[HIGH COURT OF AUSTRALIA.]

FERRANDO . . . . . PLAINTIFF;

AGAINST

PEARCE AND ANOTHER . . . . DEFENDANTS.

H. C. OF A. 1918.

SYDNEY, *Aug.* 5, 6, 29.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Alien—Deportation—Effect of Order in Council—Validity of order of Minister—Agreement to assist foreign State—Calling up conscripts—War Precautions Act 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 5—*Aliens Restriction Order* 1915 (*Orders in Council of 27th May* 1915 *and 1st March* 1916), *par.* 2J—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (VI.), (XIX.).

Sec. 5 of the *War Precautions Act* 1914-1916 provides that "the Governor-General may by order published in the *Gazette* make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular . . . (*b*) for deporting aliens from the Commonwealth; . . . (*i*) for appointing officers to carry the order into effect, and for conferring on such officers and on the Minister . . . such powers as are necessary or expedient for the purposes of the order." By par. 2J of the *Aliens Restriction Order* 1915 it is provided that "(1) The Minister" for Defence "may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth. (2) Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the competent naval or military authority, be conveniently conveyed to and placed on board a ship about to leave the Commonwealth, and whilst being conveyed to the ship, and whilst on board the ship, until the ship finally leaves the Commonwealth, be detained in such manner as the competent naval or military authority directs, and, whilst so detained, shall be deemed to be in legal custody."

Held, by *Barton*, *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Powers* J. dissenting), that par. 2J of the *Aliens Restriction Order* 1915 was within the authority conferred by sec. 5 of the *War Precautions Act* 1914-1916; that it conferred a discretion upon the Minister to make an order for the deportation of any particular alien, and authorized his subsequent arrest and detention

H. C. OF A. 1918.

FERRANDO v. PEARCE.

and the placing of him on board a ship chosen by the Minister, and his detention there whilst the ship was in the territorial limits of the Commonwealth; and that such an order was not rendered invalid by the fact that the Minister made it for the purpose of carrying out an agreement by virtue of which the Commonwealth Government was under an obligation to the country of which the particular alien was a subject to assist as far as possible in enforcing the return to that country of persons liable to military service there.

R. v. *Home Secretary*; *Ex parte Duke of Château Thierry*, (1917) 1 K.B., 922, followed.

MOTION referred to the Full Court by *Higgins* J.

An action was brought in the High Court by Cavaliere Giovanni Ferrando against the Honourable George Foster Pearce, Minister for Defence of the Commonwealth, and Cavaliere Emilio Eles, Italian Consul for Australasia. By the writ, which was issued on 25th July 1918, the plaintiff claimed against the defendant Pearce to restrain him, his agents, officers or servants, "from exercising the powers conferred upon him as such Minister by par. 2J of the *Aliens Restriction Order* 1915 for the purpose of arresting the plaintiff and/or ordering his deportation from the Commonwealth of Australia, or from detaining him or keeping him in detention or under arrest, or interfering with his freedom or liberty in any manner, or, alternatively, from ordering any restraint to be placed upon the liberty or movements of the plaintiff after the ship in which he is placed (if any) has left the Commonwealth of Australia." As against the defendant Eles the writ claimed an injunction restraining him "from instigating or procuring the doing of any of the said acts by the defendant Minister, his agents, officers or servants." The plaintiff moved for an interlocutory injunction in terms of the writ until the hearing of the action, and the motion was referred by *Higgins* J. to the Full Court.

From the affidavits the following facts (*inter alia*) appeared:—The plaintiff, who was an Italian subject resident and carrying on business in Melbourne, on 23rd April 1918 received a notice signed by the Italian Consul as follows: "The Italian Consul for Australasia orders the conscript Giovanni Ferrando to present himself on 27th inst., at 10 a.m., with his luggage, not exceeding six cubic feet, at the Drill Hall, Sturt Street, St. Kilda Road, South Melbourne, for embarkation and destination Italy." On 27th April 1918 a letter

was received by the plaintiff from the Italian Consul in the following terms :—" I make known to you that as you yesterday refused to submit yourself to a further medical examination as I proposed to you, you are obliged to present yourself this day at 10 o'clock, at the Drill Hall, Sturt Street, Melbourne, according to the order I gave you by registered post on 23rd inst. I now inform you that you are not in a condition prescribed by law in force to entitle you to a temporary exemption, consequently you are obliged to present yourself at the Broadmeadows Camp, where are collected the military reservists resident in Victoria, and where you will await pending embarkation to Italy. I make it known to you that if you are not at the said Camp by Tuesday the 30th inst., at 10 a.m., I will be obliged to order against you forcible measures in obedience to the orders received at this office from Rome." On 29th April 1918 the defendant the Minister for Defence made an order in the following terms :—" Commonwealth of Australia.—Department of Defence.—*Aliens Restriction Order* 1915.—I, George Foster Pearce, Minister of State for Defence, in exercise of the powers conferred upon me by the *Aliens Restriction Order* 1915, do hereby order that Giovanni Ferrando, an alien, a native of Italy, at present residing at 308 Flinders Lane, Melbourne, shall be deported from the Commonwealth." On 16th June 1918 the solicitor for Ferrando received from the Minister for Defence, through his secretary, a letter dated 15th June 1918 to the following effect :—" With reference to your letter of 30th April 1918 relative to the case of Cavaliere G. Ferrando, I am directed to inform you as follows : (1) that an agreement exists between the British and Italian Governments by which the Australian Government is under an obligation to assist the Italian Government as far as possible in the calling up of Italian conscripts and reservists resident in Australia ; (2) that under par. 2J of the *Aliens Restriction Order* 1915 the Minister has power to order the deportation of any alien ; (3) in order to comply with the above agreement the Minister has decided that he will exercise the power of deportation in the case of Italian subjects in Australia who fail to comply with their obligations to the Italian Government ; (4) that the Department has no Italian or British Orders or Regulations referring to the matter in its possession." A

H. C. OF A. 1918.

FERRANDO v. PEARCE.

further letter, dated 23rd July 1918, was received by the solicitor for the plaintiff from the Minister for Defence in the following terms: "With reference to your communication of 14th inst. relative to the case of Cavaliere Giovanni Ferrando, and his deportation to undergo military service in Italy, I am directed to say that in view of the medical reports received it has been decided that no action can be taken to exempt Ferrando from the requirements under Italian law relative to compulsory military service, and he must therefore proceed to Italy to render this service." On 24th July 1918 the plaintiff was, pursuant to the order of 29th April 1918, taken into custody by the military police, and was thereafter held in military custody.

Other facts are stated in the judgments hereunder.

Sir Edward Mitchell K.C. (with him *Lamb* K.C., *Abrahams* and *Hayes*), for the plaintiff. Upon the evidence it is clear that the Minister is using a power granted to him for one purpose, for another purpose to which he could not give effect without further legislation. The power given by par. 2J of the *Aliens Restriction Order* 1915 to deport aliens is a power to deport persons whose residence in Australia is objectionable or undesirable, and is confined to cases where the safety of the Commonwealth is concerned. That power of deportation is being used in order to transport beyond the seas a subject of a friendly country. There is no power in the Commonwealth to do anything in the nature of extradition without legislative authority (*Brown* v. *Lizars* (1)). A power entrusted to a public officer or body for a particular purpose cannot be exercised for another and totally different purpose (*Cunningham* v. *Tomey Homma* (2); *Cohen* v. *Wilkinson* (3); *Stockton and Darlington Railway Co.* v. *Brown* (4); *Duncan* v. *State of Queensland* (5); *Melbourne Steamship Co. Ltd.* v. *Moorehead* (6); *Pankhurst* v. *Kiernan* (7); *Lefroy's Canada's Federal System*, pp. 76, 80). The decision in *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry* (8), does not conflict with that principle, but was merely a decision that certiorari was

(1) 2 C.L.R., 837.
(2) (1903) A.C., 151, at p. 157.
(3) 12 Beav., 138; 1 Mac. & G., 481.
(4) 9 H.L.C., 246, at p. 256.
(5) 22 C.L.R., 556.
(6) 15 C.L.R., 333.
(7) 24 C.L.R., 120.
(8) (1917) 1 K.B., 922.

not a proper remedy. Here the plaintiff is seeking to restrain the doing of illegal acts, namely, detaining the plaintiff in custody and sending him back to Italy. The order for the plaintiff's deportation is only part of a scheme for sending him to Italy. If the decision in the *Duke of Château Thierry's Case* (1) goes to the extent of saying that an order for deportation can be made in circumstances like those of the present case, it is in conflict with the decisions of this Court already referred to. Although the *Aliens Restriction (Consolidation) Order* under which that case was decided was the same as par. 2J of the Commonwealth *Aliens Restriction Order*, the provisions of the *Aliens Restriction Act* 1914 under which it was made are very different from those of the *War Precautions Act*, and place no restriction on the power of deportation. Under sec. 5 of the *War Precautions Act* any order made by the Governor-General must be made "with a view to the public safety and the defence of the Commonwealth," and he cannot by his order give to the Minister unfettered power to deport any alien without regard to whether the deportation of that alien is for the public safety and the defence of the Commonwealth. It is for the Governor-General to determine the conditions under which aliens may be deported, and he has no authority to delegate his discretion as to those conditions.

[ISAACS J. referred to *R.* v. *Halliday* (2).]

There the regulation required that the Secretary of State should be satisfied that it was expedient for the safety or the defence of the Realm that a particular alien should be deported. That case is an authority for saying that in determining the intention of the Legislature regard should be had to what might be expected to be found in an Order in Council of this kind. If a strong *primâ facie* case is made out as to the unlawfulness of the plaintiff's detention on the balance of convenience, an interlocutory injunction should be granted. There is power to grant the injunction under sec. 75 (v.) of the Constitution. [Counsel also referred to *Farey* v. *Burvett* (3); *Beddow* v. *Beddow* (4); *R.* v. *Governor of Brixton Prison*; *Ex parte Sarno* (5).]

(1) (1917) 1 K.B., 922.
(2) (1917) A.C., 260.
(3) 21 C.L.R., 433.
(4) 9 Ch. D., 89.
(5) (1916) 2 K.B., 742, at p. 752.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Knox K.C. (with him *H. E. Manning*), for the defendant Minister for Defence. If sec. 5 of the *War Precautions Act* 1914-1916 is constitutional, the case is on all fours with the *Duke of Château Thierry's Case* (1). The Court there held that it was lawful in the circumstances to deport the alien, and for that purpose to put him on a ship bound for France. That is what is being done here, and the fact that it is being done in order to help Italy and that the indirect result will be that the plaintiff will be taken to Italy does not affect the validity of the order for deportation. The Minister does not intend to exercise any restraint on the plaintiff after he leaves the Commonwealth.

Clive Teece, for the defendant Eles. If the arrest and detention of the plaintiff are valid, this defendant has not done any unlawful act, and, as the Minister does not intend to exercise any restraint on the plaintiff after he leaves the Commonwealth, there is no serious, threatened and irreparable injury to the plaintiff.

Sir Edward Mitchell K.C., in reply.

BARTON J. The motion is refused by a majority of the Court. The reasons will be stated later.

Aug. 29.

The following judgments were subsequently read :—

BARTON J. By sec. 5 of the *War Precautions Act* "the Governor-General may by order published in the *Gazette* make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular . . . (*b*) for deporting aliens from the Commonwealth; . . . (*i*) for appointing officers to carry the order into effect, and for conferring on such officers and on the Minister . . . such powers as are necessary or expedient for the purposes of the order."

By the *Aliens Restriction Order* 1915, par. 2J, "(1) The Minister may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth. (2) Where an alien is

(1) (1917) 1 K.B., 922.

ordered to be deported under this Order, he may, until he can, in the opinion of the competent naval or military authority, be conveniently conveyed to and placed on board a ship about to leave the Commonwealth, and whilst being conveyed to the ship, and whilst on board the ship, until the ship finally leaves the Commonwealth, be detained in such manner as the competent naval or military authority directs, and, whilst so detained, shall be deemed to be in legal custody."

It will be observed that neither the section nor the Order makes any distinction between enemy aliens and friendly aliens. The section and the Order confer powers which, if validly conferred, are exercisable as to persons of either class.

The defendant Minister on 29th April last, under the authority so given him, ordered that the plaintiff, who then resided in Melbourne, should be deported from the Commonwealth. Under that order the plaintiff was on 24th July last taken into custody by the military police. The plaintiff, by writ dated 25th July, brought an action against the two defendants claiming to restrain the defendant Minister, his agents, &c., " from exercising the powers conferred upon him as such Minister by par. 2J of the *Aliens Restriction Order* 1915 for the purpose of arresting the plaintiff and/or ordering his deportation from the Commonwealth of Australia, or from detaining him or keeping him in detention or under arrest, or interfering with his freedom or liberty in any manner, or, alternatively, from ordering any restraint to be placed upon the liberty or movements of the plaintiff after the ship in which he is placed (if any) has left the Commonwealth of Australia." The writ also claimed an order restraining the defendant the Italian Consul for Australasia " from instigating or procuring the doing of any of the said acts by the defendant Minister," his agents, &c.

The present proceeding is a motion for an interlocutory injunction to the hearing in terms of the writ.

The affidavits disclose a number of interviews and letters which in the main deal with matters not relevant to the motion, such for instance as the fitness or otherwise of the plaintiff for what is called " sedentary " military service, and the alleged frustration of his endeavours to obtain inspection of the Italian regulations or orders

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Barton J.

applying to the calling up of the reservists of that nation. The motion was fully argued on behalf of the plaintiff, whose claim to the injunction is really founded on the allegation that the process of deportation is being abused by the Minister to enable him to assist the Italian Consul for Australasia to obtain the transportation to Italy of the plaintiff for the purposes of the military authorities of that ally of the Empire; and, as against the Italian Consul, that he has instigated or procured the defendant Minister to such abuse of his authority.

It is true that the Consul ordered the plaintiff to present himself on 27th April at a drill hall for embarkation, "destination Italy." It is true also that in a letter to the plaintiff's solicitor, dated 15th June, the Minister, through his secretary, informed him as follows: "(1) that an agreement exists between the British and Italian Governments by which the Australian Government is under an obligation to assist the Italian Government as far as possible in the calling up of Italian conscripts and reservists in Australia; . . . (3) in order to comply with the above agreement the Minister has decided that he will exercise the power of deportation in the case of Italian subjects in Australia who fail to comply with their obligations to the Italian Government."

This letter, though it states the intention to deport the class of Italian subjects mentioned, makes no threat of deportation to any Italian port. There is no doubt, however, that the plaintiff apprehends, and perhaps rightly apprehends, that the ship on which it is contemplated to place him will have such a destination. In view of the agreement referred to and of the command of the Consul to the plaintiff already quoted, such an apprehension is not surprising.

Considerably over two months have been occupied in correspondence and in medical examinations by doctors, who express differing opinions, so that the arrest for the purpose of deportation did not take place till the date mentioned, 24th July. If the deportation order is valid, the detention was conformable to par. 2J (2). The arrest and the order stand or fall together.

In the circumstances the balance of convenience is in favour of completely determining upon this motion the matter in contest. It was argued that the Minister's power is simply to deport, and

not to send the alien to any particular place. That is perfectly clear. But it is equally clear that a person cannot well be deported in a ship bound nowhere. The power is exhausted when the alien is placed outside the territorial limits of the deporting country—in this instance, Australia. Did the Minister contemplate or has he attempted or threatened to do anything beyond that? Suppose that by the Minister's authority the plaintiff is placed on board a vessel bound for Italy. It is not for the alien to choose his ship, and there is no authority other than the Minister or some power above him to make the choice. The choice is reposed in the Minister until the regulation is altered or expires. There is nothing to prevent him from choosing a ship bound for China, so far as the execution of his power of deportation is concerned. If he chooses a ship bound for Italy, that cannot possibly be said to make the deportation an abuse of his power or in any sense an illegality. The case is strikingly similar to that decided in England, first by the Court of King's Bench, and afterwards by the Court of Appeal, last year. See *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry* (1). There the Duke asked for a writ of certiorari for the removal into the King's Bench Division of an order for his deportation so that the order might be quashed. The deportation order was entirely similar to that made in the present case, save that it was for deportation from the United Kingdom. As in Mr. Pearce's order, no destination was expressed or suggested. But the Secretary of State admitted through his counsel that the order was made with the intention and for the purpose of sending the applicant to France, and thereby placing him within the power of the French military authorities. The application rested on the grounds, *inter alia*, that there were no facts or materials to justify the making of the order, and that there was no power to order his expulsion to France. Although the deportation order was silent as to destination, the King's Bench Division (2), Lord *Reading* presiding, arrived at the conclusion that there was no power to make it, and the writ was granted. The Secretary of State appealed (3), and his appeal was allowed. The Court of Appeal,

(1) (1917) 1 K.B., 552; 922. (2) (1917) 1 K.B., 552.
(3) (1917) 1 K.B., 922.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Barton J.

Swinfen Eady, *Pickford* and *Bankes* L.JJ., held that the order was valid, and accordingly that the Minister was at liberty to deport the applicant. The terms of the *Aliens Restriction Act* of the United Kingdom, sec. 1, pars. (*c*) and (*g*), are identical, *mutatis mutandis*, with those of the Australian *War Precautions Act*, sec. 5, pars. (*b*) and (*i*), already quoted, so far as the paragraphs in each case are concerned. But sec. 1 of the *Aliens Restriction Act* 1914 is as follows: "His Majesty may at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the Order—" and pars. (*c*) and (*g*), *inter alia*, follow.

Counsel for the plaintiff adverted to the distinction between the opening words of the section in the Imperial and the Australian Acts respectively. But in the state of war during which each Statute was passed "the public safety and the defence of the Commonwealth" may very well appear to a legislative authority to demand very much the same measures as are required on "an occasion of imminent national danger or great emergency."

Thus the authority and the occasion for the Aliens Restriction Order in the United Kingdom and that in Australia are substantially identical, and the provisions of the Imperial Order, art. 12, clauses 1 and 2, are identical with those of the Australian Order, par. 2J (1) and (2), save that in the latter case "Commonwealth" is substituted for "United Kingdom," "Minister" for "Secretary of State," and in sub-par. 2 "competent naval or military authority" for "Secretary of State." There can be no question, then, that the *Château Thierry Case* (1) is applicable to the present question. For myself, I see no escape from the reasoning of *Swinfen Eady* L.J. After pointing out that the question of medical unfitness ought not to affect the judgment of the Court, although it was a matter which might properly affect the Minister's discretion in deciding whether or not to make a deportation order, the learned Lord Justice said that the power to make the order was not dependent in any way on the absence of such a circumstance. Then his Lordship used

(1) (1917) 1 K.B., 922.

these words (1):—"It is urged by the respondent that the Executive Government claims and intends to exercise over him, by virtue of the Act and Order, an authority not thereby conferred. The Government claim not merely a right to deport the alien but to select the country or place to which he is to be deported. The Divisional Court held that there was not any power under the Statute or in the regulations to order the deportation of an alien to any particular country; that they must look behind the order, and if the object and intention of the Executive in making the order was to deport the alien to a particular foreign country they must treat this matter as if the order did in effect state that the alien was to be deported to France. So regarding it, the Court made absolute the rule for a certiorari to quash it. I am unable to follow this reasoning. If it were intended to do something illegal under a valid order, that would be good ground for restraining and preventing the illegal act, but not for quashing a valid order. A Secretary of State is not required to justify in a Court of law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the Court, and unless it be proved that the person is an alien the order must be quashed as made without jurisdiction; but I am not aware of any other ground upon which such an order can be quashed." He went on to express the opinion that clause (*c*) (here clause (*b*)) does not extend to authorize an order for the deportation to any particular place, but merely to provide for the deportation from the country concerned, and that the form of order adopted in the case he was then deciding (as in the present case) was the proper form of order —namely, that the alien "shall be deported from the United Kingdom" (here, from the Commonwealth). He expressed the opinion that clauses 1 and 2 of the article as to deportation are independent of each other, and that the Minister may immediately on making a deportation order cause the alien to be detained and placed on board a ship, and detained on board that ship until the ship finally leaves the United Kingdom, when his right to detain the alien any longer ceases. It was essential, he said, in order to

(1) (1917) 1 K.B., at p. 929.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Barton J.

give due effect to this provision, that the Minister should select and determine the ship upon which the alien was to be placed, and by thus selecting the ship the destination of the alien might be determined. Finally, the Lord Justice said (1):—"The conclusion at which I arrive is that, although the Executive Government has no power to order a deported alien to go to any particular place, yet by the authority given it to detain the alien and place him on board a ship (which I construe as meaning a ship which the Government select) and detain him there until the ship finally leaves the United Kingdom, the result may be that the alien will have to disembark in the country to which that ship shall directly sail. After the ship finally leaves the United Kingdom the Government cannot any longer detain him, but in most cases there would be practical difficulty in the alien leaving the ship before she makes the port to which she is bound." The other Lords Justices agreed, for reasons which, in no instance, conflict with or weaken those which I have quoted. While admittedly there would be good ground for restraining and preventing an illegal act intended to be done under a valid order, yet it is abundantly clear that no member of the Court of Appeal considered that there was anything illegal in that which the Secretary of State avowedly intended to do. And in this case the avowed intention of the Minister for Defence is to all intents and purposes of an identical nature. The concluding words of the judgment of *Swinfen Eady* L.J. (1) decisively show that the Court of Appeal perceived no illegality in the intended action.

It is well to draw attention to the fact that, in his affidavit deposing that the deportation order was issued by him under the powers given him by the *Aliens Restriction Order* 1915, the Minister for Defence adds that in his opinion the order was necessary and expedient with a view to the public safety and the defence of the Commonwealth. The addition was scarcely relevant. The determination whether a "matter" appears necessary or expedient to provide for with a view to the public safety and the defence of the Commonwealth is, as sec. 5 of the Act prescribes, vested in the Governor-General, of course in Council. But there is a more important consideration still. Parliament in sec. 5 has itself particularized,

(1) (1917) 1 K.B., at p. 931.

in pars. (*a*) to (*j*) inclusive, certain matters which it could not have committed to the supplementary legislature without considering that their regulation was at least "expedient with a view to the public safety and the defence of the Commonwealth," and the deportation of aliens is one of those matters. But it is argued that the opinion of Parliament to that effect does not bring the matter of deportation within the competence of that body or any body which it chooses to delegate for the purpose. It is trite law that any community is entitled to determine by its Parliament of what persons the community is to be composed. Hence sub-sec. XIX. of sec. 51 of the Constitution. But it is scarcely necessary to call that power in aid of the power conferred by sub-sec. VI. of the same section. It is obvious that deportations must in many cases be expedient with a view to public safety and defence. That they are capable of being so is enough. Being thus capable, whether they are so in fact is a matter which legislative authority, or authority delegated by the Legislature, alone can determine. There is, therefore, no sustainable objection on any constitutional ground to the action questioned. See *Farey* v. *Burvett* (1).

I am therefore most clearly of opinion that we cannot enjoin the Minister from exercising the powers conferred upon him by par. 2J, or from ordering the plaintiff's deportation, or from detaining him pending that event. Nor is there any ground to restrain the Minister from interfering with the liberty of the plaintiff after any ship on which he may be placed has left the territorial limits of the Commonwealth. There is no evidence of any intention to exercise any such interference, for which, indeed, the Minister would not have the slightest authority; and any such intention has been disclaimed by counsel on his behalf. As to the Italian Consul for Australasia, inasmuch as the arrest and the intended deportation are perfectly legal, there can be no pretence that he should be restrained from instigating or procuring lawful conduct.

On the whole case, then, the motion must be dismissed.

ISAACS AND RICH JJ. The application for an interlocutory injunction fails because, even taking the evidence at its best for the

(1) 21 C.L.R., 433.

H. C. OF A 1918.

FERRANDO v. PEARCE.

Isaacs J. Rich J.

plaintiff, the defendants are not committing or threatening to commit any breach of the law. His case was ultimately presented on two grounds. The first and main ground was relied on from the beginning. It was urged that, conceding the validity of sec. 5 of the *War Precautions Act* and of the Governor-General's gazetted Order 2J and of the Minister's order of 29th April 1918, the arrest and detention of the plaintiff were illegal, inasmuch as though purporting to be done under the authority of the Act, *Gazette* Order and Minister's order, they were really done for a purpose foreign to the Act, and therefore foreign to the subsidiary instruments, namely, for the purpose of either taking the plaintiff or compelling him to go to Italy to perform military service. It was contended that in those circumstances the arrest and detention were not in law for "deportation," but for "transportation" to Italy. It was urged that on the same principle that making a portion of an authorized line of railway with the intention of leaving that portion as a completed integer was not the same as making the same portion as a section of the full authorized integer, and was *ultra vires* the authority (*Cohen* v. *Wilkinson* (1)), so the arrest and detention of the plaintiff as part of a larger intended process was not the same in law as if mere deportation were intended. It was also argued that the Minister in causing the arrest and detention was, in the circumstances, departing from the express requirement in sec. 5 of considering whether the deportation of Ferrando was "necessary or expedient with a view to the public safety and the defence of the Commonwealth."

A careful examination of the Act and gazetted Order will show that, so long as the Minister's order stands, the plaintiff's contentions so far must necessarily fail. Sec. 5 gives power to the Governor-General by gazetted Order to "make provision" for certain matters. We may stop there, for a moment, to say that there are no words which are attached to the expression "make provision" so as to qualify them, so long as they are applied to the stated subject matters. The subject matters consist of two classes—first, general, and, next, specific; and the word "for," repeated, introduces both. The general are "for any matters which appear necessary or

(1) 1 Mac. & G., 481.

expedient with a view to the public safety and the defence of the Commonwealth." The specific are those preceded by the words "in particular" and respectively lettered (*a*) to (*j*) inclusive, each introduced by the word "for," which throws back the sense to the words "make provision." Not only because this is the clear arrangement of the words of the section, but also because of its necessary interpretation, the section does not impose on the Minister the duty of considering whether the arrest and detention complained of are necessary or expedient for safety or defence. That duty of considering may or may not devolve upon him, but not by reason of any requirement of the section itself. The word "appear" in the section means "appear to the Governor-General," and the "provision" which may be made is a "provision by the Governor-General." The Minister is not included by the Legislature in that portion of the section. Nor can he be introduced by implication, because that might lead to a conflict of opinion between the Governor-General and himself, which would be absurd.

The Minister's powers and duty under the gazetted Order 2J depend upon the terms of that Order properly construed. Now, what does that Order declare? It is in these terms:—"2J.—(1) The Minister may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth. (2) Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the competent naval or military authority, be conveniently conveyed to and placed on board a ship about to leave the Commonwealth, and whilst being conveyed to the ship, and whilst on board the ship, until the ship finally leaves the Commonwealth, be detained in such manner as the competent naval or military authority directs, and, whilst so detained, shall be deemed to be in legal custody."

Before construing it, reference should be made to sub-sec. 2 of sec. 5 of the Act. That provides: "Any provision of any order made under this section with respect to aliens may relate either to aliens in general or to any class or description of aliens." It is quite clear that the Legislature must have included in some way the power to deport a given alien. And the three phrases used to

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Isaacs J. Rich J.

denote that power are "aliens in general," "class of aliens" and "description of aliens." The sub-section does not go on to say "or any individual alien," but in some way from the contemplated nature of the Order the power to apply it to a given alien or given aliens must necessarily exist. What the Order establishes as the necessary "description" is "any alien with respect to whom such an order is made" that is a Ministerial order which identifies the alien as the subject of deportation.

Now, once an alien is identifiable as an alien to which Order 2J applies, the Minister's powers so far as concerns any determination or decision by him under Order 2J are ended. That Order itself provides by direction, not of the Minister, but of the Governor-General himself what is to be done. Once described by what is called the order of the Minister, the alien so described is bound by Order 2J to leave the Commonwealth, and is liable to arrest and detention until he leaves the Commonwealth. That liability it is not within the competency of the Minister to dispense with, because it is the law of the Commonwealth by virtue of the will of Parliament, and sec. 6 of the Act makes contravention of 2J (1) an offence.

The second paragraph of Order 2J, giving power of arrest and detention, is necessary to the liability of the alien to leave the Commonwealth; and, so long as that liability exists, it cannot be said that the security for it contained in par. 2 is unlawful. The paragraph enacts in express terms that the alien so ordered to be deported may be detained in such manner as—not the Minister, but—the competent naval or military authority directs, and that, whilst so detained, *he shall be deemed to be in legal custody*. It is evident that, unless the Minister's order is annulled in some way, all the acts complained of inevitably follow, not by force of the Minister's order nor by his direction or authority. His order is only a *fact* upon which the Governor-General's Order 2J operates by its own force, and, the Minister's order standing, all the arguments as to illegality of detention are useless, because the law not only directly authorizes it but declares it shall be deemed to be legal.

In every respect but one, Order 2J follows the English corresponding Order as set out in *R.* v. *Home Secretary*; *Ex parte*

Duke of Château Thierry (1). The exception is that in the English Order the power of detention and the discretion of directing the manner of detention are given to the Home Secretary, who makes the order for deportation, whereas here, as already pointed out, those powers are not given to the Minister. In the English case referred to, it was expressly decided by the Court of Appeal that the order, being on the face of it good, could not be impeached on the ground that the deportation was intended to be the first of a series of events which would ultimately result in the alien landing in his own country and being there subjected to military service.

It was suggested, in argument, that the decision in that case was really that the order could not be quashed on certiorari because it was not a judicial order. But it is also clear beyond doubt that the Court of Appeal determined the broad question of substantive law adversely to the contention of the plaintiff now under consideration. Reference need only be made to the concluding words of the argument for the respondent at p. 927 of the Report, to the answer given by *Swinfen Eady* L.J. at p. 931, to the express reference by that learned Lord Justice at the top of p. 932 to what he calls the "irregular manner" of submitting the question, and to his opinion on the law of the case, also to the words of *Pickford* L.J. at p. 934 and of *Bankes* L.J. at p. 935. At the last mentioned page it is stated that the Order "confers upon the Secretary of State an unlimited discretion. He may order the deportation of any alien. It is impossible for any Court of law to interfere with the exercise of that discretion, whether he exercises it because he considers the presence of an alien in this country undesirable on account of his character or antecedents or because he considers it undesirable that he should remain in this country when his services are required in time of war by an allied country of which he is either a subject or a citizen."

It was said by the learned counsel for the plaintiff here, that the correspondence showed the order of the Minister was made for the purpose of compelling the return of Ferrando to Italy, and therefore was outside the power granted to the Minister. Not

(1) (1917) 1 K.B., at p. 923.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Isaacs J. Rich J.

only is that view inconsistent with the English decision, but it is impossible to be right. Assuming, contrary to that decision and to the view we take of the requirements of the Governor-General's Order, that the Minister is bound by the Act itself to have regard to the public safety and defence of the Commonwealth, how is that inconsistent with an act, admittedly lawful in itself, being done with the desire and intention that there shall result from it, not by any act of the Commonwealth but from the force and operation of outside circumstances, also lawful in themselves, the addition of another soldier to the ranks of those fighting for the common cause of this Empire and its allies? Would not that advance, and therefore be expedient in, the interests of our public safety and the defence of this Commonwealth? The very reason for impeaching the validity of the purpose seems to place its justification beyond all question. Besides, the Minister, by affidavit, expressly swears that in making his order he did so because he thought it was necessary for safety and defence. It was expressly conceded that the *bona fides* of the Minister was not contested. That being so, the discretion he has exercised in making the order, that is, in specifying the plaintiff for deportation, is unexaminable (*R. v. Halliday* (1) and *Mackey* v. *James Henry Monks (Preston) Ltd.* (2)).

On every ground the plaintiff's case against the Commonwealth fails.

As regards the defendant Eles, who is Consul for Italy and is made defendant because he instigated the Commonwealth to do what it has done and is intending to do, since the Commonwealth action and intended action are lawful the instigation is equally free from wrong: *Accessorium sequitur suum principale.*

Complaint was made that the law of Italy as affecting the plaintiff does not require his service. That, even if true, would be quite immaterial from the only point of view which this Court is at liberty to adopt. The contention referred to may or may not be considered by the executive authorities; it would, however, be not only beyond our province but would be assuming a grave responsibility which rests elsewhere, and assuming it also without a

(1) (1917) A.C., 260. (2) (1918) A.C., 59, at p. 85, per Lord *Parker*.

sufficient knowledge of circumstances, to make any suggestion to the Executive on the subject.

It should be mentioned that, although the plaintiff adduced no evidence that the Commonwealth intended or threatened by any act to exceed the authority of Order 2J, Mr. *Knox* stated its intention not to exert any physical restraint on the plaintiff outside the Commonwealth.

[*Note.*—Since delivery of this judgment the case of *R.* v. *Superintendent of Chiswick Police Station*; *Ex parte Sacksteder* (1), has come to hand. We refer particularly to pp. 587 and 589.—*I.A.I. G.E.R.*]

HIGGINS J. The relevant parts of the *War Precautions Act* and of the *Aliens Restriction Order in Council* have been already set out; and the facts have been stated. It is admitted by counsel for the plaintiff that the Act is valid, and (with a reservation) the Order in Council. On the face of the Act, Order and documents, the detention of Ferrando is, for the present, legal; and it is for this reason, I presume, that the application is not for a habeas corpus but for an injunction. The first answer to the application is that the Minister does not intend to convey him to Italy—merely intends to convey him to the limits of Australia. It is not contended for the Minister that his power under the Order in Council extends beyond those limits, and the Minister does not intend to put any constraint on Ferrando after those limits have been passed. There is, therefore, *primâ facie*, no wrongful act intended by the Minister, and no ground for an injunction.

But it is admitted by the Minister that the object of the detention is to get Ferrando to Italy, the country of his birth, in order that he may render compulsory military service. The Minister says that an agreement exists between the British and the Italian Governments under which the Australian Government has to "assist the Italian Government *as far as possible* in the calling up of Italian conscripts and reservists resident in Australia"; and that in order to comply with the agreement the Minister has decided "to exercise the power of deportation in the case of Italian subjects in Australia

(1) (1918) 1 K.B., 578.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Higgins J.

who fail to comply with their obligations to the Italian Government." It is contended for the plaintiff that the power for the Minister to "deport" aliens—to put them out of Australia—is being used by him for another purpose, that he is abusing his power and should be restrained from exercising it. It is contended that this is not a "deportation" at all, but is part of a scheme of transportation to Italy. But the very recent case of *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry* (1), establishes, under a British Order in Council which is substantially the same as ours, that this very motive on which the Minister's order is based does not make the order invalid, or prevent the Minister from carrying it into effect to the extent of deportation. The motive with which an act otherwise legal is done does not vitiate the act itself (*King* v. *Henderson* (2)). The Minister is assisting the Italian authorities "as far as possible"—as far as he legally can, and no further. Practically, of course, Ferrando has to stay on the vessel until it reaches land—unless he choose to mount in the air or descend into the sea; but there is no constraint, so far as the Minister is concerned, after the vessel leaves Australia. If Ferrando get to Italy from Australia, it is not the Minister who transports him; the Minister does not affect to control him outside Australia. If the councils of two adjoining shires want a new road to connect their chief towns, the council of shire A makes the road to its boundary so as to meet the road to be made by the council of shire B to its boundary; and the motive that the two roads shall meet does not render the acts of either council improper.

There is some conflict of evidence between medical men here as to the fitness of Ferrando for military service, even "sedentary"; and there is some dispute as to the liability of Ferrando to be called up for service under Italian law. But the actual truth on these issues is irrelevant to the question of the Minister's power. Even if the Minister be mistaken on these matters; his order for deportation is binding, provided that it is within the powers conferred on him by the Order in Council and the Act. The power as conferred to "deport" an alien is absolute—is not subject to any condition as to fitness or liability to service. Should Ferrando land in Italy,

(1) (1917) 1 K.B., 552; on appeal, 922. (2) (1898) A.C., 720.

we must assume that the Government of Italy, our ally, will do him justice according to law.

But it is contended that under the *War Precautions Act* (sec. 5) the order for deportation must be made by the Minister "with a view to the public safety and the defence of the Commonwealth." These words which I have quoted are not used in the section with reference to the order of the Minister, but with reference to the Order in Council which confers power on the Minister to deport any alien. The Governor-General in Council may think —must be assumed here to think—that an absolute, unqualified power in the Minister to deport any alien, friendly or hostile, tends to the public safety and defence. The words limit the power of the Governor-General in Council—not the power of the Minister under the Order in Council. They limit the power of the Governor-General to the same extent as the power of Parliament is limited; and if the Governor-General should misinterpret the power with respect to defence, should treat it as wider than it is, should make an Order which, on the true interpretation of sec. 51 (VI.), cannot possibly be "with respect to" defence, or incidental thereto, the Order would be invalid. The Order in Council might have conferred the power to deport any alien on police constables. Under sec. 5 (*c*) the Governor-General might order the police to put all Danes or all Dutchmen in the district of Bendigo; and the police would have to obey the Order simply, without determining in the case of each particular man that confinement to the district would conduce to safety or defence. Similarly with postmasters and parcels under sec. 5 (*h*). But, if and so far as the mind of the Minister is relevant, he swears that this order of deportation as to Ferrando was in his opinion "necessary and expedient with a view to the public safety and the defence of the Commonwealth." It may well be so; it is not for us to say that the Minister had not justification for his opinion. The Minister is not under any obligation to state his reasons. Merely to assist our ally in getting men to serve is to assist the common cause, and the defence of the Commonwealth; and it may even be necessary in order to secure reciprocal action on the part of Italy with regard to British subjects. There is no

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Higgins J.

limit other than honesty of purpose upon the acts that the Legislature authorizes for the achievement of the defined object—deportation (*R.* v. *Halliday* (1)).

The words quoted limit, at most, the power of the Governor-General in Council. But grammatically they do not apply to the specific powers set out after the words " and in particular "; they do not grammatically apply to provisions for (*b*)—the deportation of aliens. I shall assume, however, in favour of the plaintiff, that it is implied by sec. 5 that these specific powers must be exercised " with a view to the public safety " &c. Indeed, it may be our duty to so construe the words as having this implication, as otherwise the power of the Governor-General might be outside the power as to naval and military defence conferred by the Constitution (sec. 51 (VI.)). On the same principle, we may treat the word " safety " in sec. 5 as applying to safety from enemies, external or internal, in this war (see the title of the Act). The section, however, is not challenged as invalid.

I assume, in favour of the plaintiff, that an injunction would be an appropriate remedy if the Minister were transporting Ferrando to Italy. Counsel for the plaintiff urges that the injunction should be granted until the trial of the action on the balance of convenience. But the balance of convenience is not the proper consideration if we are convinced that the defendant is exercising his legal right, and especially if that legal right might be defeated by mere postponement of the deportation. There is no indication that further investigation as to the facts would make the case for the plaintiff stronger; and as to the law, we are sitting in Full Bench, and the same arguments are open to the plaintiff now as would be at the trial. In my opinion, the motion for injunction should be refused, and with costs.

As for Cavaliere Eles, the Consul, he should be included in this order. Even if an injunction ought to be granted against mere instigation of an illegal act, the act to which he instigates the Minister is not illegal. But I do not think that, on the allegations of the plaintiff, the Consul is a necessary or proper party to the action.

(1) (1917) A.C., at p. 307.

GAVAN DUFFY J. This case was argued at the Bar on the assumption that the ultimate authority for the deportation order was to be found in sec. 51 (VI.) of the Constitution, and I shall deal with the case on that basis. If I were at liberty to act upon my own opinion I should hold the deportation order to be invalid, but I think that its validity is established by the case of *Farey* v. *Burvett* (1), which is not challenged in these proceedings. It was urged that even if the deportation order was valid the Minister should be restrained from executing it because his object was not merely to deport the plaintiff from Australia but to transport him to Italy, and so help to carry out an agreement under which the Commonwealth Government was assisting the Italian Government as far as possible in the calling up of Italian conscripts and reservists in Australia. But it is impossible to gather from the plaintiff's affidavits that the Minister has done or intends to do more than execute the valid deportation order, and he has assured us through his counsel that so far as he is concerned he does not propose to impose any restraint on the plaintiff outside the territorial limits of the Commonwealth. The execution of a legal authority is not illegal merely because the effect of such execution may be to bring about something not itself covered by such authority. This is not the case of the use of a power for an improper purpose. If the power of deportation were given as ancillary to the effecting of some purpose, it could only be used for the effecting of that purpose, but here the power is given to be exercised at the Minister's discretion, and the purpose which he hopes to attain by its exercise is immaterial. If any authority is required for this proposition it may be found in the recent case of *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry* (2).

An injunction is asked against the Italian Consul, not to prevent him from using any restraint over the plaintiff, but to prevent him from instigating or procuring the Minister to deport the plaintiff or to order any restraint to be placed on the liberty or movements of the plaintiff after he has left the Commonwealth of Australia. There is no evidence that the Consul has asked the Minister to do more than exercise his legal power of deportation, and, as I have

(1) 21 C.L.R., 433.

(2) (1917) 1 K.B., 922.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

already said, the Minister intends to do no more than exercise such power. In my opinion no case has been shown for an injunction against either of the defendants.

POWERS J. The application for an interlocutory injunction in this case, in my view, raises very important questions affecting the liberty of residents in the Commonwealth generally, and not only of the plaintiff in this case. As the opinion I have formed differs from that of all my colleagues I have considered the matter with special care. I adopt the words of Lord *Shaw* of Dunfermline in *R.* v. *Halliday* (1), with necessary alterations to make them applicable, to explain why I have so fully set out my reasons for dissenting. The gravity of the issue, and the respect which I entertain for my learned brothers, from all of whom I am constrained to differ, appear to me to demand a statement fuller than usual of the grounds of my own position and of the reasons why I do not concur in dismissing the plaintiff's application.

The plaintiff is an alien friend, born in Italy, forty-one years of age, subject to our laws, and entitled to claim protection against any breach of them affecting his person or property. No suggestion has been made that he is not a desirable citizen of the State of Victoria. In 1915 he submitted himself for medical examination for military service, and was rejected. On 23rd July last he was carrying on business in Melbourne in the State of Victoria. He has lost his liberty. He was arrested on 23rd July last, taken from a private hospital in Melbourne on 27th to Sydney, and detained in the old Darlinghurst Gaol, now used as a military hospital, in Sydney. On 29th counsel informed the Court, on an *ex parte* motion, that it was intended to forcibly deport him from the Commonwealth on 30th to go to Italy for military service, unless the Court made an order to prevent it. On 29th July the military officer in Court in charge of the plaintiff agreed not to deport him until the Court decided the application for an injunction then pending in the Court. Up to and on 5th August the plaintiff was being detained in military custody, although it was admitted that no vessel would be leaving for Italy for about three weeks. The acts mentioned were, it was

(1) (1917) A.C., at p. 276.

alleged, done under the authority of an order dated 29th April 1918, signed by the defendant the Minister for Defence, issued in the circumstances referred to later on. The following is a copy of the order :—" Commonwealth of Australia.—Department of Defence.—*Aliens Restriction Order* 1915. — I, George Foster Pearce, Minister of State for Defence, in exercise of the powers conferred upon me by the *Aliens Restrictions Order* 1915, do hereby order that Giovanni Ferrando, an alien, a native of Italy, at present residing at 308 Flinders Lane, Melbourne, shall be deported from the Commonwealth.—Dated this twenty-ninth day of April One thousand nine hundred and eighteen.—G. F. Pearce, Minister of State for Defence."

A writ was issued in this Court at the suit of the plaintiff, against the Honourable George Foster Pearce, Minister of State for Defence of the Commonwealth of Australia, and Cavaliere Emilio Eles, Italian Consul for Australasia. The writ was issued against the Italian Consul (Cavaliere Eles) as well as the Minister for Defence, because of the acts done and threatened by the Consul set out in the materials submitted to the Court by counsel in support of the application for an injunction. The plaintiff's claim set out in the writ is to restrain the defendant the Minister of State for Defence of the Commonwealth of Australia, his agents, officers or servants, from exercising the powers conferred upon him as such Minister by par. 2J of the *Aliens Restriction Order* 1915 for the purpose of arresting the plaintiff and/or ordering his deportation from the Commonwealth of Australia, or from detaining him or keeping him in detention or under arrest, or interfering with his freedom or liberty in any manner, or, alternatively, from ordering any restraint to be placed upon the liberty or movements of the plaintiff after the ship in which he is placed (if any) has left the Commonwealth of Australia ; and also for an order restraining the defendant the Italian Consul from instigating or procuring the doing of any of the said acts by the defendant Minister, his agents, officers or servants.

A motion was moved by Sir *Edward Mitchell*, on 5th August last in Sydney, for an injunction and order to restrain the defendants from doing the acts complained of in the writ.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

The interlocutory injunction was asked for on various grounds, but mainly on the following grounds: (1) the order for deportation in question, assuming it is an order for deportation from the Commonwealth only, was not authorized by the Order in Council under which it was admittedly made; (2) if the order of deportation in question was authorized by any Order in Council issued under the *War Precautions Act*, the Order authorizing it was invalid because the Act did not authorize the making of any Order in Council under which aliens could be deported, except an Order in Council which on the face of it showed that it appeared to the Governor-General that it was expedient or necessary, with a view to the public safety and the defence of the Commonwealth, to deport any aliens or class of aliens mentioned in the Order in Council, or unless it was proved that it was so made; (3) on the materials before the Court it was clear that the Minister had issued the order in question under and in pursuance of an agreement with the Italian Government to assist the Italian Government to compel alien Italian residents, by conscription, to leave the Commonwealth for military service in Italy, and not for any purpose authorized by the *War Precautions Act*; (4) even if the order in question could have been legally issued by the Minister under the Order in Council and the *War Precautions Act* referred to, the order for deportation in question was not a valid one because, although in form purporting to be an order for deportation from the Commonwealth, it was issued and used not for the purpose authorized by the Act, but was made with the object, purpose and intention of transporting, and was in effect an order for the transportation of, the plaintiff to Italy for compulsory military service, and as that was not authorized by law the order was invalid; (5)—in the alternative—if the order in question was made for the purpose only of assisting the Italian Government in the conscription, in the Commonwealth, of an alien resident here, and his arrest, detention and transportation to Italy for compulsory military service in that country, under an agreement with the Italian Government, it was invalid and the plaintiff was entitled under the laws of the Commonwealth to an injunction restraining the Minister and his servants and the Italian Consul from acting on the order; (6) even if the order in question was valid, the

plaintiff was entitled on the materials submitted to the Court to an injunction restraining the defendants from illegal acts being done and threatened to be done by them acting under the order; (7) on the materials before the Court it was clear that the Italian Consul was threatening to send—by force, if necessary—and was procuring and assisting the Minister to compulsorily send the plaintiff out of Australia to Italy as a conscript for military service in that country; that such acts were illegal, and ought to be restrained by the Court.

In support of the claim for the injunction on grounds 3 to 7, Sir *Edward Mitchell* relied on the facts proved on the application, some of which are referred to later on.

It was also contended:—(1) That the plaintiff is not medically fit for military service, active or sedentary. There is no doubt on the evidence that he is not fit for *active* military service; as to whether he is fit for *sedentary* service, the medical evidence is in conflict. (2) That the plaintiff is not liable to compulsory military service under Italian law. These are matters which are irrelevant if the Minister has the authority he claims, and it is for him, not the Court, to decide whether they will affect him in making the order if he has the authority.

The Minister, through counsel for the Commonwealth, takes up the position that an Order in Council (*Aliens Restriction Order* 1915), passed under the authority of the *War Precautions Act* 1914-1916, authorizes him to deport aliens for any reason he thinks fit, practically at his whim, or on the request of the Italian Government, and that this Court is not justified in interfering. Under the claim made, the Minister could deport an alien because he is a unionist, a pacifist, an anti-conscriptionist, an American or a Frenchman, irrespective of any question whether it appears to the Executive Council or to him to be necessary or expedient for the safety of the public or the defence of the Commonwealth. If a change of Government takes place while the regulation is in force, another Minister could, at his whim, deport an alien who is a non-unionist, loyalist, advocate of recruiting, conscriptionist, &c., irrespective of any question whether in the opinion of the Executive Council or even in his own opinion it is expedient or necessary for the safety of the public or the defence of the Commonwealth.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

If Parliament has given such a power this Court is not justified in interfering with or commenting on the granting of such a power. The first question is whether that power has been legally given to the Minister, if at all.

The defendant the Italian Consul, so far as this Court is concerned, takes a position similar to that taken by Peter and John before the Jewish Court, nearly 1,900 years ago. He says, in effect: —"Whether it be right in the sight of my King to hearken unto you more than unto my King, judge ye. As for me I cannot but act under the authority received from Rome, and I shall continue to conscript Italian aliens resident in the Commonwealth for compulsory military service in Italy, and use force, if necessary, to compel them to submit to conscription, and transportation to Italy for military service, and to get assistance, if necessary, from the Commonwealth authorities to enable me to carry out my orders."

The real questions to be decided on this application are (1) whether the order for deportation in question was in the circumstances authorized by law; (2) whether, if valid, the defendants have done, are doing or threaten to do unlawful acts under the order.

It was not suggested that the Minister had not acted in the belief that he was authorized to issue the order for deportation to assist the Italian Government, or that the Italian Consul did not believe that he had the right, in the Commonwealth, to enforce conscription and transportation of Italian aliens for military service in Italy, in accordance with instructions received by him from Rome. I think this Court should be satisfied beyond doubt that Parliament has authorized the arbitrary acts complained of in this case before it refuses the relief asked for by the plaintiff.

Before referring in detail to the Act and Order on which the order for deportation in question was made, I think it right—in view of the facts proved and admitted in this case, and the claims made on behalf of the Commonwealth to an unlimited and unqualified right of the Minister, or of any officer named in the Order in Council under which the order for deportation was issued, to do the acts complained of by the plaintiff—to quote part of what Lord *Shaw* of Dunfermline said in the House of Lords, in the case of *R.* v.

Halliday (1), about the duty of the Courts to strictly construe Acts, Orders and Regulations, even in time of war, which are claimed to empower the Government for the time being at its whim to deprive men of liberty by regulation and imprison them without trial, without giving them an opportunity of being heard in their defence, contrary to the provisions of *Magna Charta* and all of the Acts since passed to preserve the liberties for which the people of England fought, and which they won from the Crown and autocratic Governments under the Crown. Lord *Shaw* said (2) :—" To all which the reply is made : ' that all this scrupulous regard for liberty and the forms of trial and law is of no avail to any class of His Majesty's subjects against whom a " regulation " of internment has gone forth. If a British citizen be seized under such a fiat, it is not because he has offended against a regulation—not at all. He has, therefore, no right to be informed of any charge against him. Charge against him there is none. Trial—he cannot choose its form ; his rights are gone without trial. A " regulation " has gone forth against him. He has been " regulated " out of his liberty and out of every protection of the kind. He must be a passive victim.' " Further on, his Lordship says (3) :—" The form, in modern times, of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts only through His Ministers, is simply the Government of the day. The author of the power is Parliament : the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires* such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That

(1) (1917) A.C., 260. (2) (1917) A.C., at p. 284.
(3) (1917) A.C., at p. 287.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

way also would lie public unrest and public peril. On all this there is no disputing."

It was not contended that the Constitution did not allow Parliament under a *War Precautions Act* in times of war to confer on the Executive arbitrary powers to interfere with the liberty of the subject and private rights if necessary or expedient for public safety or defence, or that it did not allow the Executive to confer powers on Ministers and other persons to do so—on conditions to be laid down by the Executive—within the authority vested in it by Parliament. The safety of the public as a whole and the defence of the Commonwealth are more important than the rights of any citizens. All the Court is justified in doing on an application questioning the legality of any action taken is to see that any interference complained of is authorized by law.

It was conceded:—(1) That the Commonwealth Parliament has absolute power under the Constitution (sec. 51 (XIX.)) to pass laws for the deportation of aliens from the Commonwealth, conditionally or unconditionally, and for any reason it thinks fit. That power has never been questioned since the decision of this Court in *Robtelmes* v. *Brenan* (1). It is contended that Parliament has not exercised that power. (2) That the Commonwealth Parliament could, under its power to make laws with respect to naval and military defence, declare that all aliens who would not voluntarily go to their native countries to fight for their country, or the Allies, shall be subject to conscription and deportation from Australia, and the conditions under which they could be deported for the public safety or defence of the Commonwealth. The fact that the Australian people have, I regret to say, declared against conscription for military service out of the Commonwealth does not affect the power given by the Constitution to the Commonwealth Parliament. It might prevent Parliament from intentionally exercising the power. If my colleagues are right, the power has indirectly been given to the Minister through the Governor-General by an Order in Council made under sec. 5 of the *War Precautions Act* 1914-1916. (3) That the Governor-General, if it appeared to him necessary or expedient with a view to the public safety and the defence of the Commonwealth to do so, could under sec. 5 have made an Order in Council

(1) 4 C.L.R., 395.

declaring that it appeared to him necessary and expedient with a view to the public safety and the defence of the Commonwealth that any or all classes of aliens named by him, or that all aliens who would not voluntarily go to fight for their country, were to be or might be deported from the Commonwealth under conditions specified by him; or that only aliens who were fit for active military service in their own country were to be or might be deported from the Commonwealth; and by that Order in Council the Minister could have been authorized to carry out such an order. No such Order has been proved. (4) That if the order for deportation in question was authorized by law, the conflict of evidence as to the fitness of the plaintiff for military service (even sedentary) and the dispute as to the liability of the plaintiff for military service in Italy are irrelevant to the questions to be decided by the Court. (5) That if the acts done by the Minister and threatened to be done by him are authorized by law, no injunction should be granted against the Italian Consul, because the writ in the action only asks for an order restraining the defendant the Italian Consul from instigating or procuring the doing of any of the said acts by the defendant Minister, his agents, officers or servants, and not to restrain him from doing any act to force the plaintiff to go to Italy apart from acts done by the Minister.

It is not competent for the Court, if the order in question was authorized by law, to pronounce the order invalid because it may injuriously affect private rights. If the order is lawful, effect must be given to it.

The order for deportation in question, it is said, was made by the Minister on the authority of clause 2J of the *Aliens Restriction Order* 1915. The following is a copy of clause 2J :—"(1) The Minister may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth. (2) Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the competent naval or military authority, be conveniently conveyed to and placed on board a ship about to leave the Commonwealth, and whilst being conveyed to the ship, and whilst on board the ship, until the ship finally leaves the Commonwealth, be detained

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

in such manner as the competent naval or military authority directs, and, whilst so detained, shall be deemed to be in legal custody."

It is admitted that the *Aliens Restriction Order* 1915, and the amendments in 1915, 1916 and 1917, were issued under the authority of sec. 5 of the *War Precautions Act* 1914-1916. The following is a copy of what I consider the material parts of the section: "(1) The Governor-General may by order published in the *Gazette* make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular—(*a*) for prohibiting aliens, either generally or as regards specified places, and either absolutely or except under specified conditions and restrictions, from landing or embarking in the Commonwealth; (*b*) for deporting aliens from the Commonwealth; . . . (*f*) for *applying to naturalized persons, with or without modifications, all or any provisions of any order relating to aliens*; . . . (*h*) for preventing money or goods being sent out of Australia except under conditions approved by the Minister; (*i*) for appointing officers to carry the order into effect, and for conferring on such officers and on the Minister and on the Naval Board and the Military Board such powers as are necessary or expedient for the purposes of the order; and (*j*) for conferring on such persons as are specified in the order such powers with respect to the administration of oaths, arrest, detention, search of premises and persons, inspecting impounding or retention of books documents and papers, and otherwise, as are specified in the order, and for any other matters necessary or expedient for giving effect to the order."

As to the first ground of the application for an injunction, it appears to me that if the order for deportation is held to be in substance and in fact an order for deportation from the Commonwealth only, and not in fact an order for transportation to Italy or a link in the chain of transportation to Italy (or an order issued and used for a purpose not included in the authority given by the Act), the Order in Council, on the face of it, does give the Minister an unlimited and unqualified authority to issue any order he thinks fit for the deportation of all or any aliens in the Commonwealth, and for any reason he thinks fit. The words in the Order in Council are as wide as they could well be.

The next question to be considered is whether any general Order in Council or general regulations issued under the authority of sec. 5 of the *War Precautions Act* passed for the purpose of enabling the Governor-General to make regulations and orders for "the safety of the Commonwealth during the present state of war" could authorize a Minister or policeman or other officer to issue, at his own discretion, an order for deportation of an alien whether it did or did not appear to the Executive Council (Governor-General) or to the Minister or policeman that it was necessary or expedient with a view to the public safety and the defence of the Commonwealth. The answer to that question depends on the proper interpretation of sec. 5 of the *War Precautions Act* 1914-1916.

Two constructions of sec. 5 were debated: (1) that the words "which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth" grammatically could not be applied to limit the words in sub-sec. (*b*) "for deporting aliens from the Commonwealth," and that the Governor-General could, under the Act, issue any order he thought fit for the deportation of aliens, whether it appeared to him to be necessary or expedient with a view to the public safety and the defence of the Commonwealth or not; (2) that on the true interpretation of the section, looking at the purpose and object of the Act and the section as a whole, the authorities given by the section were only to be exercised if it appeared necessary and expedient with a view to the safety of the public and the defence of the Commonwealth.

Looking at sub-sec. (*h*), I do not know any power of the Commonwealth Parliament under the Federal Constitution that would justify it in authorizing the Governor-General to make an order for preventing money or goods from being sent out of Australia except "under conditions approved by the Minister," unless it is under the Commonwealth power to make laws in respect to naval and military defence. The sentence grammatically may bear the construction first mentioned, but to ascertain the proper construction the Court must look at the purpose of the Act (see *Tozer* v. *Viola* (1), per *Swinfen Eady* L.J., and *Hill* v. *East and West India Dock Co.* (2), per Lord *Cairns*).

(1) (1918) 1 Ch., 75, at p. 85. (2) 9 App Cas., 448, at p. 454.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

Looking at the purpose for which the *War Precautions Act* was passed, under the power of the Commonwealth Parliament to make laws with respect to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth" (sec. 51 (VI.) of the Constitution), the title of the Act (which can assist, but not control, the interpretation) and the Act as a whole, including sec. 5 and all its sub-sections, it appears to me that on a true interpretation of sec. 5 the authority given by Parliament to the Governor-General to do any act under the section is subject to its appearing to him necessary or expedient with a view to the public safety and the defence of the Commonwealth. Sub-secs. (*i*) and (*j*) of sec. 5, in my opinion, show that the Act contemplated an order by the Governor-General only as to the persons or class of persons to be deported, with authority to the Governor General to appoint officers "to carry the order into effect" &c. (*i*), and "for giving effect to the order" (*j*).

I agree with the contention of plaintiff's counsel that, according to the proper interpretation of sec. 5 of the *War Precautions Act*, the Governor-General must issue an Order stating the aliens or class of aliens to be deported; and that the words "any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth" prevent the Governor-General from authorizing the Minister or a policeman to deport aliens unless it appears to him, the Governor-General, to be necessary or expedient with a view to the public safety and the defence of the Commonwealth that they should be deported, and unless he so orders. Such an Order could authorize the Minister to decide whether any alien comes within the class ordered to be deported, and could authorize the Minister or any officer to carry out the Order.

It is not contended that the power to deport aliens for any reason whatever could not be given under the general power of the Commonwealth Parliament to deal with aliens (The Constitution, sec. 51 (XIX.)). The answer is that the Commonwealth has not passed any Act under that power to give the Governor-General or the Minister an unqualified power to deport aliens, but has only given a limited one under the *War Precautions Act*. What

the Governor-General himself has not been authorized by Parliament to do cannot be done by authorizing a Minister to do it. The Order in Council, on the face of it, does not show, as it did in the case before the House of Lords in *R.* v. *Halliday* (1), that the order to deport was to be exercised only when it appeared necessary for securing the safety of the public or the defence of the Realm. No attempt was made by any officer of the Government to show that the Order in Council in question was made by the Governor-General because it appeared necessary or expedient for the public safety or defence of the Commonwealth, or that the order for deportation in question was made because it appeared to the Governor-General necessary or expedient for that purpose. The Minister submitted an affidavit in which he stated that the order for the deportation of the plaintiff was, in his opinion, necessary and expedient with a view to the safety of the public and the defence of the Commonwealth, but counsel for the Commonwealth admitted that it did not assist the Court in deciding whether the order was authorized, because the Act required any valid order to appear to the Governor-General to be necessary &c. Any authority given under the *War Precautions Act* which has for its foundation the power to make laws as to the naval and military defence of the Commonwealth — apart from its necessity for defence purposes—would be, in my opinion, *ultra vires* the Act. The Order on which the Minister purported to issue the order of deportation in question is in the following words: "The Minister may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth." No words could possibly have been wider, and, in my opinion, they confer a greater power on the Minister than Parliament vested in the Governor-General.

For the reasons mentioned, I have come to the conclusion that the order for deportation issued under the Order in Council quoted was not authorized by sec. 5 of the *War Precautions Act* 1914-1916.

It was contended that we are bound by the decision of this Court in *Farey* v. *Burvett* (2) to hold that the Governor-General had authority to issue the Order he did in this case. The decision has

(1) (1917) A.C., 260. (2) 21 C.L.R., 433.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

not been questioned, and I recognize that we should follow that decision. All that was really decided in that case was "that the legislative powers of the Commonwealth Parl ament conferred by sec. 51 (VI.) and (XXXIX.) of the Constitution include a power during the present state of war to fix within limits of locality the highest price which during the continuance of the War may be charged for bread"; and for that reason the *War Precautions Act* No. 10 of 1914 as amended by the Act No. 3 of 1916 was valid so far as it purported to authorize the making of certain regulations by the Governor-General in question *in that case* for securing the public safety and defence of the Commonwealth. The Act of Parliament itself, in that case, expressly authorized the Governor-General to fix the prices of articles of food; and the regulations were admittedly within the power given by the Act. I cannot, therefore, see how that decision in any way affects our judgment in this case, in which the power of Parliament to pass the Act is not questioned, and the question is whether the act done is authorized by the Act and an Order in Council issued under the Act.

We were referred to *R.* v. *Halliday* (1) in support of the contention of the Commonwealth that the order in this case was authorized by the Commonwealth *War Precautions Act* and the Order made thereunder. Their Lordships decided that "reg. 14B of the *Defence of the Realm (Consolidation) Regulations* 1914, which empowers the Secretary of State to order the internment of any person of 'hostile origin or associations,' where on the recommendation of a competent naval or military authority it appears to him expedient for securing the public safety or the defence of the Realm, is authorized by the *Defence of the Realm Consolidation Act* 1914, sec. 1, sub-sec. 1, which confers upon the King in Council power during the continuance of the War 'to issue regulations for securing the public safety and the defence of the Realm'; therefore an order made in accordance with reg. 14B for the internment of a naturalized British subject of German birth is valid." That decision, on a similar order and on similar facts, would be followed by this Court. I cannot, however, see how that decision controls the Court in deciding whether the order for deportation under a Commonwealth Act,

(1) (1917) A.C., 260.

and an entirely different Order, in the circumstances proved and admitted in this case, is or is not valid. In that case the regulation under which the order was issued was made under the authority of the *Defence of the Realm Consolidation Act* 1914, sec. 1, sub-sec. 1, which confers on the King in Council power during the continuance of the War to issue regulations "for securing the public safety and the defence of the Realm." The authority given is similar to that given in the opening words of sec. 5 of our Defence of the Commonwealth Act, called the *War Precautions Act* 1914-1916. Under the authority of sub-sec. 1 of sec. 1 of the *Defence of the Realm Consolidation Act* referred to, a regulation (14B) was issued. The opening words are as follows: "Where on the *recommendation of a competent naval or military authority* or of one of the advisory committees hereinafter mentioned *it appears* to the Secretary of State *that for securing the public safety or the defence of the Realm it is expedient* in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order." The English regulation sets out important provisoes for the protection of the persons interned under any such order. The order questioned on that appeal before their Lordships commenced with the following words:— "Whereas, on the recommendation of a competent military authority, appointed under the Defence of the Realm Regulations, it *appears to me that, for securing the public safety and the defence of the Realm*, it is expedient that Arthur Zadig, of 56 Portsdown Road, Maida Vale, W., should, in view of his hostile origin and associations, be subjected to such obligations and restrictions as are hereinafter mentioned: I hereby order that the said Arthur Zadig shall be interned in the institution in Cornwallis Road, Islington, which is now used as a place of internment, and shall be subject to all the rules and conditions applicable to aliens there interned."

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

In that case the only question was whether, on a true construction of the Act, Parliament had authorized the making of such a regulation. Lord *Finlay* said (1): "It was insisted that Parliament had not conferred the power to make such an order in the interest of the public safety against such persons." It was clear to the Court (1) that the regulation required the Secretary of State to be satisfied that it was expedient *for securing the public safety and the defence of the Realm* before any order could be issued; (2) that it was only on the recommendation of a competent naval or military authority or of an advisory committee that the Secretary of State could act—no order could be issued at the mere whim of the Secretary of State; (3) that the order provided for representations being made against the order, and for their consideration by an advisory committee presided over by a Judge of the High Court; and that if the Home Secretary was satisfied by the report of such committee that the order might be revoked or varied *without injury to the public safety and the defence of the Realm*, he might revoke or vary the order. The Lord Chancellor (Lord *Finlay*) in delivering judgment said (2): "Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken." Lord *Atkinson* said (3): "It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the *mere whim of the Executive*" (In this case the power claimed is not only to do that "at the mere whim of the Executive" but to do it at the mere whim of a Minister, and it is admitted that if the unlimited power can be given under the authority of the Act to the Minister it could be given to a policeman to be exercised at his mere whim.) Lord *Atkinson*, continuing, said (4):—"It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the Realm it would not be *ultra vires* and void. . . . By the several provisions already referred to every precaution that could be reasonably taken has, I think, been taken to prevent error or abuse." In the *order* "it sets out . . . that the appellant shall be interned

(1) (1917) A.C., at pp. 267-268.
(2) (1917) A.C., at p. 270.
(3) (1917) A.C., at p. 271.
(4) (1917) A.C., at pp. 272-274.

for *the purpose of securing the public safety and the defence of the Realm.*" Lord *Wrenbury* agreed. Lord *Shaw* of Dunfermline dissented from the judgment, which affirmed the decision appealed from. The decision was given expressly on the grounds: (1) that the regulation authorized the internment of an alien if it were expedient for the public safety &c., and was passed under an Act specially authorizing such a regulation; (2) that the order made thereunder only authorized the internment if the Secretary of State on certain recommendations was satisfied that it was expedient &c.; and (3) that the order issued by the Secretary of State sets out that the internment was expedient &c.

I do not see how such a decision can assist the Crown in supporting the view that, under the limited power given to the Governor-General under the Commonwealth *War Precautions Act*, the Executive Council has the power to delegate to a Minister or a policeman, at his mere whim, the unqualified right to deport any alien whether he is or is not satisfied that it was necessary or expedient &c. The reasons given by their Lordships in the case referred to confirm me in the view I have previously expressed that the order for deportation was not valid.

As to grounds 3 to 5, the plaintiff's counsel claimed that, assuming the order in question could have been legally issued by the Minister under the Act at his whim for the deportation of the plaintiff from the Commonwealth—and the order made under the Act in question is in form an order for deportation from the Commonwealth only—the plaintiff is entitled to the injunction in this case on the grounds: (1) that the order in question was issued, and used, not for the deportation of the plaintiff from the Commonwealth, but with another object and intention and for another purpose *not authorized by law*, namely, for the arrest and compulsory transportation of a resident in Australia to Italy; or (2) that the order in question was made to assist the Italian Government in the conscription, in the Commonwealth, of an alien resident here, and for his arrest, detention and transportation to Italy for compulsory service in that country, under an agreement made between the British and Italian Governments, and not for deportation from the Commonwealth in the sense in which the words are used in the *War Precautions Act*.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

It was contended by plaintiff's counsel that on the materials before the Court it was clear the Minister had issued the order for the above purposes, as a link in the chain of such arrest and transportation, and for that purpose only.

If some of my learned brothers had not suggested that the plaintiff adduced no evidence that the Commonwealth intended or threatened by any act to exceed the authority given by Order 2J, assuming it to be an order for deportation only, I should not have thought it necessary to do anything more than state my reasons for doubting whether, assuming the order was made as alleged by counsel for the plaintiff, it was valid. I concur in the view stated by my brother *Higgins* in his judgment on this point, as to the effect of the evidence and admissions in this case, when he says (1):—"But it is admitted by the Minister that the object of the detention is to get Ferrando to Italy, the country of his birth, in order that he may render compulsory military service. The Minister says that an agreement exists between the British and the Italian Governments under which the Australian Government has to 'assist the Italian Government *as far as possible* in the calling up of Italian conscripts and reservists resident in Australia'; and that in order to comply with the agreement the Minister has decided 'to exercise the power of deportation in the case of Italian subjects in Australia who fail to comply with their obligations to the Italian Government.' It is contended for the plaintiff that the power for the Minister to 'deport' aliens—to put them out of Australia—is being used by him for another purpose, that he is abusing his power and should be restrained from exercising it. It is contended that this is not a 'deportation' at all, but is part of a scheme of transportation to Italy." Not only the object of the detention, but the sole purpose of the arrest, detention and proposed deportation by the Minister were, I understood admittedly, to assist to compel Ferrando to go for compulsory military service to Italy. Whether admitted or not, the evidence, in my opinion, clearly shows that the order in question was issued for that purpose.

I do not think it is necessary to refer to more than a few portions of the evidence submitted, to show that the order for deportation

(1) *Ante*, p. 259.

and the other acts complained of were done solely to assist in the conscription in Australia and transportation to Italy of the plaintiff, as a conscript, in pursuance of the agreement between the British and Italian Governments; and that the Italian Consul intended to use force, if necessary, in the Commonwealth to compel conscription in the Commonwealth and transportation to Italy. On 23rd April 1918 the Italian Consul issued and served on the plaintiff the following notice (omitting formal parts):—"Royal Italian Consulate.—Call to Arms and Repatriation of Conscripts Resident in Australia.—The Italian Consul for Australasia orders the conscript Giovanni Ferrando to present himself on 27th inst., at 10 a.m., with his luggage, not exceeding six cubic feet, at the Drill Hall, Sturt Street, St. Kilda Road, South Melbourne, for embarkation and destination Italy.—The Royal Italian Consul: E. Eles.—Melbourne, 23rd April 1918." On 27th April 1918 a further communication was sent by the Consul to the plaintiff, which contained the following notice and threat:—"I make known to you that as you yesterday refused to submit yourself to a further medical examination as I proposed to you, you are obliged to present yourself this day at 10 o'clock, at the Drill Hall, Sturt Street, Melbourne, according to the order I gave you by registered post on 23rd inst. I now inform you that you are not in a condition prescribed by law in force to entitle you to temporary exemption, consequently you are obliged to present yourself at the Broadmeadows Camp, where are collected the military reservists resident in Victoria and where you will await pending embarkation to Italy. I make it known to you that if you are not at the said Camp by Tuesday the 30th inst., at 10 a.m., I will be obliged to order against you forcible measures in obedience to the orders received at this office from Rome.—E. Eles, Italian Consul." On 29th April 1918, the day before the time allowed (by the above notice) for the plaintiff to be at the Camp, the order of the Minister in question was issued. That the order was issued to assist the Italian Government in enforcing compliance with the notice is apparent from the letter of the Minister of 15th June, explaining to the solicitor for the plaintiff his reason for deciding to deport the plaintiff. The following is a copy of the letter (omitting formal parts):—"With reference to your letter of 30th April 1918 relative

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

to the case of Cavaliere G. Ferrando, I am directed to inform you as follows: (1) that an agreement exists between the British and Italian Governments by which the Australian Government is under an obligation to assist the Italian Government as far as possible in the calling up of Italian conscripts and reservists resident in Australia; (2) that under par. 2J of the *Aliens Restriction Order* 1915 the Minister has power to order the deportation of any alien; (3) in order to comply with the above agreement the Minister has decided that he will exercise the power of deportation in the case of Italian subjects in Australia who fail to comply with their obligations to the Italian Government; (4) that the Department has no Italian or British Orders or Regulations referring to the matter in its possession." The letter from the Minister of 23rd July 1918, the date the order was first put in force, sets out even more clearly that he was enforcing and intended to enforce *deportation to undergo military service in Italy*. The following is a copy of the letter (omitting formal parts): "With reference to your communication of 14th inst., relative to the case of Cavaliere Giovanni Ferrando, *and his deportation to undergo military service in Italy*, I am directed to say that in view of the medical reports received it has been decided that no action can be taken to exempt Ferrando from the requirements *under Italian law relative to compulsory military service*, and *he must therefore proceed to Italy to render this service*."

It was not contended that the Imperial Parliament had passed an Act authorizing acts to be done in the Commonwealth in pursuance of the agreement referred to with the Italian Government, or that the Commonwealth Parliament had passed the necessary legislation to enable the agreement to be legally carried out by assisting conscription in Australia and transportation of residents from the Commonwealth to Italy by deportation or otherwise; and no claim was made that the order was or could be issued under any authority to enforce in the Commonwealth an agreement between the British and Italian Governments. In none of the lengthy correspondence submitted on the application does it appear that the Minister or the Italian Consul had any other intention than that expressed in his letter of 23rd July, namely, that the

plaintiff was to be deported to undergo military service in Italy, and that he must proceed to Italy to render that service.

An affidavit by Ernest Leslie Hulme was submitted to the Court, stating that he had experience in connection with deportations of Italian subjects from the Commonwealth of Australia, and that it was a matter of general knowledge, in his belief, that Italians leaving the Commonwealth under an order for deportation are kept under surveillance and military control until they reach Italy. No evidence was submitted by the Commonwealth to controvert that evidence. Counsel for the Minister stated that there would not be any surveillance or military control after the vessel left the Commonwealth; and at the close of the argument, at the request of the Court, stated that the Minister undertook not to exercise physical restraint on the plaintiff after he was deported beyond Commonwealth territory. That undertaking did not affect the legal right of the plaintiff to an injunction, but would of course be taken into consideration when the Court considered what order it should make. No such undertaking was given by or on behalf of the Italian Consul.

The evidence submitted and admissions made at the hearing satisfy me that the order in question, when made, was made with the purpose, object and intention of sending the plaintiff to Italy, and Italy only, and was an order to effect that purpose only. I regard it, as the Minister put it in his letter of 23rd July last, as a *deportation to undergo military service in Italy* and to compel the plaintiff to proceed to Italy to render compulsory service. The Minister in his affidavit does not deny or qualify the statements set out in the letter. The statement in the affidavit that the order was issued because it was in his opinion necessary or expedient for the public safety and defence of the Commonwealth is not inconsistent with that statement, for he may believe it is necessary for the defence of the Commonwealth to carry out the agreement between the British and Italian Governments.

Assuming that the order in question was made only for the deportation of the plaintiff to undergo military service in Italy and to compel him to proceed to Italy to render compulsory service in Italy, or to assist in the conscription and transportation to Italy of the plaintiff in accordance with the agreement made between

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

the British and Italian Governments, counsel for the Commonwealth contends that the order would still be valid, because the order of deportation *in form* was only an order for deportation from the Commonwealth, and that the injunction asked for ought not to be granted against either of the defendants. If so, it appears to me that an order for extradition (in the form of a deportation order) could be made against a resident of Australia for a crime which is not an extraditable offence in Australia, or for any other purpose, contrary to the laws of the Commonwealth.

In support of the view that the order, if in form an order for deportation from the Commonwealth only, was valid, the Court was referred to the decision of the Court of Appeal in the case of *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry* (1). In that case the Court decided that the provisions of sec. 1, sub-sec. 1, of the *Aliens Restriction Act* 1914, and of the *Aliens Restriction (Consolidation) Order* 1916 made thereunder, did *not* give a Secretary of State power to order the deportation of an alien to any *particular country*. The Court, however, refused to make absolute a rule for a writ of certiorari to bring up, for the purpose of quashing it, an order made by the Secretary under the above-mentioned Act and Order, which, in form, was a valid order, and only ordered that the alien "shall be deported from the United Kingdom." After deciding the question which disposed of the appeal, the Court, by request, expressed the opinion that, on the facts admitted in that case, the order in question, if made *under the provisions of the Act and Orders referred to*, was a valid order, although the Secretary stated that it was intended, under the order, to send the alien to a particular country.

Even if that decision and opinion were binding on this Court, I do not think it would decide the questions raised on the present application. In England a *War Precautions Act* had been passed and also an *Aliens Restriction Act*, both passed by a Parliament under a Constitution without limits. The *Aliens Restriction Act* in England gives an unqualified power to deport aliens in time of war. In the Commonwealth a *War Precautions Act* only, under the limited powers granted by the Constitution, namely, the power to make

(1) (1917) 1 K.B., 922.

laws with respect to " the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth " (The Constitution, sec. 51 (VI.)) had been passed. No Aliens Restriction Act has been passed by the Commonwealth Parliament under its general power to deal with aliens (sec. 51 (XIX.)). In England the power of detention and the discretion to direct the conditions of detention are given to the Home Secretary, who made the order for deportation then in question under an Order in Council issued under the *Aliens Restriction Act*, whereas here the powers are given to the Governor-General under the limited authority vested in him by the *War Precautions Act* (for defence), and by him given to the Minister. In England conscription for military service in England and beyond the seas is lawful. Under the Commonwealth Defence Acts conscription is authorized only for home defence. Further, the Court of Appeal expressed the opinion, when it refused to make absolute the order to quash the order for deportation, that if it were intended to do something illegal under a valid order, that would be a good reason for restraining and preventing the illegal act, but not for quashing the order.

This Court is asked in this case to restrain and prevent what are alleged to be illegal acts done under an invalid order, or, if it is valid, illegal acts done and threatened to be done under that order. The matter dealt with in the Court of Appeal in *R.* v. *Home Secretary*; *Ex parte Duke of Château Thierry*, in the first instance came before the Divisional Court, consisting of Viscount *Reading* C.J., *Ridley* J. and *Bray* J. (1). That Court held unanimously, as the Court of Appeal did, that the provisions of sec. 1, sub-sec. 1, of the *Aliens Restriction Act* 1914, and of the *Aliens Restriction (Consolidation) Order* 1916 made thereunder, do *not* give a Secretary of State power to order the deportation of an alien to any particular country. Viscount *Reading*, in his judgment, said (2) :—" I will assume for the purpose of my decision that the contention of the Attorney-General is correct, and will therefore treat this case as that of a person who is amenable to military service under the law of our ally, France, and has been

(1) (1917) 1 K.B., 552. (2) (1917) 1 K.B., at pp. 555-556.

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

summoned to serve in France and has failed to respond to that summons. The question then is whether these facts entitle the Secretary of State to order the deportation of the applicant so that he may be sent to France and come under the jurisdiction of the military authorities there. That must depend upon the language of the Statute and the Order in Council made thereunder. Looking at the Statute, I come to the conclusion that there is no power under the Statute or the Order, which can only derive its authority from the Statute, to order the deportation of an alien to any particular country. There is undoubtedly power to order the deportation of an alien from this country; but that is very different from saying that there is power to say to which country the alien shall be deported. In my opinion this case must be decided upon the view we take as to the power to order deportation to a particular country notwithstanding that in form this order does not mention any country. In form the order is correct, but this Court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that that is the object and intention of the Executive in making the order, we must treat it as if the order did in effect state that the alien was to be deported to France. The Attorney-General has admitted that it is the object and intention of the Executive to send this man to France and that that is the only reason why this order was made by the Secretary of State. It is not suggested that he was an unfit person to remain in this country for any other reason than that he was required to attend in France, where he is what is called an *insoumis* who has not submitted himself to the jurisdiction of the military authorities though he has been called upon to do so. Therefore, brushing aside technicalities, I have come to the conclusion that this order cannot stand. I do not think that under art. 12 of the Order Parliament has given to the Secretary of State the power to make an order which would forcibly remove an alien from this country to another country to which he does not wish to go. The alien must leave the country, and if he does not leave the country I can understand that the Executive may have the power to remove him notwithstanding that it may be to a country to which he does not wish to go; but

he must have the opportunity of leaving this country when the order for deportation is made, and he may go to any country he pleases. Parliament can say that the Secretary of State shall have the extended power, but it is for Parliament to say so, and not for us sitting as a Court of Justice interpreting legislation. Upon that ground, and upon that ground only, I come to the conclusion that we must deal with the substance of this case, and that, therefore, this order must be quashed. We must not, particularly when dealing with personal liberty, strain the language, and must be careful only to interpret the law reasonably and naturally according to the language used. Applying that rule of construction, I arrive at the conclusion that there was no power to make this order, and that the rule must be made absolute." For the purpose of deciding the appeal, all that the Appeal Court did was to decide that the order for deportation ought not to be quashed on a writ of certiorari. It agreed that an order on the face of it for deportation to France would have been illegal, but, at the request of the Attorney-General, expressed the opinion that under the *Aliens Restriction Act* in force in England and the orders lawfully issued under it, the order, being *in form* only an order for deportation from England, was a valid one even if it were intended to be used to send the alien to a particular country.

This Court, although not bound by the decisions or the opinions expressed by the learned Judges of the Court of Appeal, even if the facts proved were the same in each case, would only disagree with them if forced by the view it takes of the law. In this case the Acts and Orders under which the order for deportation was issued differ, and the facts admitted or proved in the cases differ. In that case the Court held that the Divisional Court was wrong in treating the matter as if the order did in effect state that the alien was to be deported to France. In this case I think the Court is justified in reading with the order the letters sent by the Minister, in which it is stated that the intended deportation was a deportation to undergo military service in Italy and that the alien must proceed to Italy to undergo that service.

On the materials before the Court in this case, assuming I am right in reading with the order the letters referred to, I feel bound

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

to follow the decisions of this Court, which have not been questioned, and decisions of the Privy Council which, in my view, require me to hold in this case that the order in question was invalid.

In support of the view that I have taken I refer to the decisions and judgments in the following cases: *Attorney-General for Quebec* v. *Queen Insurance Co.* (1); *Stockton and Darlington Railway Co.* v. *Brown* (2); *Hill* v. *East and West India Dock Co.* (3); *Union Colliery Co. of British Columbia Ltd.* v. *Bryden* (4); *Madden* v. *Nelson and Fort Sheppard Railway Co.* (5); *Bradford Corporation* v. *Myers* (6); *R.* v. *Barger* (7); *Melbourne Steamship Co. Ltd.* v. *Moorehead* (8); *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (9); *Duncan* v. *State of Queensland* (10); *Tozer* v. *Viola* (11); *Cohen* v. *Wilkinson* (12); *China Mutual Steam Navigation Co. Ltd.* v. *MacLay* (13):

The last ground relied on was that even if the order in question was valid the plaintiff was entitled to an injunction restraining the defendants from illegal acts done and threatened to be done by them acting under the order. On this point the learned Chief Justice of this Court, in the case of *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (14), said :—" In my opinion the jurisdiction of the Court both to make a declaration of right and to grant an injunction is clearly established in any of the following cases: (1) if the Act itself under which the alleged power is claimed is wholly invalid; (2) if the Government instrumentality is attempting to exert under cover of a valid Act powers which are not capable of being conferred on it by the Commonwealth Parliament; or (3) if it is attempting to exert under cover of the instrument creating it, powers which that instrument does not confer. I think it immaterial whether the instrument under which the power is asserted is an Act of Parliament, or letters patent purporting to be issued under an Act of Parliament, or letters patent validly so issued." Par. 2J of the *Aliens Restriction Order* 1915, on which the order for

(1) 3 App. Cas., 1090.
(2) 9 H.L.C., 246.
(3) 9 App. Cas., 448.
(4) (1899) A.C., 580.
(5) (1899) A.C., 626.
(6) (1916) 1 A.C., 242.
(7) 6 C.L.R., 41.
(8) 15 C.L.R., 333.
(9) 15 C.L.R., 182.
(10) 22 C.L.R., 556.
(11) (1918) 1 Ch., 75.
(12) 1 Mac. & G., 481.
(13) (1918) 1 K.B., 33.
(14) 15 C.L.R., at p. 193.

deportation is founded, has already been quoted by me. Under this Order in Council all the Minister is authorized to do in the first place is to order the deportation of an alien. The alien is, after such an order, required to leave the Commonwealth forthwith (and remain out of it). He may be detained on shore or on board *until the ship in which he is to be deported finally leaves the Commonwealth*, in such manner as the competent naval or military authority directs. If the order is valid, such detention is to be deemed legal custody—whatever indirect effect it may have on the plaintiff and his rights under other conditions. Any detention, however, under that Order in Council, except what is necessary for the purpose of compelling him to finally leave the Commonwealth, is not lawful, whatever restraint might be placed on deportees under the general power to deport, if exercised. Any threats to detain the plaintiff *after the ship finally leaves the Commonwealth*, or to send him beyond the Commonwealth, or to compel him to go to Italy for compulsory military service, or to deport or transport him to Italy, were unauthorized because outside the authority conferred by the Order in Council, which is only to detain an alien *until the ship finally leaves the Commonwealth*. I am of opinion that such threats have been made by the Minister and by the Consul, and on that ground the plaintiff is entitled to succeed on his application even if the order is held to be valid.

In conclusion, I hold that in the circumstances the order of deportation in question was not valid, and that even if valid the defendants have done and threatened to do acts under the order which they are not authorized to do under it or under the Order in Council or otherwise.

It is clear that this Court has jurisdiction to make an order in a proper case restraining both the Minister and the Consul from committing unauthorized acts. This is a case in which, if the Court has any doubt about the legality of the acts done by the defendants, an interlocutory injunction should certainly be granted. Sir *Edward Mitchell* pressed for it on several grounds: (1) that the Court ought to grant it unless it had no doubt that the acts complained of or any of them were legal; (2) that the plaintiff was being deported out of the Commonwealth without being allowed to prove that he

H. C. OF A. 1918.

FERRANDO v. PEARCE.

Powers J.

was not liable to military service under the Italian law, and therefore not affected by the agreement between the two allied countries; (3) that the inspection of documents material to the plaintiff's case had been refused; (4) that no time had been given to the plaintiff to obtain further evidence to prove his claim to relief; (5) that he, as counsel, could not, in the circumstances, agree to the decision on the application for the interlocutory judgment being final; (6) that it was admitted that the plaintiff was not fit for active military service in Italy; (7) that the plaintiff was a necessary and material witness in the action, which could not be proceeded with in his absence; (8) that the plaintiff would undertake to expedite the hearing of the action; (9) that the plaintiff was prepared to give any bond or undertaking required by the Court to abide by the decision of the Court, and to submit to the order of deportation if the Court held on the facts proved in the action that it was authorized.

In my opinion the plaintiff's application for an interlocutory injunction should have been granted, because the acts done and threatened by the defendants were not authorized by the Act, the Order in Council or the order for deportation, and on the ground of the balance of convenience the Court was justified in granting it.

Motion dismissed with costs.

Solicitor for the plaintiff, *P. J. Ridgeway*, Melbourne, by *H. Richardson Clark & Fitzgerald.*

Solicitors for the defendants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *J. Woolf*, Melbourne, by *Parish & Stephen.*

B. L.