[HIGH COURT OF AUSTRALIA.]

LITTLE . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANT.

H. C. OF A. 1947.

BRISBANE, *June* 24, 25.

MELBOURNE, *July* 11.

DIXON J.

Defence—National Security—False imprisonment—Arrest and detention—Restriction order—Release—Detention order—Validity of orders—Failure to specify areas—Delegation of powers by Minister—Recitals in orders—Whether opinion of Minister examinable—Liability for arrest and detention in respect of contravention of invalid order—Mistake—Bona fides—Protection—National Security Act 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940) *ss.* 13*, 17—*National Security (General) Regulations* (*S.R.* 1939, *No.* 87—1942, *No.* 405) *regs.* 25, 26, 90.

(1) Reg. 26 (1) (*c*) of the *National Security (General) Regulations* provided that the Minister might, if satisfied with respect to any particular person that with a view to prevent that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary so to do, make an order directing that he be detained. An order for detention of the plaintiff was made reciting that the Minister was satisfied with respect to him of the matters stated in the regulation. The plaintiff attacked the validity of the order on the grounds (i) that the Minister was not in fact satisfied of

* The *National Security Act* 1939-1940 provides by s. 13 :— "(1) Any person who is found committing an offence against this Act, or who is suspected of having committed, or of being about to commit, such an offence, may be arrested without warrant by any constable or Commonwealth officer acting in the course of his duty as such, or by any person thereto authorized by the Minister. (2) If a person suspected of having committed, or of being about to commit, an offence against this Act, is arrested under the provisions of this section, a report of the fact and circumstances shall forthwith be made to the Attorney-General or to a person appointed in that behalf by the Attorney-General, and—

(*a*) if no charge is laid against the suspected person within ten days from the date of his arrest, he shall be released from detention; or

(*b*) if a charge is laid against the suspected person, he shall be dealt with according to law.

(3) No action shall lie against the Commonwealth, any Commonwealth officer, any constable or any other person acting in pursuance of this section in respect of any arrest or detention in pursuance of this section, but if the Governor-General is satisfied that any arrest was made without any reasonable cause, he may award such compensation in respect thereof as he considers reasonable."

the matters recited; (ii) that no facts had occurred or existed warranting such an opinion; (iii) that the Minister had no information or material upon which he could reasonably form such an opinion.

Held, (1) that the detention order was not examinable upon any ground affecting the Minister's opinion short of bad faith; (2) that proof that the opinion of the Minister was erroneous, that it was based only on the advice of his officers and that there was no ground for suspecting the plaintiff's loyalty, was insufficient to invalidate the detention order.

Held, further, that an arrest made under the detention order was not rendered unlawful because the officer making the arrest was not in possession of the order itself.

(2) Reg. 26 (6) provided that a person in respect of whom an order is made in pursuance of the regulation should be supplied with a copy of the regulation.

Held, that a failure to comply with this provision would not make the detention unlawful and tortious.

(3) Reg. 25 (1) provided that the Minister upon being satisfied as stated above with respect to a particular person might make an order (*a*) for securing that except so far as permitted by the order or by the authority or person specified in the order, that person shall not be in any area specified in the order; (*b*) for securing that he shall reside in a specified area and shall not leave that area except as he is permitted to do so by the order of the authority &c.

The Minister made a restriction order directing that the plaintiff should reside outside such area as the military authorities from time to time determine.

Held, that the restriction order was invalid because (i) it did not require that he should not be in any area under par. (*a*) or that he should reside in an area under par. (*b*); (ii) it did not specify an area and the regulation meant that the whole order should be in writing and that there should be some description or indication in the order itself of the place intended; (iii) the attempt to delegate to the military authorities the selection of the place was not authorized by the regulation or any other power.

(4) Under the restriction order the military authorities communicated to the plaintiff certain directions as to where he might reside. The plaintiff acted in a way which appeared to officers of police to amount to an intended contravention of the order or the directions thereunder and they arrested the plaintiff without warrant, depending for their authority to do so upon s. 13 (1) of the *National Security Act* 1939-1940.

Held, that s. 13 (1) should be read as referring to the doing of acts or the making of omissions which do amount to an offence and as authorizing the arrest of a man found doing such acts or making such omissions or suspected of having done or made them or of being about to do or make them and sub-s. (1) does not cover an erroneous belief on the part of the officer as to the legal significance or quality of the acts or omissions of the person arrested. Accordingly the arrest of the plaintiff for contravening the restriction order was unlawful.

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH.

(5) *Held*, however, that no action would lie against the Commonwealth in respect of the arrest, by reason of sub-s. (3) of s. 13; the words "any arrest or detention in pursuance of this section" in sub-s. (3) cover an arrest by an officer who with facts to go upon honestly thinks that what he has found or suspects is an offence against the act committed or about to be committed by the person whom he arrests or detains, notwithstanding that the arrest and detention are not actually justified and his error or mistake is in whole or in part one of law.

TRIAL OF ACTION.

By writ of summons dated 3rd June 1946 the plaintiff, Robert Clince Little, sued the Commonwealth for £10,000 damages for false imprisonment relative to two periods of detention, the first from 8th or 10th June to 19th June 1942 and the second from 20th June to 20th October 1942. In respect of the first period of detention the defendant relied on the validity of a restriction order made by the Minister for the Army pursuant to regs. 25 and 26 of the *National Security* (*General*) *Regulations* and on s. 13 (3) of the *National Security Act* 1939-1940. In respect of the second period of detention the defendant relied on the validity of a detention order made by the Minister in pursuance of the same regulations.

The action was heard before *Dixon* J. in whose judgment the relevant facts and statutory provisions are sufficiently set forth.

Parker for the plaintiff.

McGill K.C. and *Brown* for the defendant.

Cur. adv. vult.

July 11.

Dixon J. delivered the following written judgment:—

In this action the plaintiff seeks to recover damages from the Commonwealth for false imprisonment. The claim relates to two distinct periods of imprisonment, separated however by only a single day of freedom. The plaintiff was taken into custody on either 8th or 10th June 1942 and released on 19th June. He was again taken into custody on 20th June and detained until about 20th October 1942 when he was finally released from detention.

There is a dispute as to the precise place and time at which the first period of imprisonment began, but there is no doubt how it was occasioned. It arose from the fact that the Minister for the Army had made an order with respect to the plaintiff purporting to restrict his place of residence. Because it was believed that he had failed to comply with the order or at all events would not do

so, he was taken into custody by the Queensland police and confined until the period of ten days mentioned in s. 13 (2) (*a*) of the *National Security Act* 1939-1940 had run out or was about to run out, no charge having been laid in the meantime.

The second period of imprisonment was the result of a detention order which the Minister for the Army had made on 18th June. The fact that an order had been made was not communicated to the police until 20th June, that is, after they had set the plaintiff free. He was at once rearrested.

The plaintiff attacks the validity of all these proceedings. He says that the restriction order was void ; that even if it were valid, he was not liable to arrest for anything he did or failed to do and that the detention order was void.

The defendant, the Commonwealth, supports the validity of both the orders and justifies the arrest of the plaintiff on each occasion and his subsequent detention. But, as to the first arrest of the plaintiff and his confinement for ten days or thereabouts the Commonwealth also relies upon two independent grounds of defence. The first is that the Queensland police in arresting the plaintiff and detaining him acted in actual or supposed execution of a power or duty reposed in or imposed upon them by law and that they were not acting as and were not in fact servants or agents of the Commonwealth for whose wrongful acts the Commonwealth would be civilly responsible.

The second of such grounds of defence to the plaintiff's claim for false imprisonment for his first arrest and period of confinement is that it is a claim in respect of an arrest and detention in pursuance of s. 13 of the *National Security Act* which provides that no action shall lie against the Commonwealth in respect of any arrest or detention in pursuance of the section. This defence is not affected by the termination of the *National Security Act* 1939-1946 : see s. 19 of Act No. 77 of 1946.

The restriction order and the detention order were made as under one or other of regs. 25 and 26 of the *National Security (General) Regulations* and both these provisions state that the Minister may exercise the powers they respectively confer if satisfied with respect to any particular person that with a view to prevent the person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary to do so.

The plaintiff maintained that the Minister for the Army could not have been so satisfied in his case and was not so satisfied. In summing up his defence, counsel for the Commonwealth, as might have been expected, took up the position that the Minister's opinion

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

or expression of opinion on these matters was not examinable, but without objection the plaintiff in his evidence had described the course of his career and had gone into other facts which could only be directed to showing that there was no basis for the Minister's action, that is, unless perhaps some of the facts were relevant to damages. No doubt it was thought better that the plaintiff should be allowed to give his full story ; but it is not necessary for me to do more than state briefly the circumstances of the case and indicate my findings upon such disputed questions of fact as I think material.

The plaintiff is a natural-born British subject. He was born of British parents in New Zealand where he was brought up. Not many years after reaching manhood he went abroad. After some wanderings, chiefly in South America, England and South Africa, he returned in 1939 to New Zealand. In the same year he came to Australia. Having married, he sought some pastoral or rural property on which to settle and, in November 1939, he bought Townshend Island off the coast of Queensland about 95 miles north of Rockhampton and about 75 miles north of Yeppoon. At the southern end, the island is separated from the mainland at high tide by about a mile and a half of water. At the northern end, the distance is seventeen miles. Apparently he ran some sheep and a few cattle and horses on the island, where there was a homestead. At the end of January 1940 the plaintiff's wife was drowned. He seems to have continued to work the island with the help of an old man and to have lived sometimes there and sometimes in a flat at Rockhampton. Sometime before January 1942 the plaintiff learned that Military Intelligence had been taking some interest in him. In Rockhampton there was an officer of Military Intelligence named Jolley, whose rank is variously given as captain or lieutenant. The plaintiff repaired to Captain Jolley, but more in a spirit of remonstrance and expostulation than of inquiry or anxiety. In January 1942 Captain Jolley, accompanied by a sergeant of police, visited the island and made some kind of search, but it is not suggested that anything was discovered warranting any doubts of the plaintiff. He does appear, however, to have been the subject or victim of gossip, due, he suggests, to some enmity he had incurred. At all events for some unexplained reason on 8th May 1942 the Minister for the Army made an order with respect to the plaintiff. The document is headed " Restriction order under regulations 25 and 26." It recites the Minister's satisfaction with respect to the plaintiff that with a view to prevent his acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary to impose the restrictions it proceeds to specify.

The operative part of the instrument then orders that the plaintiff shall be subject to four restrictions, the more material of which are that he should reside outside such area as the military authorities might from time to time determine and that he should submit himself to internment in the event of a breach of any of the restrictions contained in the order. Having received this order or a copy of it from the Minister, the General Staff Officer (Intelligence) Headquarters Queensland Lines of Communication Area, on 23rd May 1942, transmitted a copy of it to the Commissioner of Police, Brisbane with instructions to serve the plaintiff with it, giving him a copy and also a copy of regs. 25 and 26, a thing required by reg. 26 (6). The Commissioner was also instructed to request the plaintiff to make immediate preparations to remove himself to reside in a district situated outside an area 300 miles from the sea coast of Australia and below the twenty-seventh parallel. When he notified the police of his proposed place of residence, he was also to be required to report to the police nearest thereto once a week on Saturday. The plaintiff was to be told, too, that his removal must be prior to any impending appeal and that he would not be allowed to return to any district inside the 300 miles radius until the result of the appeal was known. The Commissioner sent on these instructions to the Inspector at Rockhampton and as a consequence, on 28th May 1942, a detective of police served copies of the order and of the two regulations upon the plaintiff in Rockhampton and acquainted him with the instructions of Military Intelligence. There is a dispute as to whether the letter of instructions to the Commissioner was actually read over to the plaintiff, but, if it matters, I think the higher probability is that the detective did read to him the more material parts of that communication. The instructions it contained represented a general direction which had been given by the General Officer Commanding the Northern Command for the purpose of restriction orders, such as that made in the plaintiff's case by the Minister. I think that the communication to the police may be taken to contain a "determination" by the "military authorities" of the area outside of which the plaintiff was to reside. But I shall not interrupt my statement of the facts to examine, at this point, the validity under regs. 25 and 26 of the resulting restrictions which it had thus been sought to impose upon the plaintiff. The plaintiff signed a receipt acknowledging that he had received from the Intelligence Section Northern Command a copy of a notice to a person in respect of whom an order had been made under reg. 26. The detective, whose name is Raetz, gave evidence, and he and the plaintiff are not in agreement

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

as to what was said. The events took place five years ago and it is not surprising that in this and other matters attempted reconstructions of facts and conversations should vary. I think that the substance of what was said at this point was as follows :—The plaintiff stated his intention of going to Townshend Island to prepare for his departure south of the twenty-seventh parallel, which not without difficulty they ascertained to run slightly north of Brisbane. The detective said he must not do so but must make his preparations from Rockhampton. The plaintiff expressed resentment at his treatment and probably stated his intention of taking every step to clear the matter up. I think that he did tell the detective that he would inform the police when he was leaving for the island and I believe that he did so inform them probably about 2nd or 3rd June. I think he said on that occasion that he would return at once and go south for the purpose of clearing himself. The plaintiff went to Townshend Island about 4th June and, after remaining there perhaps two or three days, he attempted to return to Yeppoon in his launch, but was compelled to go back owing to weather and the insufficient endurance of his craft. On the morning of Monday 8th June Detective Raetz and two constables arrived at the island. They had been sent by the Inspector of Police and Raetz had been instructed to bring the plaintiff back to Rockhampton and he had been armed with an order to enter and search given by the Inspector apparently under reg. 79 (2) of the *National Security (General) Regulations*. According to the plaintiff's account, he was at once placed under arrest and required to accompany the officers of police back to Rockhampton. According to Raetz, he was not then taken into custody but was requested to return to Rockhampton, a request with which he voluntarily agreed to comply. Until it was amended at the opening of the trial, the Commonwealth's defence stated that the plaintiff was arrested at Townshend Island by a member of the Queensland Police Force, though it gave the date as 10th June. The report to the Attorney-General pursuant to s. 13 (2) of the *National Security Act* was neither produced nor tendered. The officers bore arms and during the night took turns in mounting some sort of guard. I feel confident that Raetz' orders were to bring the plaintiff back with him. In all these circumstances and notwithstanding the explanations suggested of some of them, I find that Raetz did give the plaintiff to understand that he was under constraint and, although in the conditions prevailing on the island and upon the return journey no forcible or actual physical confinement or restraint was considered necessary, I think that, having force at his command, by what he said and did, Raetz sufficiently

treated the plaintiff as his prisoner to give a foundation for an action of false imprisonment unless the arrest was justified.

On 10th June the party reached Yeppoon, where they found Captain Jolley with a car. I find it difficult to believe that he was not there to receive them. At all events he drove them back to Rockhampton. There the plaintiff was taken by Raetz before the Inspector. It is not easy to be sure what precisely took place at the interview, but I think that substantially it amounted to an assertion by the Inspector that the plaintiff had not been at liberty to visit the island coupled with a questioning of the plaintiff on the Inspector's part as to why he had gone there in disobedience of the restrictions imposed on him and to a claim by the plaintiff that he was at liberty to go there, together with some explanation by the plaintiff of his visit to the island. It was a very short interview and it ended in the Inspector's directing that the plaintiff should be locked up. The Inspector made a report to the Chief Commissioner as the channel for reporting to the Attorney-General pursuant to s. 13 (2); but as I have said no report to the Attorney-General was put in evidence, notwithstanding that, under s. 13 (2), the making of such a report may be considered to be a condition of the authority to hold the prisoner. Some evidence however of dubious admissibility was given, without objection, from which perhaps it should be inferred that a report was in fact made to the Attorney-General.

Sub-section (2) (*a*) of s. 13 provides that, if no charge is laid against the suspected person, arrested under sub-s. (1), within ten days from the date of his arrest, he shall be released from detention. If, as I have held, the date of the plaintiff's arrest was 8th June the ten days would expire at midnight on 18th June. He was in fact released next day, no charge having been laid. On the following day, viz. 20th June, a telegram or other communication was received by the Inspector informing him that the Minister had made such a detention order. On the Inspector's instructions, Detective Raetz again arrested the plaintiff. He was lodged in the lock-up for three or four days and then taken under police escort to Brisbane and thence conveyed to Graythorne Internment Camp. On 23rd June 1942 he signed a receipt acknowledging in the same form as before that he had received a copy of a notice and it may have related to the detention order, though I am inclined to think it refers to a copy of reg. 26 served in compliance with reg. 26 (6). On 24th June 1942 at Graythorne he made an application by statutory declaration for leave to object to an advisory committee against the order for

H. C. OF A. 1947.

LITTLE v. THE COMMONWEALTH.

Dixon J.

detention. Shortly afterwards, he was removed to the Loveday Camp in South Australia. After he had been there for very many weeks, the plaintiff estimates the period at three months, he was brought before an advisory tribunal. On 9th October 1942 perhaps as the result of a report from the tribunal, the Attorney-General made a restriction order in respect of the plaintiff. Upon the terms of that order he was released from custody as already stated about 20th October 1942. The more important conditions of the order required the plaintiff to reside in Queensland in that part south of the Tropic of Capricorn and 100 miles from the coastline and to report weekly to the police. The plaintiff objected to an advisory committee against this order and his objection was heard by a committee presided over by *Philp* J. with the result that on 8th December 1942 the restriction order was revoked, a revocation of which he was not notified until 20th January 1943.

Some months later the plaintiff had an interview with the Minister for the Army, to whom he had written about the first restriction order on 28th May 1942. According to the plaintiff's evidence, the Minister spoke of the reliance which he necessarily placed upon his officers and, in effect, assigned to his subordinates the responsibility for what had been done.

I have not thought it necessary to go into the hardships and ignominy suffered by the plaintiff, but it is evident from the foregoing narrative that in this respect the two periods of imprisonment are scarcely to be compared. The plaintiff's removal to Loveday Camp and his long incarceration there necessarily form his chief cause of complaint. At that time, however, under reg. 26 (1) (*c*) it was lawful for the Minister for the Army to direct that any person be detained if the Minister were satisfied with respect to that person that with a view to preventing his acting in any manner prejudicial to the public safety or the defence of the Commonwealth it was necessary so to order. The plaintiff was in fact arrested and held in pursuance of an order made in the purported exercise of the power and, unless he can show that the order was invalidly made or that there was something unlawful in the manner in which it was carried into execution, he has no redress in a court of law for his arrest or detention thereunder.

The order recites the requisite opinion of the Minister, but, for the purpose of invalidating the order, the plaintiff has sought to show that the Minister did not in fact possess that opinion. Courts have not always been at one on the question whether it is open to them to examine the truth of such a recital in an order of this

character and of that I must say something presently. But, in any case, I do not think that the plaintiff has established that when he made the order the Minister did not entertain the opinion the recital ascribes to him. All that the plaintiff has to rely upon to destroy the recital in this way is, first, the proofs he advanced of the absence of any real ground for suspecting his loyalty or dependability, and, secondly, his evidence which I have already summarized of his conversation with the Minister. But as to the first, an erroneous opinion is none the less an opinion, and, as to the second, the proper source of any Minister's information is the reports of his officers and the foundation upon which he forms an opinion must be their advice.

In undertaking to show that no real ground existed for impugning or doubting his loyalty and his reliability in relation to the war, the plaintiff embarked upon the proof of a negative. But I think it is right to say that his evidence raised a very strong presumption that the orders had been mistakenly made and had no real foundation in any acts, conduct or tendencies of the plaintiff. The law makes it unnecessary for the Commonwealth to disclose the information upon which the Minister acted and I am not aware of its nature. But it is also right to say that nothing has appeared in the proceedings before me which would justify any suggestion against the plaintiff's loyalty or steadfastness to the allied cause. That, however, is beside the point which I have to decide, namely whether there is any ground for nullifying the Minister's order. That he was mistaken in his opinion is certainly not such a ground. Even if it were open to show that the recital that he entertained the opinion was wrong, that has not been shown. But I do not think the order is examinable upon any ground affecting the Minister's opinion short of bad faith. With reference to the analagous but by no means identical reg. 55 of the *War Precautions Regulations* *Cussen* J. said in *R.* v. *Lloyd*; *Ex parte Wallach* (1) "Much may be said for the contention that his" (the Minister's) "decision was intended to be conclusive and final and not in any way subject to judicial intervention." On appeal to this Court, it appears to have been conceded by all the Judges, except possibly *Higgins* J., that theoretically the existence of the Minister's opinion was examinable in such circumstances as the present, but all agreed that as he was the sole judge of the truth, reliability, relevance and sufficiency of the information before him and of the reasonableness of his conclusion, no practical challenge to his opinion could be made (*Lloyd* v. *Wallach* (2)).

(1) (1915) V.L.R. 476, at p. 492. (2) (1915) 20 C.L.R. 299.

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

In *Liversidge* v. *Anderson* (1) a construction was placed on reg. 18B of the *Defence* (*General*) *Regulations* 1939, which provided that, if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him, he may make an order against the person directing that he be detained. The majority of the House held that all that it required was that the Secretary of State should " believe that he has in his own mind what he thinks is reasonable cause " (Lord *Wright* (2)) or that there should be grounds for his belief that appear to him to be reasonable (Lord *Romer* (3)). Their Lordships held that the regulation did not contemplate " the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law " (Lord *Maugham* (4)). " The production by the Secretary of State of an order of detention by him *ex facie* regular and duly authenticated, such as the House has before it in this case, constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid." (Lord *Macmillan* (5). Cf. *Budd* v. *Anderson* (6)).

A contention was made that the arrest on 20th June 1942 under the order was unlawful because the detective making it was not in possession of the order itself. In arrests for crime the common law rule is that where a warrant is necessary, as is the case with most misdemeanours, the officer making the arrest must have the warrant with him ready to be produced if required and that without it he is not justified in making an arrest (*Galliard* v. *Laxton* (7) ; *Codd* v. *Cabe* (8) ; *Horsfield* v. *Brown* (9) ; *R.* v. *Whitehouse* (10) ; *Nolan* v. *Clifford* (11) ; *Bull* v. *Laing* (12)). In England the rule was changed by s. 44 of the *Criminal Justice Act* 1925. In my opinion detention orders are not governed by the rule. Its basis is the fact that arrest upon a criminal charge is the commencement of a prosecution requiring the bodily presence of the accused. A detention order involves no charge, no judicial proceeding and no further order. It is decisive and immediately operative and is directed at the preventive detention until further order of the person to be taken into custody : See per *Scott* L.J., *Leachinsky* v. *Christie* (13).

(1) (1942) A.C. 206.
(2) (1942) A.C., at p. 265.
(3) (1942) A.C., at p. 274.
(4) (1942) A.C., at p. 220.
(5) (1942) A.C., at p. 258.
(6) (1943) K.B. 642.
(7) (1862) 2 B. & S. 364 [121 E.R. 1109].
(8) (1876) L.R. 1 Ex. D. 352.
(9) (1932) 1 K.B. 355, at p. 365.
(10) (1863) 2 S.C.R. 118.
(11) (1904) 1 C.L.R. 429, at p. 444.
(12) (1929) S.A.S.R. 65.
(13) (1946) 1 K.B. 124, at pp. 128-129 ; 133-135, 136 ; Affd. (1947) A.C. 573.

A point was made that in relation to the detention order a copy of reg. 26 had not been furnished to the plaintiff as required by reg. 26 (6). In all probability a copy was given to him on 23rd June 1942, but, in any case, I do not think the omission would make his detention unlawful and tortious: See *Greene* v. *Home Secretary* (1); *Budd* v. *Anderson* (2).

It follows from what I have said that in my opinion the plaintiff cannot recover damages against the Commonwealth in respect of his arrest on 20th June 1942 and his imprisonment from that date until 20th October or thereabouts.

It remains to deal with the plaintiff's cause of action in respect of his arrest on 8th June and confinement until 19th June 1942. The Commonwealth seeks to justify this imprisonment under s. 13 (1) of the *National Security Act* 1939-1940 and failing that to defeat the action under s. 13 (3). In any case the Commonwealth denies vicarious responsibility for the action of the police.

Section 13 (1) provides that: "Any person who is found committing an offence against this Act, or who is suspected of having committed, or of being about to commit, such an offence, may be arrested without warrant by any constable or Commonwealth officer acting in the course of his duty as such, or by any person thereto authorized by the Minister."

Section 10 makes it an offence to contravene or fail to comply with any provision of any regulation or with any order, rule or by-law made in pursuance of a regulation. Regulation 90 of the *National Security* (*General*) *Regulations* provides that "a person shall comply with every direction and requirement given to or made of or applicable to him under or in pursuance of any provision of these Regulations or any order made under any such provisions."

It follows that the plaintiff was lawfully arrested if he was found contravening or failing to comply with a good restriction order or directions binding upon him given pursuant thereto or if he were suspected of having contravened or failed to comply with such an order or such directions or of being about to do so. In considering whether his arrest was thus justified, the first question must be whether the Minister's restriction order was validly made.

I am clearly of opinion that it was not validly made. The order contained some restrictions referable to reg. 26 (1), but these I have not thought it necessary to set out. The material restrictions cannot be supported unless under reg. 25 (1). That sub-regulation empowers the Minister to make an order for any one or more of three purposes which it proceeds to set out. The validity of that

(1) (1942) A.C. 284, at pp. 296-298, 309. (2) (1943) K.B. 642.

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

part of the order with which we are concerned depends upon two of them which are expressed as follows :—" (*a*) for securing that, except so far as he is permitted by the order, or by the authority or person specified in the order, that person shall not be in any area specified in the order ; (*b*) for securing that he shall reside in a specified area, and shall not leave that area except so far as he is permitted to do so by the order, or by the authority or person specified in the order." Now the restriction which, or the directions thereunder which, the plaintiff was supposed to have disregarded simply says—" shall reside outside such area as the Military Authorities may from time to time determine." He is not required to live in an area, as an exercise of the power under par. (*b*) of reg. 26 (1) might have required him to do. Nor is he forbidden to be in an area as he might have been under par. (*a*) nor can the requirement that he shall live outside an area be considered a measure to secure that he shall not be within it. Residence in a place is not inconsistent with temporary physical presence elsewhere and residence outside a place does not exclude occasional visits to that place.

I think, therefore, that the particular restriction does not fall within either of the purposes set out in pars. (*a*) and (*b*) of reg. 26 (1) and there is certainly no other power under which it could be supported.

Further, the restriction fails to specify an area. The expressions in pars. (*a*) and (*b*) " any area specified in the order " and " a specified area " appear to me to contemplate some description or indication in the order itself of the place intended. I think that reg. 25 in speaking of an order means an order in writing and that pars. (*a*) and (*b*) mean that the writing shall contain a sufficient indication of the locality into which the person affected may not go or in which he must reside. It is to be noticed that not only does the particular restriction adopted by the Minister leave the choice and statement of the area to the military authorities, but it enables them to vary it from time to time. Neither of these things, in my opinion, is within the contemplation of reg. 25 (1). The power of delegation given by s. 17 of the *National Security Act* does not overcome the objection. No doubt it enables a Minister to carve up a given power into portions and delegate a portion, but I think that it requires a distinct written authorization and one which names some person or occupant of an office or at least gives a description to be filled by an ascertainable person or persons. I think that to read the restriction order as intending a delegation pursuant to s. 17 puts too great a strain upon its words. But, in

any case, it fails to designate any person or persons as a delegate or delegates either by name or by reference to an office or definite description. "Army authorities" is an expression far too vague and general for the purpose.

Then what was done under or in consequence of the Minister's order would not be enough to complete the order. It amounts only to a written instruction or request to the Commissioner of Police to cause the plaintiff to be informed of what he must do. There is no "determination" in writing which could supplement the instrument signed by the Minister so that, if other objections were out of the way, the two together could amount to an order in writing. The plaintiff was, in fact, orally acquainted with the directions given for, after all, the reading of parts of the communication simply formed part of an oral statement to him. Curiously enough, according to an exact reading of the language of the letter of 23rd May from Military Intelligence to the Commissioner, it describes an area beginning 300 miles from the coast as that from which the plaintiff is excluded as a resident, and that certainly is not what Army Intelligence intended to convey to the Commissioner or what Raetz did convey to the plaintiff.

For the reasons I have given I think that there was no valid restriction order, direction or requirement for the plaintiff to contravene or fail to comply with. But I am sure that the Inspector did not perceive this, nor, for that matter, did Detective Raetz.

In the general sense the Inspector believed, when he sent Raetz to fetch the plaintiff from the island, that the plaintiff had contravened the order and when, on 10th June, he directed him to be locked up, he believed, in addition, that he would do so again. I take it, too, that Raetz shared these beliefs. But more precisely what the Inspector, and no doubt Raetz, thought was that the plaintiff was legally bound by the order and the direction thereunder not to go to the island, and that not only had he already done so but he would return to it and, further, that he was legally bound to remove himself with less delay than he had shown below the twenty-seventh parallel and to the further side of a line 300 miles inland from the coast. As the order was invalid he was not so bound. But I think their belief also involved a misconstruction or misapplication of the provisions of the order. An order to reside in another place requires the establishment of a new residence and it must be understood as allowing time in which to make the change. It does not prohibit movement of the kind involved in the plaintiff's visit to the island.

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

I think that s. 13 (1) should be read as referring to the doing of acts or the making of omissions which amount to an offence. It means that, if a man is found doing such acts or making such omissions or is suspected of having done or made them or of being about to do or make, then he may be arrested without warrant. But it does not cover an erroneous belief on the part of the constable or officer as to the legal significance or quality of the acts or omissions, actual or suspected, past or threatened, of the persons arrested. An error on the part of the constable or officer as to what constitutes an offence is, in my opinion, covered by sub-s. (3) of s. 13 or not at all. Sub-section (3) of s. 13 is as follows:—"No action shall lie against the Commonwealth, any Commonwealth officer, any constable or other person acting in pursuance of this section in respect of any arrest or detention in pursuance of this section, but if the Governor-General is satisfied that any arrest was made without any reasonable cause, he may award such compensation in respect thereof as he considers reasonable."

The words "acting in pursuance of this section" cannot, of course, be attached to the words "the Commonwealth," and the important expression upon which the application of the provision depends is "in respect of any arrest or detention in pursuance of this section." If this expression properly interpreted covers the first arrest and detention of the plaintiff, then I can see no answer to the Commonwealth's contention that his action for that cause is barred by the sub-section.

Protective provisions requiring notice of action, limiting the time within which actions may be brought or otherwise restricting or qualifying rights of action have long been common in statutes affecting persons or bodies discharging public duties or exercising authorities or powers of a public nature. In provisions of this kind it is common to find such expressions as "act done in pursuance of this section" or "statute," "anything done in execution of this statute" or "of the powers or authorities" given by a statute, or "under and by virtue of" a statutory provision. Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment. Lord *Kenyon* C.J. said:—"It has been frequently observed by the Courts that the notice, which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only

required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." (*Greenway* v. *Hurd* (1): See, too, *Theobald* v. *Crichmore* (2)). "There can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act." (Lord *Campbell*, speaking for the Privy Council, *Spooner* v. *Juddow* (3)). It has, however, been found not easy to define the exact conditions which must be fulfilled to qualify for protection. Bona fides has been regarded as indispensable. But the difficulty has been to give such provisions an operation which, on the one hand, will not be so narrow that it goes little, if at all, beyond what is authorized by the substantive parts of the enactment, and, on the other, will not be wide enough to cover wrongful acts so outside the scope of the authority given by the statute that it can hardly be supposed that it was intended to protect those responsible. In *Cann* v. *Clipperton* (4) *Williams* J. said:—"It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute."

As might be expected recourse was made to the conception of "reasonableness" in an attempt to pass between these Symplegades. Accordingly, some decisions added to good faith the further condition that the defendant must have proceeded on reasonable grounds in supposing that he was acting in pursuance of the statute. Thus, in *Hughes* v. *Buckland* (5), an action for wrongful arrest, *Parke* B., speaking of a provision limiting the time for "an action against any person for anything done in pursuance of this Act" said:—"The Act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in strict pursuance of the Act, because, in such a

(1) (1792) 4 T.R. 553, at p. 555 [100 E.R. 1171, at pp. 1172-1173].
(2) (1818) 1 B. & Ald. 227 [106 E.R. 83].
(3) (1850) 4 Moo. Ind. App. 353, at pp. 379-380 [18 E.R. 734, at p. 744].
(4) (1839) 10 A. & E. 582, at p. 589 [113 E.R. 221, at p. 224].
(5) (1846) 15 M. & W. 346, at pp. 355-356 [153 E.R. 883, at p. 887].

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

case, a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions ; and then the meaning will be, that a party, to be entitled to protection, must bona fide and reasonably believe himself to be authorized by the Act."

But a further difficulty arose. Suppose the wrongdoing officer knew nothing of the provisions or even the existence of the statute. The answer was given in *Read* v. *Coker* (1) where *Jervis* C.J. said :— " It has been further contended, that the defendant could not have believed that he was acting in the execution of the statutes when he did the acts complained of, inasmuch as it did not appear that he had any knowledge of their existence. That point is, I believe, now made for the first time ; nor do I think it properly arises here. If, as the jury have found, the defendant bona fide believed he was acting in the assertion of a legal right, he was justified by the law, although he did not precisely know what that law was." (See, too, *Danvers* v. *Morgan* (2)).

The logical difficulty which might be felt in this rule was obviated by the next step, which was to formulate or adopt a test of the application of protective provisions of the kind under consideration. The test was whether the defendant honestly believed in the existence of a state of facts which, if it had existed, would have afforded a justification under the statute (*Roberts* v. *Orchard* (3)). It is, of course, obvious that if the title of the wrongdoer to protection depends upon his belief as to a state of facts which would make his act lawful, then what he knew or thought about statutory powers and authorities is immaterial. Unfortunately, however, this test left out of account a very common case, namely that in which there had been no misapprehension about the facts but a mistake as to the legal results ensuing or as to the extent of the defendant's powers or authorities or the course in which the law required that he should proceed in their exercise. There are many examples where it has been held that defendants who have thus incurred a tortious liability have acted in pursuance or execution of a statute and so are covered by provisions limiting, qualifying or barring the right of action. An old instance is that of one justice doing what only two justices were authorized to do (*Weller* v. *Toke* (4)). Other examples are to be found in the case of a constable forcing an outer door to levy a distress for a church rate (*Theobald* v. *Crichmore* (5)), a constable entering a house without a search warrant

(1) (1853) 13 C.B. 850, at p. 862 [138 E.R. 1437, at p. 1442].
(2) (1855) 1 Jur. N.S. 1051.
(3) (1863) 2 H. &. C. 769, at p. 774 [159 E.R. 318, at p. 320].
(4) (1808) 9 East 364 [103 E.R. 611].
(5) (1818) 1 B. & Ald. 227 [106 E.R. 83].

(*Surfling* v. *Nurse* (1)), and a highway board breaking down a gate without first applying to a justice (*Smith* v. *Hopper* (2)).

Clearly the purpose of a provision limiting or qualifying rights of action against officers and others acting under a statute would not be fulfilled by an interpretation excluding from its operation cases arising from mistaking the law or failing to comply with the requirements of the law. But, apart from this, another modification was made in the test which had been put forward, a modification affecting the requirement of reasonable grounds for the defendant's belief. In *Hermann* v. *Seneschal* (3) the defendant, a shopkeeper, gave the plaintiff into custody on a mistaken charge of uttering a counterfeit coin. The jury found that he bona fide intended to act in pursuance of the power conferred by the statute but that he had no reasonable ground for believing the plaintiff to be guilty of the offence. Upon these findings the court entered a verdict for the defendant, holding that the governing question was whether the defendant really believed that the facts existed which would bring the case within the statute and honestly intended to put the law in force and that the question of reasonableness was subordinate, that is, evidential only. In *Roberts* v. *Orchard* (4) which I have mentioned, the Exchequer Chamber followed this decision and restated the question in such cases in terms which made it enough honestly to believe in facts which if they existed would afford a justification.

In dispensing with the necessity of reasonable grounds, these decisions did not escape comment or criticism and perhaps qualification (*Leete* v. *Hart* (5)). But the effect of the subsequent case of *Chamberlain* v. *King* (6) seems to be that, provided there are some circumstances on which to base the belief, it is enough that the belief is honest. No doubt it is some aid to understanding if a distinction is maintained between departures from the law and errors of fact as sources of liabilities incurred in acting bona fide in pursuance or execution of a statutory provision and so the subject of protection. But that the former are covered as well as the latter is definitely decided by *Selmes* v. *Judge* (7). A short passage from the judgment of *Blackburn* J. will make this clear and will also sufficiently indicate the nature of that case. "The only illegal act done by the defendants was to make an informal rate;

(1) (1846) 11 J.P. 279.
(2) (1847) 9 Q.B. 1005 [115 E.R. 1560].
(3) (1862) 13 C.B.N.S. 392 [143 E.R. 156].
(4) (1863) 2 H. & C. 769 [159 E.R. 318].
(5) (1868) L.R. 3 C.P. 322, at pp. 324-326.
(6) (1871) L.R. 6 C.P. 474.
(7) (1871) 6 Q.B. 724.

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in *Hermann* v. *Seneschal* (1) nor in *Roberts* v. *Orchard* (2) was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law" (3). It is true that in *Maxwell's Interpretation of Statutes* the view is expressed that apparently there would be no protection for an arrest made in misconception not of the facts but of the law. I think the true rule is given in *Halsbury, Laws of England,* 2nd ed. vol. 26, p. 296:—"A defendant who honestly intends to act in execution of a public duty may be protected although he acts in ignorance, or under a mistake, as to the law."

The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.

It may be suggested that the interpretation to be placed upon a provision like s. 13 (3) of the *National Security Act* completely barring an action should be narrower than that placed upon provisions which do no more than prescribe a time limit within which to sue or a notice before action or in some other way qualify without destroying the cause of action. But to place upon a form of words traditionally used to describe a situation meanings which vary according to the consequences affixed by the legislature is a course that can hardly be defended. In *Thomas* v. *Stephenson* (4) Lord *Campbell* L.C.J. said that "the policy hitherto pursued by the legislature" in protecting public functionaries who have made a mistake in the exercise of a statutory authority honestly believing that they were justified by it was only to free them from technical difficulties in conducting their defence and to exempt them from the heavy costs which must follow a verdict against them if they are willing to offer compensation. But, although Lord *Campbell*,

(1) (1862) 13 C.B.N.S. 392 [143 E.R. 156].
(2) (1863) 2 H. & C. 769 [159 E.R. 318].
(3) (1871) 6 Q.B. 724, at pp. 727-728.
(4) (1853) 2 E. & B. 108, at p. 116 [118 E.R. 709, at p. 712].

speaking in 1853, described this as more reasonable, he said that the Parliament in its omnipotence might exempt the officers from all liability and he evidently regarded such a consequence as having no influence upon the ambit of the protective provision.

For the reasons I have indicated, I think that the words "any arrest or detention in pursuance of this section" occurring in s. 13 (3) of the *National Security Act* 1939-1940 cover an arrest or detention by a constable who with some facts to go upon honestly thinks that what he has found or suspects is an offence against the Act committed or about to be committed by the person whom he arrests or detains notwithstanding that the arrest and detention are not actually justified and that his error or mistake is in whole or in part one of law. This being the operation of sub-s. (3) of s. 13, the circumstances of the arrest of the plaintiff on 8th June and his detention until 19th June 1942 appear to me to make it inevitable that I should hold that the Inspector and, in giving effect to his orders, Detective Raetz acted in pursuance of s. 13 and that, accordingly, it was an arrest and detention in pursuance of that section and so not actionable.

I have already described what, in my opinion, was the actual state of mind of the Inspector and of Raetz. The Minister's order and the directions thereunder of Military Intelligence, through the Commissioner of Police, and the plaintiff's movements were facts giving rise to their beliefs, facts upon which they proceeded. Perhaps, in interpreting the Minister's order and the directions thereunder, their mistake was one of law and certainly the validity of the order is a matter of law and about that, as I think, the Inspector and Raetz were mistaken. But clearly they supposed that the plaintiff had offended and would offend against the order and, therefore, against the Act and they meant to proceed under s. 13, of the provisions of which the Inspector, at all events, was aware. They intended to act according to their duties as constables, although they were mistaken as to the legal position in which the plaintiff stood. It follows that I must decide that in respect of the first period of confinement the plaintiff by reason of s. 13 (3) cannot maintain his action. Section 13 (3) substitutes for the remedy he would otherwise have at law, an application to the Executive for compensation for an arrest if considered to have been made without reasonable cause.

If I had not reached the conclusion that s. 13 (3) deprived the plaintiff of his action in respect of the first arrest and period of imprisonment, it would have been necessary for me to decide whether the Commonwealth were responsible for the acts of the

H. C. OF A. 1947. LITTLE v. THE COMMONWEALTH. Dixon J.

Inspector and of Detective Raetz in taking and keeping the plaintiff in custody. Prima facie, these officers appear to have been acting independently in the purported discharge of duties or authorities imposed on or vested in them by the law and not as agents of the Commonwealth. I do not think that the Commonwealth relies upon the distinction between State officers of police and Federal officers. The defence in question rests upon the general doctrine, which has been specifically applied to constables of police making arrests, the doctrine that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability (*Tobin* v. *The Queen* (1); *Raleigh* v. *Goschen* (2); *Enever* v. *The King* (3); *Baume* v. *The Commonwealth* (4); *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (5); *Zachariassen* v. *The Commonwealth* (6); *Commonwealth* v. *Zachariassen* (7); *Fisher* v. *Oldham Corporation* (8); *Field* v. *Nott* (9)).

But, in spite of the prima-facie applicability of this principle to the acts of the Inspector and of Raetz in arresting the plaintiff and detaining him, I think that I should hesitate to give effect to it. There is much in the case to suggest that Military Intelligence under some arrangement between the Commonwealth and the States used the police to act in aid of and on behalf of that arm of the Commonwealth Forces and were in close communication with the Queensland police, whether always through the Commissioner or sometimes through subordinates I am not sure. The whole matter was dealt with but faintly in the evidence. However Captain Jolley was not called as a witness and his presence at Yeppoon with a car that took the plaintiff to Rockhampton and other smaller indications in the case have led me to doubt the assumption upon which the particular defence proceeds, namely that the police did not act as the authorized agents or upon the actual intervention of Military Intelligence.

However, for the reasons I have given, I think the action fails and there must be judgment for the defendant.

Having regard to the circumstances of the case and to the failure of the defence upon some issues or questions of fact and law, the

(1) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(2) (1898) 1 Ch. 73.
(3) (1906) 3 C.L.R. 969.
(4) (1906) 4 C.L.R. 97.
(5) (1916) 2 A.C. 556; (1913) 17 C.L.R. 149.
(6) (1917) 24 C.L.R. 166.
(7) (1920) 27 C.L.R. 552.
(8) (1930) 2 K.B. 364.
(9) (1939) 62 C.L.R. 660.

Commonwealth may not wish to apply for costs. It will be time enough to consider what order should be made if it does so.

In the meantime there will be judgment for the defendant. There would be no advantage to the plaintiff in a nonsuit, especially as his writ was issued only very shortly before the expiry of the period of limitation in respect of the first arrest.

Judgment for defendant.

Solicitors for the plaintiff: *William Parker* (Sydney) by *J. A. Walsh & Walsh.*

Solicitor for the defendant: *H. F. E. Whitlam*, Crown Solicitor, for the Commonwealth.

B. J. J.