[HIGH COURT OF AUSTRALIA.]

HAMILTON . . . . . APPELLANT;
PLAINTIFF,

AND

HALESWORTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1937.

SYDNEY, *Nov.* 30; *Dec.* 1, 13.

Starke, Dixon and McTiernan JJ.

Police Offences—Limitation of actions—Arrest by special constable "in pursuance of" Police Offences Act—Period within which action may be commenced—Different periods prescribed in different statutes—Bona fides of special constable—Burden of proof of mala fides—Police Offences Act 1901-1936 (*N.S.W.*) (*No.* 5 *of* 1901—*No.* 30 *of* 1936), *secs.* 101 (1A), 103, 114*—*Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 39 *of* 1929), *secs.* 352, 520, 563.*

Sec. 101 of the *Police Offences Act* 1901-1936 (N.S.W.) provides for the appointment of special constables. Sec. 103 of that Act enacts that "every special constable appointed under this Act shall have, exercise, and enjoy all such powers, authorities, advantages, and immunities . . . as any constable duly appointed now has by virtue of the common law, or of any Act or Imperial Act."

Held that in exercising the power of arrest conferred upon constables by sec. 352 of the *Crimes Act* 1900-1929 (N.S.W.) a special constable appointed under the *Police Offences Act* 1901-1936 (N.S.W.) acts in pursuance of the *Police Offences Act* and is, therefore, entitled to the protection of sec. 114 thereof.

* Sec. 114 (1) of the *Police Offences Act* 1901-1936 (N.S.W.) provides: "All actions to be commenced against any person for anything done in pursuance of this Act shall be commenced within two months after the act was committed."

Sec. 563 (1) of the *Crimes Act* 1900-1929 (N.S.W.) provides: "All actions against any person, for anything done, or reasonably supposed to have been done in pursuance of this Act, shall be commenced within six months after the fact committed"

H. C. OF A. 1937. HAMILTON v. HALESWORTH.

A special constable is entitled to the protection of sec. 114 of the *Police Offences Act* 1901-1936 (N.S.W.) provided that he acts under a bona fide belief in the existence of a state of facts which, if they existed, would justify him in doing the acts complained of. Some facts must exist which give rise to an honest belief, but it is not necessary that the belief should be reasonable, and the burden of proof of an indirect motive or mala fides lies upon the plaintiff.

The application of sec. 114 of the *Police Offences Act* 1901-1936 (N.S.W.) to the exercise by a special constable of the power of arrest conferred upon constables by sec. 352 of the *Crimes Act* 1900-1929 (N.S.W.) is not excluded by sec. 563 of the *Crimes Act*.

Decision of the Supreme Court of New South Wales (Full Court): *Hamilton* v. *Halesworth*, (1937) 54 W.N. (N.S.W.) 198, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by William Hamilton in the Supreme Court of New South Wales against Fred Halesworth, the plaintiff sued in three counts alleging (*a*) wrongful arrest, (*b*) assault, and (*c*) malicious prosecution.

The defendant pleaded (i.) not guilty, (ii.) not guilty by statute, the Acts relied on being the *Crimes Act* 1900 and particularly secs. 352 and 563, and the *Police Offences Act* 1901, as amended by the *Police Offences* (*Amendment*) *Act* 1908, and particularly secs. 101, 102, 103, and 114, and (iii) as to the first and second counts, justification, and (iv) as to the third count a formal plea which is not material to this report.

The evidence for the plaintiff showed that the plaintiff and two companions were walking through Centennial Park on the evening of 6th May 1936. One of his companions saw some pansies and said: "I'm going to get a few of these." Plaintiff said: "Don't be a fool," and walked ahead with the other man. Plaintiff in evidence said: "Pat bent down and rushed up between Martin and myself and said 'Here, take these,' and put pansies into Martin's pocket. I looked up and saw Mr. Halesworth coming across. He said to Pat: 'What have you got there?' Pat said: 'Only a few pansies.' He said to Martin: 'What have you got?' Martin said: 'Nothing.' He looked at me. He did not say anything. I said: 'You can search me, I have nothing on me.' He said: 'Never mind about that, the three of you had better come along with me.' I said: 'Where are you taking us?' He said: 'Up to the superintendent's house.'

I said : ' You cannot, I have nothing on me.' He said : ' Never mind about that, come along with me, the three of you. I might have a bike here but you had better not make a run for it as I have a gun in my pocket.' On the way to the superintendent's house he called out to a ranger : ' Is that you, Ed. ? ' and the ranger rode across and said : ' What is the trouble ? ' Mr. Halesworth said : ' I caught these three stealing pansy plants.' He said : 'Come up the hill with me.' We went up to a house. Halesworth went in and left the three of us with Mr. Earp. There was no one there. I do not know whose house it was." All three were taken to the superintendent's house. Defendant knocked at the door and the superintendent came out and Halesworth said : " I caught these three stealing pansies." The superintendent said : " You know what to do, you are a policeman," and the three men were then taken to the police station and charged under sec. 520 of the *Crimes Act* 1900-1929 (N.S.W.) on a charge of stealing pansies. Plaintiff was released on bail later on the same evening, and at the hearing two days later the man who took the pansies pleaded guilty and the plaintiff and the third man were discharged.

The assault complained of in the second count was a technical assault connected with the arrest, and the malicious prosecution count was based on the fact that the defendant laid the charge and appeared and gave evidence before the magistrate.

The action was commenced on 5th November 1936. The plaintiff put in evidence the notice of action, which was addressed to the defendant as a ranger and special constable. At the conclusion of the plaintiff's case the defendant gave evidence that he was a ranger at Centennial Park and a special constable, and his certificate of appointment as a special constable in accordance with the provisions of the *Police Offences Act* 1901 and the *Police Offences (Amendment) Act* 1908 was put in evidence. The certificate showed that the capacity in which he was appointed was " Ranger, Centennial Park."

After this evidence had been given, counsel for the defendant submitted that the action must fail as it was commenced more than two months after the happenings of the matters complained of. The trial judge desired to leave to the jury any matters of fact that

H. C. OF A. 1937.

HAMILTON v. HALESWORTH.

the parties wished to have determined, but both counsel asked that the point of law raised should be decided and effect given to the ruling. The trial judge then directed that a nonsuit should be entered, and his direction was upheld by the Full Court of the Supreme Court: *Hamilton* v. *Halesworth* (1).

From that decision the plaintiff appealed, *in forma pauperis*, to the High Court.

Evatt K.C. (with him *Dwyer* and *O'Sullivan*), for the appellant. The appellant was charged under sec. 520 of the *Crimes Act*. The act for which he was so charged is not made an offence under the *Police Offences Act*. The fact that the office of special constable is created by the *Police Offences Act* is the only nexus between that Act and this case. In view of the terms of sec. 103 of that Act the respondent, who is a park ranger and is only incidentally a special constable, is in no better position for whatever he may do than an ordinary constable. Sec. 114 is a protection to any person and is not limited to constables or special constables. It is a mere incident that after sec. 114 was enacted the legislature introduced into the Act the provisions relating to special constables. The decision in *Shatwell* v. *Hall* (2) is applicable to this case. The nonsuit should not have been granted. There was a definite issue of fact to go to the jury as to whether in any event the respondent was or was not entitled to the protection of sec. 114; whether it was not an act of sheer officiousness on the part of the respondent and one which was quite outside the protection of the limitation sections (*M'Ternan* v. *Bennett* (3)). The trial judge could not give a decision on sec. 114 without first having the issue of bona fides on the part of the respondent settled by the jury. The question arises whether the word "now" in sec. 103 became static in 1901 when the Act was assented to. If, as is submitted, "now" means at the time of the assent, then the power did not exist to arrest the appellant on suspicion of the particular offence.

Shand, for the respondent. The full powers and duties of a constable are set forth in the *Police Offences Act*, and it is immaterial

(1) (1937) 54 W.N. (N.S.W.) 198. (2) (1842) 10 M. & W. 523; 152 E.R. 578.
(3) (1898) 1 Fraser 333, at p. 337.

that he is given further powers or further protection by other Acts. Sec. 114 of that Act gives an additional protection to a special constable. The arrest of the appellant by the respondent was in pursuance of powers conferred upon the latter and exercised bona fide; therefore he is entitled to protection (*Purua* v. *Douglas* (1); *Mellor* v. *Leather* (2); *Hazeldine* v. *Grove* (3)). The decision in *Shatwell* v. *Hall* (4) is distinguishable as it turned more on the fact that what was done was not in fact something done under the Act; it is not known what particular fact was left to the jury. Mistake on the part of a special constable is immaterial provided he acted bona fide (*Selmes* v. *Judge* (5); *G. Scammell & Nephew Ltd.* v. *Hurley* (6); *Siebert* v. *Miller* (7)). An illustration of the distinction is shown in *M'Ternan* v. *Bennett* (8). Here there is no evidence of *mala fides* on the part of the respondent. The onus is on the appellant of proving that the respondent did not act in good faith. The appellant should have required that the question of good faith be left to the jury if he denied it (*Hazeldine* v. *Grove* (9)). Sec. 103 gives to special constables the duties and immunities of constables, and sec. 114 gives them, together with other persons, additional immunities. Assuming that the matter is within sec. 114, emphasis of the word "now" in sec. 103 is immaterial. Whether or not the respondent had an actual power to arrest under the *Crimes Act* is immaterial; the only question is: Did he act in the bona fide execution of his duties?

Dwyer, in reply. There is evidence from which the jury could have found want of bona fides on the part of the respondent. Sec. 114 seems to suggest that if there is anything in the evidence which would turn upon the finding of fact by the jury, before the matter could be properly decided, the question should be left to the jury to consider.

Cur. adv. vult.

(1) (1927) N.Z.L.R. 255.
(2) (1853) 1 E. & B. 619, at pp. 625, 626; 118 E.R. 569, at p. 572.
(3) (1842) 3 Q.B. 997; 114 E.R. 791.
(4) (1842) 10 M. & W. 523; 152 E.R. 578.
(5) (1871) L.R. 6 Q.B. 724, at p. 727.
(6) (1929) 1 K.B. 419, at pp. 427-429.
(7) (1896) 12 W.N. (N.S.W.) 87.
(8) (1898) 1 Fraser 333.
(9) (1842) 3 Q.B., at p. 1002; 114 E.R., at p. 793.

H. C. OF A. 1937.

HAMILTON v. HALES-WORTH.

Dec. 13.

The following written judgments were delivered :—

STARKE J. The appellant and two companions were walking through Centennial Park and one or other of the party plucked pansies and made off with them. The respondent, who was a ranger of the park and a special constable appointed under the *Police Offences Act* 1901-1936, noticed them and took them to the superintendent's house. Later all three were charged under the *Crimes Act*, sec. 520, with stealing the pansies. The appellant was discharged. He then commenced an action in the Supreme Court against the respondent charging him with (i.) wrongful arrest, (ii.) assault, (iii.) malicious prosecution, and claiming no less than £1,000 damages.

The action was commenced within six months but more than two months after the grievances alleged. The respondent by his pleas claimed the protection afforded by the *Police Offences Act* 1901-1936, sec. 114 (1) : " All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be commenced within two months after the act was committed." The action was tried before *Maxwell* J. with a jury. The learned judge directed a nonsuit and his decision was affirmed on appeal. The object of a provision such as that set forth is to protect persons acting illegally but in supposed pursuance of and with a bona fide intention of discharging their duty (*Theobald* v. *Crichmore* (1)). The defendant is entitled to protection if he honestly believes in the existence of a state of facts which, if they had existed, would have justified him doing the acts complained of. Some facts must exist such as might give rise to an honest belief but it is not necessary that the belief should be reasonable (*Chamberlain* v. *King* (2)). It was contended that the question of the honesty of the defendant's belief in this case was a question of fact for the jury. But ample facts were proved on which the defendant might honestly believe that the appellant and his companions were stealing pansies and not the slightest evidence was adduced that he did not so believe. It would have been wrong in such circumstances to leave the question of the honesty of the defendant's belief to the jury.

(1) (1818) 1 B. & Ald. 227 ; 106 E.R. 83.
(2) (1871) L.R. 6 C.P. 474.

It is next said that the defendant is not entitled to the protection of the section because he was not acting in pursuance of the Act. The defendant was a special constable appointed under the *Police Offences Act* 1901, No. 5, Part IV. And sec. 103 provides that every special constable appointed under that Act shall have, exercise and enjoy all such powers, authorities, advantages and immunities and be liable to all such duties and responsibilities as any constable duly appointed now has by virtue of the common law or of any Act or Imperial Act.

The *Crimes Act* 1900-1929 (N.S.W.), sec. 352, enacts :—" (1) Any constable or other person may without warrant apprehend—(*a*) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act, . . . and take him, and any property found upon him, before a justice to be dealt with according to law. (2) Any constable may without warrant apprehend, (*a*) any person whom he, with reasonable cause, suspects of having committed any such offence or crime." The words in sec. 2 (*a*) " offence or " were added by the Act, 1924, No. 10, to meet the decision of this court in *Nolan* v. *Clifford* (1).

The main contention for the appellant was that the grievances complained of were not done in pursuance of the *Police Offences Act* 1901-1936. It was conceded that the respondent was appointed under that Act but it was argued that the acts he did were not in pursuance of that Act at all, but of the *Crimes Act* 1901-1929. The argument is fallacious, for the words of sec. 103 of the *Police Offences Act* explicitly confer upon special constables the powers and authorities of constables and thus incorporate them by reference into the *Police Offences Act* itself.

The cases of *Shatwell* v. *Hall* (2) and *McLaughlin* v. *Fosbery* (3) were relied upon in support of the argument and *Hazeldine* v. *Grove* (4) and *Mellor* v. *Leather* (5) as destructive of it. But each case turns upon the particular statute there in question. There is no doubt, in my opinion, that the right construction of the *Police*

(1) (1904) 1 C.L.R. 429.
(2) (1842) 10 M. & W. 523 ; 152 E.R. 578.
(3) (1904) 1 C.L.R. 546.
(4) (1842) 3 Q.B. 997 ; 114 E.R. 791.
(5) (1853) 1 E. & B. 619 ; 118 E.R. 569.

H. C. OF A. 1937.

HAMILTON v. HALES-WORTH.

Starke J.

Offences Act is as already indicated and contrary to that contended for by the appellant.

The next argument was that the respondent could not rely upon the provisions contained in the *Crimes Act*, sec. 352 (2) (*a*), because a constable was not authorized to apprehend without warrant any person for the offence of stealing flowers. It will be remembered that sec. 103 of the *Police Offences Act* 1901 refers to the powers and authorities a constable "now has," and the words "or offence" were only added to the *Crimes Act* 1900-1929 in the year 1924. But it is unnecessary to discuss the matter, for the respondent can justify equally well under sec. 352 (1) (*a*), which is incorporated in the *Police Offences Act* by sec. 103. He was acting pursuant to the latter Act if he had a bona fide belief in the existence of facts which if existing would have justified him in so acting. He saw, as he believed, the appellant and his companions both in the act of stealing pansies and immediately after they had committed that offence. No evidence was adduced fit to be submitted to a jury that he did not honestly so believe.

Lastly it was contended that the respondent was not entitled to greater protection than that afforded to constables by sec. 563 of the *Crimes Act*, which enacts: "All actions against any person, for anything done, or reasonably supposed to have been done in pursuance of this Act, shall be commenced within six months after the fact committed."

It may be doubted whether the defendant did anything in pursuance of that Act. It is unnecessary to determine this point, for he acted in pursuance of the *Police Offences Act* and that explicitly protects him against action and prosecution for anything done in pursuance of that Act unless commenced within two months after the act was committed.

The appeal should be dismissed.

DIXON AND MCTIERNAN JJ. This appeal turns upon the question whether the defendant is entitled to the protection of sec. 114 of the *Police Offences Act* 1901, as amended, which enacts that all prosecutions and actions to be commenced against any person for anything done in pursuance of that Act shall be commenced within

two months after the act was committed. He is a park ranger who has been nominated and appointed a special constable by a magistrate or magistrates at the request of his employers under sec. 101 (1A) of the *Police Offences Act*. By sec. 103, a special constable appointed under the Act shall have, exercise and enjoy all such powers, authorities, advantages and immunities and be liable to all such duties and responsibilities as any constable duly appointed had, at all events when the Act was passed, at common law or under statute.

The defendant is sued on causes of action arising out of his apprehending the plaintiff with two other persons on a charge of stealing plants from the park of which he is ranger. The charge against the plaintiff was dismissed. The offence is created under sec. 520 of the *Crimes Act* 1900, as amended, which makes the offender liable on summary conviction to payment for the damage done and to a fine of £20, or to six months' imprisonment. Under sec. 352 of the same Act, a constable is authorized without warrant to apprehend any person whom he with reasonable cause suspects of having committed offences of a class within which that in question falls.

The plaintiff contends that, if the defendant acted in pursuance of any Act it was not the *Police Offences Act* but the *Crimes Act*, which by sec. 563 provides a limitation of six months, and not two, as does the former Act. In fact he brought his action less than six months but more than two months after the grievances of which he complains. His first reason for this contention is that under the *Police Offences Act* the defendant is merely established in the office of a special constable and placed in the same situation as a constable. His powers and duties, it is said, are annexed to the office but arise from various statutory and other sources, and, in exercising them, he acts " in pursuance of " or " in execution of " the enactment by which they are conferred or imposed on constables. This view derives some support from *Shatwell* v. *Hall* (1), which was cited in support of the plaintiff's contention. There constables appointed under a special local Act were held not entitled to rely upon a protective provision therein in answer to an action brought against them for what they had done in executing a warrant as constables. Lord *Abinger* C.B. said : " Now the action is not brought for anything

(1) (1842) 10 M. & W. 523 ; 152 E.R. 578 ; 12 L.J. Ex. 74.

H. C. OF A. 1937.

HAMILTON v. HALES-WORTH.

Dixon J. McTiernan J.

done by them directly in execution of any of the powers of the local Act of Parliament; but it was said that it was brought against them for something which they did, and could only do, by the authority of the Act. It is true they were appointed constables by virtue of the Act of Parliament, which gives them all the authority of constables; but the act they did was not in pursuance of the Act of Parliament at all, and they were not entitled to notice, in respect thereof, any more than any other constable would be" (1). This case was cited with apparent approval by *Griffith* C.J. in *McLaughlin* v. *Fosbery* (2). But we find that the correctness of the decision was attacked by counsel before the Court of Queen's Bench, and that court distinguished it to the point of denying its authority. In *Mellor* v. *Leather* (3) Lord *Campbell* C.J. said that, if it was found difficult to reconcile the judgment with that of the Court of Queen's Bench in the almost contemporaneous case of *Hazeldine* v. *Grove* (4), it might be observed that the judgment of the Court of Exchequer in *Shatwell* v. *Hall* (5) was given upon refusing a rule, while that of the Court of Queen's Bench in the later case was given after full argument by counsel on both sides and is, besides, posterior in point of date.

A study of *Mellor* v. *Leather* (3) shows that it is a strong authority against the plaintiff's contention. The case arose under sec. 76 of the *Municipal Corporations Act* 1835 (5 & 6 Will. IV. c. 76), whereby watch committees were directed to appoint constables who were given all such powers and privileges and made liable to all such duties and responsibilities as any constable duly appointed then had or thereafter might have within his constablewick at common law or by statute. Doubtless this provision is the ultimate source of the form of sec. 103 of the *Police Offences Act*. A constable so appointed took possession of a pony in respect of which a charge of larceny had been laid. The charge failed and he was sued in replevin; he pleaded the general issue and under that plea sought to justify as a constable. This he could only do if some statute gave him

(1) (1842) 10 M. & W., at p. 526; 152 E.R., at p. 579.
(2) (1904) 1 C.L.R., at p. 565.
(3) (1853) 22 L.J. M.C. 76; 1 E. & B. 619; 118 E.R. 569.
(4) (1842) 3 Q.B. 997; 114 E.R. 791; 12 L.J. M.C. 10.
(5) (1842) 10 M. & W. 523; 152 E.R. 578; 12 L.J. Ex. 74.

the privilege of pleading the general issue and giving the special matter in evidence under that plea. The only provision doing so which could apply to his case was one contained in the *Municipal Corporations Act* under which he had been appointed a constable. By sec. 133 of that Act, in all actions against any person for anything done in pursuance of that Act, the defendant might plead the general issue and give the special matter in evidence thereunder. The question, therefore, was whether, in assuming to exercise a power which he believed belonged to a constable, the defendant was acting in pursuance of the Act containing the provisions under which he derived that office. Lord *Campbell* C.J. said : " The only authority under which the defendant Clough acted as a constable was that given by stat. 5 & 6 Will. 4 c. 76, s. 76 ; whatever power, privilege or responsibility he had were wholly under that Act. It appears to us that, when he was acting as a constable in this particular case, he was acting in pursuance of the power given to him by that statute, and that he is entitled to the protection given by sect. 133 to all ' persons acting in the execution of this Act ' " (1). In our opinion this reasoning applies to sec. 114 of the *Police Offences Act* considered in relation to secs. 103 and 101 (1A). In assuming to apprehend the plaintiff in the exercise of an authority supposed to exist in him as a special constable, the defendant acted in the intended execution of powers flowing, so far as he was concerned, directly from sec. 103. If the facts had been as he alleged, his act would have been authorized ; and thus he was acting in pursuance of the *Police Offences Act*, unless he had no bona fide belief in the facts he professed to rely upon, a matter which falls within the fourth ground of the appellant's argument.

The second ground upon which the plaintiff rests his contention that sec. 114 does not apply is that one of the immunities of a constable conferred by sec. 103 upon a special constable is freedom from suit after the expiration of times limited by statutory provisions like sec. 563 of the *Crimes Act* and that such provisions accordingly apply to the exclusion of sec. 114 of the *Police Offences Act*. The first step in this reasoning may be valid, but the second appears to us to be fallacious. Even if such provisions as sec. 563 of the

(1) (1853) 1 E. & B., at p. 626 ; 118 E.R., at p. 572.

H. C. OF A. 1937.

HAMILTON v. HALES-WORTH.

Dixon J. McTiernan J.

Crimes Act may be drawn in, so to speak, by sec. 103, this does not exclude the application of sec. 114 to cases falling within its express terms.

The third reason given for the plaintiff's contention lies in the limitation expressed by the word "now" in sec. 103. This word seems to limit the powers &c. of constables which are given to special constables by that section to the powers &c. existing at the commencement of the *Police Offences Act*. For some reason the words "or may hereafter have," which occur in sec. 76 of the *Municipal Corporations Act* 1835 have been dropped in sec. 103 of the *Police Offences Act*. It appears that the power of arresting on reasonable suspicion of an offence like that now in question was given to constables by sec. 352 (2) of the *Crimes Act* after the commencement of the *Police Offences Act*. At that time reasonable suspicion of such an offence having been committed was not enough to justify apprehension by a constable without warrant. He was empowered to apprehend any person in the act of committing, or immediately after having committed, such an offence (sec. 352 (1)). But in that case the constable's justification depended on his prisoner's actual guilt.

In the present case, however, the defendant took the plaintiff into custody on the footing that he had just been a party to the commission of the offence of stealing plants. If the defendant honestly intended to put the law in motion and he really believed in a state of facts which, if it existed, would have justified his act, or he intended to act according to the duties of his office as a special constable, then it would be a thing done in pursuance of the statute, although it turned out that the plaintiff was not in fact guilty (See *Hermann* v. *Seneschal* (1); *Selmes* v. *Judge* (2)). When a defendant is found purporting thus to execute what is actually a statutory power, the burden rests upon the plaintiff of proving that he was not actuated by an honest desire to do his duty: that he was not acting in the intended, but in the pretended, execution of his functions (Cf. *G. Scammel & Nephew Ltd.* v. *Hurley* (3)). Thus

(1) (1862) 13 C.B. N.S. 392, at pp. 402, 404; 143 E.R. 156, at pp. 160, 161.

(2) (1871) L.R. 6 Q.B., at p. 728.

(3) (1929) 1 K.B., at pp. 427, 429.

the question whether sec. 103 did or did not operate to give to the defendant as a special constable a power of apprehension applicable to the particular offence affording him a substantive justification, notwithstanding the plaintiff's actual innocence, seems to us not to be a decisive matter. The question is not whether what the defendant did was justified in law but whether it was done in pursuance of the *Police Offences Act*, and this means in purported or assumed pursuance thereof. It is plain that he acted in the assertion of powers he supposed that he possessed in virtue of his office of special constable. It is equally clear that if in fact the plaintiff had been guilty of the offence he might then and there have been apprehended by the defendant. Whether or no a reasonable suspicion would afford a justification, it remains true that the defendant is entitled to the protection of the limitation imposed by sec. 114 of the *Police Offences Act*.

The fourth and last ground for contending that the plaintiff's action is not subject to this limitation is that the defendant did not act bona fide in the assertion of a power that he believed belonged to him as a special constable. The nature of this answer to such a provision as sec. 114 is dealt with by Lord *Finlay* in *Newell* v. *Starkie* (1), and by *Scrutton* L.J. in *G. Scammell & Nephew Ltd.* v. *Hurley* (2). The burden of proving an indirect motive or *mala fides* lies upon the plaintiff, and, in our opinion, he has not discharged it. We think that there is no evidence fit to be submitted to a jury in support of the allegation.

It follows that the nonsuit was right and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *John S. Heaney*.

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1919) 89 L.J. P.C. 1, at p. 6.

(2) (1929) 1 K.B., at p. 428.