rid of the argument that the legislature intended to interfere with the freedom of government of the Australasian Colonies. I do not think it necessary to formally decide the point, but for the reasons I have given I think it very improbable that the legislature had any such intention.

I return to the actual facts of this case. The warrant, instead of being signed in the Western Pacific, was signed in the Brisbane River, outside the limits of the Order, and at a place where the person who signed it, Mr. Oliphant, clearly had no jurisdiction. It is entitled:—"In His Britannic Majesty's High Commissioner's Court for the Western Pacific at Gizo, British Solomon Islands, Criminal Jurisdiction. Held at Gizo on the 15th day of June 1905," &c.

It is addressed to "George Robertson, and other officers of the Court." Robertson was the supercargo on the steamship which was on its way from the British Solomon Islands to Sydney. The warrant was "to convey the said Hazelton to Sydney, New South Wales, and . . . there to deliver him to the magistrate, gaoler, or other officer to whom it may appertain to give effect to any sentence passed by the Court there exercising criminal jurisdiction, together with this warrant, or a duplicate thereof, that the said sentence" (of imprisonment) "may be duly carried into effect."

H. C. OF A. 1907.

HAZELTON v. POTTER.

Griffith C.J.

There is no date, except the date at the head. The person receiving that document might, perhaps, suppose it was signed at Gizo on 15th June, and was within the jurisdiction of the person who signed it. Robertson, who wrote it out himself in the Brisbane River, knew that that place was not within the Western Pacific, and that he was not an officer of the Court, and I suppose he knew that Oliphant had no power there to appoint him an officer of the Court. Perhaps such a warrant might operate as a justification to another person acting under it, but it is not necessary to determine that question.

I will assume, then, without so deciding, that a warrant of removal signed within the limits of the Order in Council, addressed to an officer of the High Commissioner's Court, and directing him to remove a prisoner to Suva to serve a sentence of imprisonment, would authorize that officer to detain the prisoner in custody on shore in Australia in transit from the place where the warrant was issued, if it should become necessary, in order to give effect to the particular route lawfully chosen for removal, to detain him in Australia awaiting the departure of another vessel bound to Suva. The foundation of such an authority would be the necessity of the case. Now, the authority to remove conferred by Article 112, whatever its extent, is conferred only upon the officer to whom the warrant is addressed, and in the case supposed the prisoner would be still in his custody, and the detention on shore in Australia would be by him or by his authority. I will assume also, without so deciding, that such a warrant would authorize any subject of His Majesty in Australia to assist the officer for the purpose of such detention. I will assume further that a warrant in the Form C. 17, although not in terms addressed to the keeper (as is usual in English and Australian warrants), would be sufficient authority to the keeper of the prison at Suva to receive and detain the prisoner. Making these assumptions, how does the case stand ?

The warrant in question was not signed within the limits of the Order in Council, but this fact may, perhaps, be disregarded. It was addressed to a person who was not an officer of the Court, and could not lawfully be appointed as such officer at the place where the appointment, which was made, if at all, by the warrant,

purported to be made. This fact also may, perhaps, be disregarded. But the warrant does not purport to authorize, and cannot on any reasonable construction be read as authorizing, Robertson, the person to whom it was directed, to remove the appellant to Suva. Whatever authority it purported to confer on him terminated on his delivery of the appellant to the keeper of the prison in Sydney. Any detention of the appellant, therefore, in Sydney was not a detention by Robertson, and could not be justified as such under the terms of the warrant. Again, assuming that a warrant in Form C. 17 would, if Suva were mentioned as the place of imprisonment, justify the reception and detention of the prisoner at Suva by the keeper of the prison there, the warrant in question was not addressed to him, and it is manifest that the High Commissioner's Court has no authority to address a warrant to the keeper of a prison in Australia. The argument from necessity, which alone would justify the detention by the officer in Australian territory, has no application, and the detention by the keeper of an Australian prison is wholly unauthorized by the warrant. The defence of justification under the warrant therefore fails.

With regard to the defence of want of notice of action, very similar considerations apply. I will assume, but without so deciding, that Article 139 applies to an action in the Supreme Court of New South Wales. In order that advantage may be taken of this provision, the defendant must show, to begin with, that at the place where the act complained of was done there was some law in force under which it might under some circumstances have been lawful. It is quite immaterial that he thought there was such a law, if in fact there was none. And the law must be a law of the place where the act was done. If the provisions of a law of a foreign country are binding in a State, they are binding, not as the law of the foreign country, but because the law of the State or of a paramount authority has made them part of the State law. The furthest extent to which it can be suggested that the Order in Council has effect in the present case is that *ex necessitate* the person to whose custody a prisoner is committed for removal to Suva may himself detain him in custody in Australia. There is no pretence that any other person in Australia can be

H. C. OF A. 1907.

HAZELTON v. POTTER.

Griffith C.J.

authorized (except in aid of that person) to detain the prisoner independently. From every point of view, therefore, it is plain that there was no law in force in New South Wales under which the detention of the appellant by the respondent under the circumstances alleged could have been lawful. Now, the test whether notice of action is required is, as stated in *Roberts* v. *Orchard* (1), whether the defendant honestly believed in the existence of a state of facts which, if it had existed, would have afforded a justification under the Statute invoked. The reasonableness of the defendant's belief, if he honestly entertained it, is not to be inquired into, except as an element in determining the honesty: *Chamberlain* v. *King* (2). Nor is a mistake in the construction of the Statute fatal to the defendant: *Selmes* v. *Judge* (3). But there must be some Statute in force under which the act complained of could under some circumstances have been lawful. A mistake by the defendant as to the existence of a law cannot be brought within these principles.

In the present case there was no law in force in New South Wales which authorized the High Commissioner's Court to address a warrant to a keeper of a prison in that State or which authorized a keeper of a prison to detain of his own authority a person in course of removal to Suva. The mistake of the respondent was neither as to a matter of fact nor as to the construction of a law of New South Wales, but as to the existence of such a law. In the words of *Bayley* J., in *Cook* v. *Leonard* (4) there was no colour for supposing that the act done was authorized. It is unnecessary to consider whether a mistaken interpretation of a warrant could afford ground for notice of action, for in the present case the language, so far as regards the respondent, was plain and unambiguous. He thought that such a direction was valid under some law in force in New South Wales, and there was no such law.

For these reasons I think that notice of action was not necessary, and that the appellant is entitled to retain his verdict.

It was suggested that the acts done by respondent did not

(1) 2 H. & C., 769; 33 L.J. Ex., 65.
(2) L.R. 6 C.P., 474.
(3) L.R. 6 Q.B., 724.
(4) 6 B. & C., 351; at p. 355.

amount to an imprisonment. But that point was practically abandoned, and I do not think it necessary to say anything about it.

BARTON J. In the way in which this case has shaped itself the defence is narrowed down to the general plea of justification under the Order in Council and as to the warrant that was issued, and as to the question of notice. I pass over the second plea, because it relates to a document called the warrant, which is not in evidence, but which, upon the evidence taken, was not in the hands of the respondent at the time when the acts complained of were committed, and of which he knew nothing at that time. Speaking, then, to the third plea, which is justification under the warrant actually in evidence, and throughout the case was known as Exhibit B, I am of opinion that, upon the face of it, that warrant was no authority to Robertson, to whom it was given, to remove the plaintiff to Suva. Robertson was the supercargo of the steamer, the *Moresby*, on which both plaintiff and Oliphant came from Gizo on the journey from the Solomon Islands to Sydney, at which port the *Moresby* ended her voyage. Looking at the words of the warrant, they are addressed to "George Robertson and other officers of the Court." Robertson was not an officer of the Court when he left Gizo, and was not even colourably an officer of the Court, unless the appointment of him made at Brisbane River in Australia made him an officer, as to which it is not necessary to express an opinion. "Robertson and other officers" were commanded to convey Hazelton to Sydney, and "there to deliver him to the magistrate, gaoler, or other officer to whom it may appertain to give effect to any sentence passed by the Court there exercising criminal jurisdiction, together with this warrant, or a duplicate thereof."

Now it will be observed that, so far as Robertson is concerned, he did nothing in execution of this warrant. His function ceased when he had delivered Hazelton to "the magistrate, gaoler, or other officer to whom it may appertain to give effect to any sentence passed by the Court there exercising criminal jurisdiction." The delivery was to the Superintendent of Police by Robertson, unless it is held that the delivery was to the two

H. C. OF A. 1907.

HAZELTON v. POTTER.

Barton J.

detectives who came down to see about the matter. None of the persons concerned in the detention of the plaintiff were either a "magistrate, gaoler or other officer" of the kind who could give effect to the sentence passed by a Court exercising criminal jurisdiction in Sydney. Therefore, in the first place, Robertson did something wrongfully. He ignored the authority given him by the document. He handed Hazelton over to Potter, who seemed to have assumed the functions of "magistrate, gaoler or other officer" described in the warrant, but without authority. A moment's reflection would have shown Potter that he was not an officer charged with the execution of sentences of the local criminal Courts. There is nothing in the warrant authorizing the doing of anything with the plaintiff after he should be handed over to somebody in Sydney. The matter rests with his reception in Sydney. There is nothing to show what is to be done with him after he is taken into the hands of some person, really or assumedly under the warrant, in Sydney. Certainly we have the words at the end of the document: "that the said sentence of imprisonment may be duly carried into effect"; but it is impossible to argue that such words give authority to any person to take him beyond Sydney, or to keep him there for an hour. What, then, can be the meaning of such a warrant? Can it be a warrant fulfilling the requirements of Article 112 of the Order in Council, even supposing Article 112 applies? Is it a warrant for the removal—and it can only be a good warrant if it is this—of the person arrested and sentenced in order that he may be detained in Suva, Fiji? Obviously there is not a word in it which makes a direction to that effect, and it is impossible to suppose it to be a good warrant for such a purpose. But its badness in that respect is not a mere matter of argument. The hiatus which is constituted by want of any direction to take him beyond Sydney gapes on the face of the document, and it could not possibly be assumed by Potter, exercising his intelligence, that he was authorized by this document—or that anybody was authorized by this document—to take the prisoner beyond Sydney. If it was not a warrant to remove the prisoner beyond Sydney it was palpably bad. How could anyone, then, taking him there, justify keeping him?

Robertson had finished his share of the matter when he relinquished the custody of the appellant to Potter. Potter was not within the terms of the persons described in the warrant, and the warrant was not, upon any possible construction, a warrant for the removal of the plaintiff to Suva or beyond Sydney. If he was not to be in Sydney indefinitely, which goes without saying, in whose custody was he to be taken to Suva? In my opinion, the whole thing was visibly and radically bad. I consider, therefore, that the warrant set forth in this plea is no justification of the conduct pursued towards the appellant. In truth its face was almost a warning against interference with the liberty of the person named in it.

Now as to the plea that there was no notice of action. Speaking to the law on that subject generally, apart from the terms of the Order in Council, I will first refer to the case of *Cook* v. *Leonard* (1). *Bayley* J., in giving judgment, referring to cases of arrest under the supposed authority of a Statute, said :— "These cases fall within the general rule applicable to this subject, viz., that where an Act of Parliament requires notice before action brought in respect of anything done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the Act of Parliament, but extend to all acts done *bonâ fide*, which may reasonably be supposed to be done in pursuance of the Act." That is an assertion that the person acting should have some fair reason for acting, and if it appears that he has acted *bonâ fide* he will be justified. *Bayley* J. went on to add (2) :—"Where an Act of Parliament says, that in the case of an action brought against any person for anything done in pursuance or in execution of the Act, the defendant shall be entitled to certain privileges, the meaning is, that the act done must be of that nature and description that the party doing it may reasonably suppose that the Act of Parliament gave him authority to do it." *Holroyd* J. and *Littledale* J. gave judgment in the same direction.

In the case of *Cann* v. *Clipperton* (3), the necessity for there being a reasonable ground for belief is again emphasized. Lord

(1) 6 B. & C., 351, at p. 354. (2) 6 B. & C., 351, at p. 356.
(3) 10 A. & E., 582, at p. 588.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Barton J.

Denman C.J. there said:—"Else I am unwilling to say that, if a party acts *bonâ fide* as in execution of a Statute, he is justified at all events, merely because he thinks he is doing what the Statute authorizes, if he has not some ground in reason to connect his own act with the statutory provision." *Williams* J. says in the same case (1):—"It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a Statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the Statute." Obviously, if there were no show of observance of the Statute, there would be no necessity for notice.

I have referred to those cases in order to show that the law goes now a little further as to the protection of persons acting in pursuance, or intended pursuance, of an authority under a Statute. There is the case of *Read* v. *Coker* (2) on that subject, where *Jervis* C.J. said:—"The defendant does not want to establish a full and complete justification for the plaintiff's apprehension; to entitle him to a notice of action, it is enough to show that he *bonâ fide* believed he was acting in pursuance of the Statute, for the protection of his property."

The law seems to have relaxed a little the strictness of earlier cases, in which it was necessary not only to have *bonâ fide* belief, but to have reasonable ground for such belief. It seems now to have been laid down that the existence of *bonâ fide* belief is sufficient, and it is only where the question of the *bona fides* itself is to be tested that it will depend upon the reasonableness of the belief. At the same time, as His Honor has pointed out, there must be some ground for entertaining that belief, and if the person thinks that he has been acting in pursuance of the Statute, or the law, there must, at any rate, be some law which may be capable of constituting a defence when his conduct is impeached.

(1) 10 A. & E., 582, at p. 589.

(2) 13 C.B., 850, at p. 861.

In *Roberts* v. *Orchard* (1), *Williams* J. said:—"Most of the cases on this subject have been cited, and the result of them is, that where the question is whether a defendant is entitled to notice of action under an Act of Parliament of this nature, the proper way of leaving the question to the jury is thus:—'Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the Statute?' The law was so laid down by *Erle* C.J. and myself in the case of *Herman* v. *Seneschal* (2) and that appears to me good law and the result of the authorities."

That case supports what His Honor has said, that there must be in existence some law to which the person whose conduct is impeached could appeal in bar of the action if the facts were as he honestly thought they were.

Well, now, putting the matter on that basis—all the cases pre-suppose the existence of some law as to which such a belief could be at least colourably held. What law, then, was it? None has been suggested, whether as a law of New South Wales itself, or a law of some other community made binding here by our legislature or that of the mother country. If the plaintiff lawfully reached Potter's hands in Sydney, how could he take him to Suva? What colour was there for supposing that the act done was authorized? It seems to me that it is impossible to urge that there was any real colour.

With reference to Article 139, upon which respondent strongly relies, it has been broadly and strongly argued that the words "in any of Her Majesty's Courts," make the giving of such a notice necessary even in Courts of the King outside the limits of the Order. The limits of the Order are defined in that Article. [His Honor read the Article].

Of course the State of New South Wales, or any State in Australia would be excepted by the terms of that Article, unless it is otherwise expressly provided, in relation to any particular matter, and the question is, therefore, whether Article 139, by using the words "any of Her Majesty's Courts," expressly provides for the inclusion of the Courts of any autonomous self-governing community such as this. We are not deciding this

(1) 2 H. & C., 769, at p. 774. (2) 13 C.B.N.S., 392.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Barton J.

question to-day, but I should like to say that it would take a vast deal more argument than I have heard yet to persuade me to affirm the proposition that the Imperial Statute under which the Order in Council was made ever authorized the extension by this kind of legislation of a rule of procedure—because it is nothing but a rule of procedure—to Courts outside the limits of this Order, and the Courts of countries which are accustomed to manage their own business for themselves.

And looking at the terms of sec. 6 of the *Pacific Islanders Protection Act* 1875, it occurred to me that the explanation of the term "any of Her Majesty's Courts" might be found in the second and third paragraphs of the section, because the second paragraph empowers the Sovereign under Order in Council to create a "Court of justice," and so on, "and Her Majesty may by Order in Council from time to time direct that all powers and jurisdiction aforesaid, or any part thereof, shall be vested in and may be exercised by the Court of any British Colony designated in such Order, concurrently with the High Commissioner's Court or otherwise." It is clear that that provision might account for the use of the words "in any of Her Majesty's Courts," because, if we assume it was the intention not only to create the Court, but to designate other Courts in the British Colonies under this Order, then there would be reason for the Order, and for the term "in any of Her Majesty's Courts," being Courts created or designated as having jurisdiction in that behalf, and that is probably the reason for the use of the term. It should be added that the Supreme Court of New South Wales has not been "designated" in that behalf.

At any rate, it is a matter of ambiguity whether the term "any of Her Majesty's Courts" was intended to include any Court outside the limits of the Order, especially in view of the strictness with which Article 4 of the Order recognizes the existence, and, as far as possible, the exception, of self-governing communities. Where there is an ambiguity we are at liberty to adopt the more reasonable of two constructions open, and it seems to me that the construction to which we lean is more reasonable than that which would give this Article of the Order in Council an operation co-extensive with the whole judicial

system of the British Empire. If I had to decide whether Article 139 bore the construction that respondent's counsel places upon it, I should have to say that they had not convinced me of that construction.

As it happens, we are not driven to pronounce a decided opinion upon that question now, because the defendant, even assuming that the term "any of Her Majesty's Courts" is co-extensive with the judicial system of the Empire, did not establish that he was entitled to notice of action. On the question whether the provision as to notice of action under Article 139 could be held to apply to an action brought in a Court of New South Wales, I think the case of *Scott* v. *Lord Seymour* (1) is worthy of attention. That case is cited by *Sir Frederick Pollock* in his book on *Torts* (7th ed., p. 201), as authority for the proposition that "Nothing less than justification of the law will do. Conditions of the *lex fori* suspending or delaying the remedy in the local Courts will not be a bar to the remedy in an English Court in an otherwise proper case. And our Courts would possibly make an exception to the rule if it appeared that by the local law there was no remedy at all for a manifest wrong, such as assault and battery committed without any special justification or excuse."

It is not necessary, either, to decide specifically the questions which arose under Article 112, which provides:—"On arrival at the place named in the warrant, the person if removed under an order of deportation, shall be discharged or otherwise handed over to the proper gaoler, constable, magistrate, or officer." That Article intensifies other criticism that has been uttered this morning upon the warrant as framed, because it shows how vitally necessary it was that the final place should be named in the warrant, and direction given for the conveyance of the prisoner thither by some person designated.

It has been urged that under Article 112 there was authority in case of necessity to bring the person in custody to Sydney on his way to Fiji. To that I would only say that necessity has not been shown in this case. We have had only vague evidence as to the time which might be occupied in taking him one way or the

(1) 1 H. & C., 219.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Barton J.

other, but not to justify his being brought to Sydney; and more than that, to justify any transference or delegation of his custody, it would have to be shown that a strict necessity existed, such as the absence of reasonable means of communication, and of that we have no evidence.

I shall not say more as to the meaning of Article 112, because the whole case for the defendant has so broken down upon other grounds that it is not necessary to discuss these points. I agree with the learned Chief Justice that the appeal should be dismissed.

ISAACS J. read the following judgment:—The first defence ultimately persisted in is that the acts complained of were justified in law, that is, so far as the defendant is concerned. The justification alleged is shortly this: That the plaintiff was sentenced by a competent Court at Gizo to be imprisoned for three months at Suva, that a warrant was in fact, or appeared on its face to have been, duly issued to remove him from Gizo to Suva, that the plaintiff was brought to Sydney under the warrant on his way to Suva, and that all the defendant did was to receive and detain the plaintiff in aid of the person acting under the warrant, and in the manner thereby directed, and in the execution and intended execution of the warrant; and for the authority in law to do this, Article 112 of the Pacific Order in Council 1893 is relied on.

The acts complained of being *primâ facie* illegal in New South Wales, they cannot be justified except under some law having force within that State. See for instance, *The Queen* v. *Lesley* (1).

There is no law of New South Wales to protect the defendant, even assuming all the facts to be as alleged, and, therefore, unless he can point to some Imperial law empowering him to seize and imprison the plaintiff in New South Wales, his acts were unlawful. The defendant contends that Article 112 of the Order in Council is in force in New South Wales, and being made by virtue of an Imperial Statute is paramount to any law of that State. The Order in Council recites three enactments under the powers of which it is made, and adds the not uncommon expression as to powers, "or otherwise in Her Majesty vested." I pass by this additional phrase with the observation that no further power

(1) 29 L.J.M.C., 97.

has been suggested, and it would have to be one couched in the clearest terms to authorize an Order in Council conflicting with the Constitution and laws of New South Wales.

The legislative enactments referred to are the *British Settlements Act* 1887, the *Pacific Islanders Protection Acts* 1872 to 1875, and the *Foreign Jurisdiction Act* 1890.

The first named Act enables the Sovereign in Council to make laws and constitute Courts for the peace, order and good government of British subjects and others within any British settlement, that is, within certain British possessions not under a legislature constituted otherwise than by virtue of that Act or an Act repealed by it. New South Wales could not be affected by that provision.

The same Act also gives power to confer on any Court in any British possession—which, of course, includes New South Wales —any such jurisdiction, civil or criminal, in respect of matters arising in a British settlement as could be conferred on a Court in the settlement itself.

This power has not been exercised so far as New South Wales is concerned, and even if it had been, the jurisdiction conferred would not, in view of the express terms of the section, include an act done in that State.

The Statute may therefore be laid aside as immaterial to the matter in hand.

The *Pacific Islanders Protection Act* 1872 contains nothing relevant, and has not been referred to in argument.

The *Pacific Islanders Protection Act* 1875, by sec. 6, empowers the Sovereign to exercise jurisdiction over British subjects within any islands and places in the Pacific Ocean, not being within the British Dominions, nor within the jurisdiction of any civilized power, to create a High Commissioner—" in, over, and for such islands and places, or some of them," and by Order in Council to confer on the High Commissioner power to make regulations for the government of British subjects " in such islands and places."

So far there is no power conferred by the section to infringe on the autonomy of the State of New South Wales.

Then the same section proceeds to enact that the Sovereign may: (1) By Order in Council create a Court of Justice with

H. C. OF A. 1907.

HAZELTON v. POTTER.

Isaacs J.

jurisdiction over British subjects within the islands and places to which the authority of the High Commissioner shall extend, with power to take cognizance of offences on the sea or within jurisdiction of the Admiralty; and (2) by Order in Council direct that *such jurisdiction* may be vested and exercised by the Court of any British Colony designated in such Order; and provide for the transmission of offenders to such Colony for trial and punishment, for the admission of certain evidence on the trial, and for all other matters for carrying out such Order in Council; (3) by Order in Council ordain laws for the government of British subjects, *being within such islands and places.*

I am unable to find a word in the enactments referred to which directly empowers the Crown to legislate by Order in Council for the government of British subjects in New South Wales; nor, apart from the power to invest a Court in that State with jurisdiction to decide, and having decided, to enforce its judgments, in what may be shortly termed "Pacific Island Causes," and apart from the power to provide for matters auxiliary thereto, is there to be found a syllable enabling the Crown to legalize any act committed in the State which would otherwise, and according to the law of New South Wales, be unlawful.

The last Act specifically referred to as the source of authority for the Order in Council is the *Foreign Jurisdiction Act* 1890. But that Statute has no bearing on this case. It may be shortly described as an Act to provide for the exercise of British Courts outside the British Dominions, and by British Courts within the Dominion, over matters occurring outside the Dominions.

None of these legislative provisions directly gives power to authorize the imprisonment in New South Wales of a person who has been tried and convicted at Gizo, even though he be in course of removal to Suva.

Authority, however, to do so is claimed to rest on the necessity of the case, and reliance is placed on two cases, *Leonard Watson's Case* (1), and *Attorney-General for Canada* v. *Cain and Gilhula* (2). Neither of these cases supports the contention. In *Leonard Watson's Case* (1), the Court determined that, in pursuance of legislation in Upper Canada held to be valid apparently because

(1) 9 A. & E., 731,

(2) (1906) A.C., 542.

an Imperial Act recognized the power to authorize transportation, the applicant could and did in Upper Canada bind himself to submit to transportation from Upper Canada to Van Diemen's Land as a condition of pardon, and that the Crown was entitled to carry out the bargain so made, in the only way in which it could practically be performed. Lord *Denman* C.J. said (1) that the matter for consideration was "whether, under the circumstances of this prisoner, he can justly complain that he is injured and has a right to be set free." And his Lordship further said (2):—"As soon as the conditional pardon has been granted on the prisoner's petition, the Crown had a right to enforce the condition, and to take all necessary steps for that purpose. The circumstances confer the authority; and no warrant could enlarge it. . . . . As it is physically impossible to embark at once for Van Diemen's Land from Upper Canada, in every intermediate territory where the prisoner was confined in the necessary performance of the *condition to which he had lawfully bound himself* he was lawfully confined." Then the learned Lord Chief Justice adds:—"And Statute 5 Geo. IV. c. 84, (an Imperial Statute) in the section before quoted, shows that transports from the Colony on commuted sentences had been habitually received in England in their passage to the penal settlements."

The reasons for the decision seem to me to completely differentiate this case from the one cited. Here everything of which the plaintiff complains was done *in adversum*; the only thing in the nature of consent being to apologize to the High Commissioner in order to escape imprisonment of any kind; there is no Imperial Statute or State Statute recognizing interim imprisonment in New South Wales *en route* from one part of the geographical limits of the Western Pacific region to another, and consequently I fail to see how *Leonard Watson's case* (3) can be regarded as an authority for the defendant.

The Attorney General of Canada v. *Cain and Gilhula* (4), decides in accordance with a well established principle that when a power is granted everything necessary to effectuate it is impliedly granted with it unless expressly forbidden. Lord

(1) 9 A. & E., 731, at p. 782.
(2) 9 A. & E., 731, at p. 786.
(3) 9 A. & E., 731.
(4) (1906) A.C., 542.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Isaacs J.

Atkinson said (1) that since a State had power to expel aliens "it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all."

But the obvious limitation of the rule of necessary implication is the necessity itself. As Lord *Selborne* said in *Barton* v. *Taylor* (2), "The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity."

I do not understand that a voyage from Gizo to Sydney and thence to Suva is a necessary part of a prisoner's removal from Gizo to Suva, in the sense in which the constraint on the person of the alien outside Canada was held to be a necessary part of the act of his deportation in the case cited. It might be very convenient to make Sydney a resting place, but that is no inherent part of the act of the authorized removal.

Equally with the former case, the decision last cited fails to lend any support to the respondent's cause.

I am, therefore, not prepared, as at present advised, to assent to the proposition that, under the various Acts referred to, it is in any circumstances justifiable by virtue of the doctrine of necessity to authorize the imprisonment in New South Wales of malefactors sentenced in one part of the Western Pacific to punishment in another, and removed there by lawful warrant. It is, however, unnecessary to decide that point definitely in this case, because I am satisfied that the facts do not raise it.

But if there is power to enact by Order in Council such an authority, the respondent must show that it has been so enacted. It is no easy task to read Article 112 in conjunction with the rest of the Order so as to protect a person committing an act in New South Wales.

However general the expressions used throughout the body of the Order, they must in all cases be understood with reference to the 4th Article, defining at the outset the possible limits within which the Order may operate.

That Article begins by declaring that the limits of the Order shall be the Pacific Ocean and the islands and places therein.

(1) (1906) A.C. 542, at p. 546.

(2) 11 App. Cas. 197, at p. 204.

These are the extreme possible limits of the operation of the Order and consequently of every provision in it.

But from these possible limits of operation, there is an express exclusion. Unless otherwise expressly provided by the Order itself in relation to any particular matter, two descriptions of places are wholly excluded namely:—(1) British possessions having a legislature; (2) Places having a foreign jurisdiction or protection.

The respondent's construction of Article 112 might with equal accuracy be extended to bring in the second (foreign) class of excluded places as the first (British); and it is no answer to say that we cannot presume the Imperial legislature would invade the rights of foreign powers, because Article 4 expressly includes the Pacific Ocean and the islands and places therein, except the two classes specifically mentioned, and the mere fact of exclusion sufficiently indicates the extent of the earlier words if left unqualified. And yet it would scarcely be argued that if Honolulu, for instance, had a more convenient line of vessels from Sydney, the 112th Article would authorize removal via Honolulu.

I have used the expression "possible limits" because the actual working limits of the Order are made still narrower.

While it was evidently felt that the policing of the Western Pacific might in time require further proportions of space, it was thought sufficient in the meantime to specify a restricted part of the vast region described in Article 4 as the area within which—in the absence of directions from a Secretary of State—the jurisdiction should be exercised.

Accordingly Article 6 carefully cuts down the actual sphere of jurisdiction to an area within certain meridians and parallels. The boundaries of the area so limited are fully described in Article 6, and I need not repeat them. But a glance at the map shows that area to include, besides the islands mentioned in the sub-clause (1) of Article 6, a vast number of other islands and places "which are not excluded by the 4th Article of this Order," these latter words being carefully inserted in the 6th Article.

Within the area are territories some of which then belonged and still belong to other nations, and others have since become foreign territory, as American, French and German possessions.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Isaacs J.

Within that area, too, is situated practically the whole of Queensland, and a substantial strip of New South Wales. And the 6th Article provides:—"Until otherwise directed by a Secretary of State as hereinafter provided" (that is, by instructions to the High Commissioner) "jurisdiction under this Order shall be exercised only in relation to the following parts of the limits of this Order," that is, the specific parts I have referred to.

It is necessarily part of the defendant's case, that the 112th Article confers whatever jurisdiction exists—express or implied—to remove a prisoner, and to aid in that removal. But, if so, how escape from the precise words of the 4th and 6th Articles, the one delimiting the extreme possible sphere of jurisdiction, and the other more definitely restricting the working area of the jurisdiction?

The argument of implication resorted to in this case—an argument which entirely sets aside the actual language of the two Articles designedly inserted to control the interpretation of the whole Order—would equally well, in conceivable circumstances, subject the whole of Queensland, except a narrow strip on the West, and also no inconsiderable part of New South Wales, to the jurisdiction of the High Commissioner.

Indeed, the same argument, if valid to extend Article 4, might be pressed on still further, so as to override the explicit terms of the 6th Article, and to include all the rest of New South Wales, and the whole of Victoria, Tasmania, and New Zealand, all of which are within the extreme possible sphere, but beyond the actual working area of the High Commissioner's jurisdiction. These considerations appear to me to place the contention of the respondent outside the pale of probability. This is more evident when one looks also at the delimited area of the 6th Article, and sees the relative positions and distances of, say, the Solomon Islands and the Fiji Islands, on the one hand, and those of the same islands in respect of Sydney. New South Wales is not within Article 111 (2) of the Order, because its government has not consented to the reception of persons deported, and, even if there had been such consent, this is not a case of deportation. In short, therefore, there has been no express inclusion of New South Wales within the possible sphere of the 4th Article; nor if there

were, has there been any inclusion of the State in manner provided by the 6th Article, so as to get over what I may term the double exclusion; and lastly, an inclusion by implication is both contrary to the words of the 4th and 6th Articles, and in this case, at all events, unsupported by the facts.

But even this is far from constituting the full weakness of the defendant's case, which must fail even if he could succeed in establishing that Article 112 was part of the law in New South Wales. For even supposing that that Article would in appropriate circumstances apply, the elements of fact necessary to its application are wholly wanting. There has been no warrant of removal such as is contemplated by the Article. The only document in the nature of a warrant was one prepared and signed by Mr. Oliphant in Brisbane, outside his jurisdictional limits, and in contravention of Article 14, and, indeed, quite outside the limits of the Order. The warrant was consequently invalid in law (see *Perkin* v. *Proctor* (1)). The principle affirmed in such cases as *Hill* v. *Bateman* (2) and *Shergold* v. *Holloway* (3) was, however, invoked in aid of the respondent. It was argued on his behalf that, as the warrant was on its face a good warrrant, he was protected in any action he took in executing it. But, in my opinion, it was properly answered that, the warrant being invalid, and Potter not being an officer of the Court out of which it issued, and therefore not under any duty to execute it, was at best a mere volunteer *quâ* the warrant, and not within the principles of protection.

With equal force, it was also answered, that the warrant on its face was not a warrant of removal within the terms of the 112th Article because its terminus was Sydney. The fact that it authorized Robertson or some other officer of the Court to deliver the plaintiff and the warrant itself to some person in Sydney shows conclusively, to my mind, that it could not reasonably be read as containing authority to Robertson or any other person to convey Hazelton to Suva. Possibly it was intended to supplement it by some other warrant; but no other warrant appears, or was relied on. It was that warrant and that only on which this

(1) 2 Wils., 382, at p. 384. (2) 2 Stra., 710.
(3) 2 Stra., 1002.

H. C. OF A. 1907.

HAZELTON v. POTTER.

Isaacs J.

defence is rested. Its concluding words, "that the said sentence of imprisonment may be duly carried into effect," discloses not an authority, but an object; and applies not to authorize the conveyance of the appellant from Sydney to Suva, but to indicate the purpose of imprisoning him at Suva on his arrival there. On its face the intended effect of that particular warrant was unmistakeably exhausted in Sydney.

There is consequently no ground upon which Potter can obtain the benefit of the principles of the cases cited, and in the result he fails to show any legal exoneration for imprisoning the appellant.

Then Mr. *Scholes* relied, and ultimately founded his chief reliance, on Article 139 of the Order in Council. He contended that the phrase "Any of Her Majesty's Courts" includes the Supreme Court of New South Wales. So it does if read alone. But still there is the constantly speaking limitation of Articles 4 and 6, always reminding us that, however wide the language of any particular Article may be, nothing short of some express provision is to include the territory of any ordinary self-governing Colony. If under sec. 6 of the *Pacific Islanders Protection Act* 1875 the Court of a self-governing Colony be designated, it may, as suggested by my learned brother *Barton*, be the subject of an Order in Council. But such an Order in Council, conferring jurisdiction on Courts in British Colonies, would have to be made wider than the present, and, as required by the words of the Statute, would have to designate the Colony. The insuperable difficulty in the way of the defendant's construction, even with the aid of sec. 6 of the Act of 1875, is that the present Order in Council has fixed its utmost possible limits, "the Pacific Ocean and the islands and places therein," and apparently no extension whatever of this limitation is contemplated by the Order, though restrictions within the limits are provided for. The 139th Article could not, therefore, as the present Order in Council is framed, apply for instance to the Supreme Court of Western Australia or the Supreme Courts of England or Canada. Then why to that of New South Wales?

There is what I may term internal evidence contained in the Order which runs contrary to the respondent's contention. When

the frame of the Order is looked at, it is found that Part XVI. is headed "Official," that is, official for the purposes of the Order; and it contains three Articles. Article 137 has a heading "general official powers," that is certainly within the limits. It uses equally large terms with those found in Article 139. It speaks of "Any of Her Majesty's Officers"—clearly referring to officers performing duties within the specified limits, and not to officers all over the Dominion, or rather all over the world. Article 138 relates to cases heard by Acting Commissioners which must always be within the same limits. The only other Article of the Part is Article 139, and it prescribes procedure and practice for "Her Majesty's Courts," and speaks later on of "the Court." Why should not the same principle be applied to this Article as to the two preceding Articles of the same group?

Neither is it to be overlooked that, though the only Court constituted is the High Commissioner's Court, yet that tribunal is subdivided into what are frequently called "Courts" in various Articles of the Order, and are regarded as separate tribunals for many purposes. Moreover, much of the jurisdiction conferred by the Order is personal only, and within limits where foreign tribunals co-exist. These are expressly referred to in Article 110, and on the whole it seems to me that the phrase "any of Her Majesty's Courts" was not used with the intention of including every British Court throughout the world. If the unlimited meaning contended for is to be allowed to this expression, then I see no reason why in Article 110 the same method of interpretation should not be applied to the equally wide phrases "foreign Court" and "foreign officer," and "Court of any State in amity with Her Majesty" so as to empower the High Commissioner's Court to order any person within its jurisdictional limits to go to San Francisco or St. Petersburg and attend and give evidence before the Courts there.

If then the 139th Article does not operate in New South Wales, so as to govern and control the tribunals there, it cannot have any application to the case. It was indeed said by *Rogers* J. that, though it did not bind the Courts, it bound the parties. It could not bind the parties in respect of any act done in New South Wales unless it operated as part of the law in force in that State,

H. C. OF A. 1907.

HAZELTON v. POTTER.

Isaacs J.

and, if that be so, it would equally bind the Courts. But if it is not part of the law of New South Wales it binds no one, whether Court or individual, within the State territory. Finally, assuming once more that Article 139 is in full force in New South Wales, for it is not essential to definitely determine that question one way or the other, though I entertain no doubt upon it, still, in the circumstances of this case the principle of *Roberts* v. *Orchard* (1), followed in *Chamberlain* v. *King* (2), and *Rochfort* v. *Rynd* (3), and affirmed in *McLaughlin* v. *Fosbery* (4), would, by reason of the undisputed facts, place the respondent outside the shelter of the Article. In the Irish case cited the defendants, who were justices, were sued in trespass for a seizure under a distress warrant, and they pleaded the 8th section of an Act which prohibited any action against a justice of the peace for anything done by him in the execution of his office, unless commenced within six months. The action was commenced after the period, and the defendants moved on affidavit to set aside the action. The applicability of the 8th section was in question, and the decision turned on whether the signing of the distress warrant was an act done by the defendants in the execution of their office.

Palles C.B. said (5):—"The true rule is that the protection of the 8th section is afforded in every case in which the Justice *bonâ fide* believes in the existence of a state of facts which would have entitled him to act as he did" (citing *Chamberlain* v. *King*) (2); and he adds also supported by that case, "If the belief be *bonâ fide*, the protection is not lost by it not being reasonable, but the fact of its being unreasonable is, of course, an element in the determination of the *bona fides*."

After reciting the facts, the learned Chief Baron proceeeds to recognize and apply a rule which is very material in this case. He says (6):—"These being the facts, and the onus of proving the defence lying on the defendants, they should have affirmatively shown a *bonâ fide* belief, not that they had authority to do as they did, but that facts existed which would have so authorized them. Neither is the existence of this belief sworn to, nor are

(1) 2 H. & C., 769.
(2) L.R. 6 C.P., 474.
(3) 8 L.R Ir., 204.
(4) 1 C.L.R., 546, at. p. 566.
(5) 8 L.R. Ir., 204, at p. 208.
(6) 8 L.R. Ir., 204, at p. 209.

facts alleged which would show that such a belief might have been entertained."

The motion was accordingly refused, and the whole facts were left to be determined on the trial. Here in like manner the defendant had the onus of proving the defence, yet he does not say he had any belief in facts which would have justified him, and if he had said so, the evidence incontrovertibly establishes that he could not as a reasonable man have believed, and therefore could not have *bonâ fide* believed, that the warrant he assisted to execute was a warrant of removal from Gizo to Suva. That consideration is at once fatal in any aspect to his claim to succeed under the 139th Article.

I am therefore of opinion that this appeal must be allowed.

Appeal allowed. Order appealed from discharged, and rule nisi for nonsuit discharged with costs. Judgment for plaintiff restored, respondent to pay costs of appeal and of motion to rescind leave.

Solicitors, for the appellant, *McEvilly & McEvilly.*

Solicitor, for the respondent, *The Crown Solicitor of New South Wales.*

C. A. W.