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Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Starling (Acting).

ALTER CAUFMAN AND OTHERS, (*Appellants*) *v.* THE GOVERNMENT OF BOMBAY (*Respondent*). [9th August, 1894.]

Habeas corpus—Foreigners—Act III of 1864, *validity and application of—Powers of legislation of the Governor General in Council—Indian Councils Act (Stat.* 24 *and* 25 *Vict., c.* 67), *s.* 22—*Crim. Pro. Code (X of* 1882), *s.* 491—*Warrant to arrest and imprison—Form of warrant—Service of warrant—Procedure.*

On the 3rd July, 1894, certain foreigners resident in Bombay having been arrested by the police and sent to jail under warrants issued under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule *nisi* under s. 491 of the Criminal Procedure Code (X of 1882) and under Stat. 31, Car. II, c. 2 (Habeas Corpus Act), calling on the Superintendent of the Jail to show cause why they should not be set at liberty. In the affidavits filed in showing cause against the rule the only reason suggested for their arrest was that they were connected with loose women residing in a certain district of Bombay. It was contended for the prisoners that their arrest and imprisonment were illegal, (1) inasmuch as Act III of 1864 was *ultra vires* of the Indian Legislature; (2) that the Act being intended only to secure the "peace and security" of British India was in this case improperly applied.

[637] *Held* (1) that Act III of 1864 was not *ultra vires* of the Governor-General of India in Council;

(2) that it was rightly applied in the case of the foreigners in question, although their residing in Bombay may not have been likely to have affected or endangered the peace and security of British India.

Per STARLING, J.—Section 3 of Act III of 1864 gives the fullest power to the Government to order any foreigner to remove himself from British India. The Government is the sole judge of what is necessary for the peace and security of British India, and if it acted in accordance with the letter of the Act the Court could not inquire into the sufficiency of its reasons for so acting.

A separate warrant was issued in the case of each of the foreigners in question; and all were in the same form. The warrant directed the person whose name appeared in it forthwith to "remove himself from British India by sea," and it further contained the following words:—"All officers to whom this order may be communicated are required to see that it is duly obeyed, and in the event of its being infringed to apprehend and detain the said ( ) in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom." Each warrant was signed by the Secretary to Government and was directed to the Commissioner of Police and to the Superintendent of the Jail.

Held that the warrants were not vaild warrants for the following reasons:—

(1) They were irregular in that they contained an order to the person named in them to do a certain thing with a further conditional order for his imprisonment in the event of his not doing it. There ought to have been a separate order to each prisoner to remove himself from British India, which order should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail.

(2) The persons named in them were not indicated with sufficient certainty and particularity. The warrants contained no description of the persons against whom they purported to be directed, and did not give their place of residence.

(3) By reason of the direction contained in them that the persons named in them were to remove themselves from British India by sea to the places mentioned in the warrant. The particular route to be specified under s. 3 of Act III of 1864 is intended to be a route in British India, and not a route beyond the high seas. The Government has no jurisdiction to direct a person's movements at sea beyond the limits of three miles from the shore.

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(4) (Per STARLING, J.)—The warrants were also defective inasmuch as they bore no seal.

[R., 11 Cr. L. J. 570=8 Ind. Cas. 137=23 P. R. 1910 Cr.=85 P. L. R. 1910.]

APPEAL from an order made by Farran, J.

The appellants and two others, who were foreigners residing in Bombay, were arrested by the police in Bombay on warrants issued under Act III of 1864, ss. 3 and 4, on the evening of the 3rd [638] July, 1894. On the following day an application was made on their behalf to Farran, J., who issued a rule *nisi*, under s. 491 of Act X of 1882, and under Stat. 31, Car. II., c. 2 (Habeas Corpus Act) calling on the Superintendent of the Jail to show cause why the prisoners should not be set at liberty. On the 9th July the rule came on for hearing, and after argument Farran, J., as to the five appellants discharged the rule (1). From this order of discharge the present appeal was filed.

From the affidavits it appeared that on the 11th June the Commissioner of Police handed over to an Inspector of Police seven warrants purporting to be issued by the Governor of Bombay in Council, under ss. 3 and 4 of Act III of 1864 and signed by one of the Secretaries to Government and dated the 8th June. Each of the warrants was made out in the name of one of the prisoners. The Inspector was directed to show to each of the said persons the warrant applicable to him, and to have the contents thereof read and explained to him.

The warrant made out in the name of the first appellant was as follows. The warrants for the other prisoners were exactly similar, except that two of them directed removal "by sea to Roumania" and one "to Austria" and one "by sea to Adrianople":—

"*Warrant.*

"In exercise of the power conferred by s. 3 of Act III of 1864, the Right Honourable the Governor of Bombay in Council is pleased hereby to direct that Alter Caufman *alias* Alter Goolyk do forthwith remove himself from British India by sea to Odessa.

"And all officers to whom this order may be communicated are requirde to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Alter Caufman *alias* Alter Goolyk in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom.

"By order of His Excellency the
Right Hon'ble the Governor in Council,
"(Signed) W. LEE-WARNER.

"*Political Department,*
"*Bombay Castle, 8th June 1894.*"

[639] On the 17th June the Inspector of Police went to a house in Bombay which was used by the prisoners and others as a club, and there carried out (as he alleged) the above orders.

The following paragraphs of the affidavit of the Inspector of Police state the subsequent proceedings:—

"4. On two or three occasions after that I went to the same club and found the above-named persons there, and I warned them again that

(1) The case as to the remaining two prisoners was adjourned. They were subsequently discharged on the ground of informality in the warrant with regard to their names.

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they must comply with the orders of Government to depart from British India. They then appeared to understand what the orders were, but said they had no money to enable them to buy their passage. They all speak a little English. Jay Hussel *alias* Edell Chusel speaks English fairly well.

"5. I reported to the Acting Commissioner of Police that they had failed to leave Bombay, although they had had an opportunity of doing so. I was then ordered by the Acting Commissioner of Police to arrest the above-named persons in pursuance of the said warrant. I accordingly attended with four European constables at the said club on the evening of the 3rd July, at eight o'clock in the evening, and showed the warrants again to and arrested the above-named seven persons. As it was late that evening I detained them in the police lock-up—three of them at Girgaon and four of them at Nesbit Lane, and the next day, in accordance with the terms of the said warrant, I made them over, with the several warrants applicable to them, to Mr. Alfred George Mackenzie, the Superintendent of Her Majesty's Common Jail, at the said jail.

"6. It is true that I declined to give copies of the warrants, and that I referred the parties, who asked me for copies, to the Acting Commissioner of Police.

"7. I have been in the E Division for two years. The above-named seven persons lived within that division. They are all known to me as *being connected with the loose women who live about the vicinity of Foras Road and Cursetji Sukhlaji Street.*"

The passage italicised in the seventh paragraph was the only indication in the affidavits of any cause for the arrests.

The matter came on before Farran, J., who after argument discharged the rule. From that order the present appeal was brought. It was heard on the 3rd August.

The preamble of Act III of 1864 and ss. 3 and 4 of that Act under which the arrests were made are as follows :—

"Whereas it is expedient to make provision to enable the Government to prevent the subjects of foreign states from residing or sojourning in British India, or from passing through or travelling therein, without the consent of the Government; it is enacted as follows :—

"3. The Governor General of India in Council may, by writing, order any foreigner to remove himself from British India or to remove himself therefrom by [640] a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government.

"4. If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse so to do; or if any foreigner, having removed himself from British India in consequence of an order issued under any of the provisions of this Act, or having been removed from British India under any of the said provisions, shall wilfully return thereto without a license in writing granted by the Governor General of India in Council or by the Local Government under whose order he shall have removed himself or been removed, such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order of the Governor General of India in Council or of the Local Government within whose jurisdiction he shall be so apprehended or detained, upon such terms or conditions as the said Governor General of India in Council or Local Government shall deem sufficient for the peace and security of British India and of the allies of Her Majesty, and of the neighbouring princes and states."

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For the appellants it was contended that their arrest was illegal on the following grounds :—

1st. That Act III of 1864 was invalid, being *ultra vires* of the Indian Legislature.

2nd. That the Act was in this case improperly applied.

3rd. That the warrants were irregular.

Kirkpatrick, for the appellants.—This Court may consider the validity of an Act of the Indian Legislature—*Empress* v. *Burah*(1), and I contend that Act III of 1864 is invalid, being *ultra vires*, and that orders and arrests made under it are illegal. The Indian Legislature may not exceed its powers (see per Lord Selborne in the *Queen* v. *Burah* (2)). It is created by Statute and has no powers except those given to it by Statute. Those powers are prescribed by s. 22 (3) of the Indian Councils Act (Stat. [641] 24 and 25 Vict., c. 67). That section explicitly declares how far the Acts of the Indian Legislature shall operate. They may control or supersede Acts of the Local Legislatures, but the section gives the Indian Legislature no power to control or supersede an Act passed by the English Parliament, and it expressly forbids it to make any law "which shall repeal or in any way affect" (4) any provisions of Stat. 21 and 22 Vict., c. 106. Section 64 of this latter Statute (5) provides that "all Acts and provisions

(1) 3 C. 63. (2) 5 I. A. 178 (193) = 4 C. 172 (180).

(3) The following is the material portion of s. 22 of the Councils Act (Stat. 24 and 25 Vict., c. 67) :—

Section 22.—The Governor General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, or Lieutenant Governor in Council of any presidency or other territory for which a Council may be appointed, with power to make laws and regulations, under and by virtue of this Act. Provided always, that the said Governor General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act :

Or any of the provisions of the Acts of the 3 and 4 Will, IV, c. 85, and of 16 and 17 Vic., c. 95 and 17 and 18 Vic., c. 77, which after the passing of this Act shall remain in force.

Or any provisions of the Act 21 and 22 Vic., c. 106, entitled "An Act for the better Government of India," or of the Act of 22 and 23 Vic., c. 41, to amend the same :*

* * * * * * * *

or which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

(4) As to the meaning of these words, see *per* Sargent, J., in the *Queen* v. *Beay* (7 B. H. C. R. Cr. Ca. 27).

(5) Stat. 21 and 22 Vict., c. 106, is the Statute passed in 1858 by which the Government of India was transferred from the East India Company to Her Majesty, and is entitled "An Act for the better Government of India."

Section 64.—All Acts and provisions now in force under charter or otherwise concerning India shall, subject to the provisions of this Act, continue in force, and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors, and Court of Proprietors thereof; &c., &c.

now in force under charter or otherwise concerning India shall . . continue in force." English law was then and is now in force in the Presidency towns (see 6 Beng. L. R. at pp. 438-9 and pp. 446-7 and [642] see 4 Bom. H. C. Rep. 31—39). Magna Charta, the Petition of Rights and the Habeas Corpus Act are essential parts of English law; (see per Norman, J., at p. 451 of 6 Beng. L.R.); therefore, these Statutes as part of that law were in force: they are, therefore, Acts expressly continued in force by that section. But Act III of 1864, which allows arbitrary imprisonment and refuses a trial in open Court and gives no opportunity for defence, supersedes and practically repeals these Acts. Therefore the Indian Legislature by Act III of 1864 assumes to itself without authority the power of superseding English Statutes and also infringes s. 64 of 21 and 22 Vic., c. 106, which it was expressly forbidden to do by s. 22 of the Councils Act. Act III of 1864 is, therefore, *ultra vires* and invalid.

It is also *ultra vires* and invalid under the last clause of s. 22 of the Councils Act as it affects "part of the unwritten law and constitution of the United Kingdom, whereon may depend in *any degree* the allegiance of *any person* to the Crown." It is true that Act III of 1864 only refers to foreigners. But under this provision an Act may be invalid although it relates to persons who owe no allegiance to the Crown. For the test is, does it affect (not allegiance but) the constitution. Does it affect *any part* of the constitution on which the allegiance of *any person* depends *in any degree*? It will hardly be denied that the allegiance of Englishmen depends largely on the careful observance of the right to personal freedom, except on conviction of an offence after fair and open trial. This is conclusively shown by Norman, J., in his judgment in *Ameer Khan's case* (1) at p. 451 of the report. That right is an essential part of the constitution. But the constitution does not limit that right only to British subjects, but extends it to all who live within its protection (see pp. 443-4 of the report). Act III of 1864 takes away that right altogether from foreigners. Therefore in its dealings with foreigners it affects a part of the constitution on which the allegiance of Englishmen in *some* degree at all events depends, and it is, therefore, under the Councils Act, invalid. Further it is clear that under the Councils Act the Indian Legislature's power to legislate for foreigners is precisely the same as its power to [643] legislate for British subjects. Therefore, in order to ascertain if an Act as to foreigners is valid, we have only to see if it could be validly enacted as to British subjects. The test of validity is the same, as the powers of legislation are precisely the same. Act III of 1864, if made applicable to Englishmen, would certainly violate a part of the law and constitution whereon their allegiance in some degree depends. See per Norman, J., in *Ameer Khan's case*, at p. 451 of the report (1). Therefore, it would be invalid and *ultra vires* as to them, and, if so, it must also for the same reason be invalid as to foreigners. It is to be remembered that there is no analogy between the position and proceedings of the English Parliament and those of the Indian Legislature. Parliament being *paramount* has the power to pass any measures it pleases. Being *representative* it may be presumed that its measures merely express the will of the community and, therefore, can hardly be such as to shake the allegiance of the community. But whatever their nature and effect may be, they are "law," being passed by a competent legislature and can be legally enforced

(1) 6 B.L.R. 392 (450, 451).

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The Indian Legislature on the other hand is a non-representative and Subordinate body exercising merely delegated and limited powers, and it is expressly forbidden to pass any measures which may have a tendency to affect allegiance. Such measures if passed by it are not "law" and any attempt to enforce them is illegal. The meaning and purpose of this limitation of the powers of a subordinate legislature are obvious.

Ameer Khan's case (1) will be relied on by the other side. It, however, was decided not with reference to the Councils Act, but with reference to Stat. 3 and 4 Will. IV., c. 85, and is no authority in the present case. But in any event I contend that it was wrongly decided, and ought not to be followed. The Judges did not decide that case on a construction of the Act then in force (Stat. 3 and 4, Will. IV, c 85, s. 45), but on political considerations. Norman, J., apparently found it impossible to hold that under the words of that Statute the Legislature had power to pass Act III of 1858, and he, therefore, held that it could do so on the ground of "emergency." He held that any Act which the Indian Legislature could pass in view of an emergency it could also **[644]** make permanent (see pp. 454-5 of the report). But that is clearly not the intention of the Councils Act, which by s. 23 gives a special power in cases of emergency to make laws which shall only remain in force for six months. If the doctrine laid down by Norman, J., were accepted, the limitations prescribed in s. 22 might be altogether disregarded and the Indian Legislature could permanently assume to itself supreme, uncontrolled and arbitrary power. No rights would be secure, for an emergency abrogates all law and all rights (see *Phillips* v. *Eyre* (2); *Empress* v. *Burah* (3). Considerations of emergency or expediency or necessity ought not to influence Judges in construing the law—*The King* v. *Wilkes* (4); *Queen* v. *Dudley* (5). An emergency which makes it necessary for Government to overstep the law does not justify the Courts in misconstruing the law, but calls for an Act of indemnity—*Phillips* v. *Eyre* (2).

Phear, J., held (p. 476 of the report) that Act III of 1858 constituted the Governor-General in Council a Court with full discretion to adjudicate and with power to imprison during pleasure. The effect of that decision is that the Indian Legislature might give itself judicial power and assume the power of interpreting and administering its own laws without control, and might thus constitute itself a Court in which there should be no trial granted, and no defence permitted,—in fact, turn itself into a new Star Chamber. I submit that is an unconstitutional doctrine. The Indian Legislature may not disregard what in England is deemed essential, *viz.*, the separation of the legislative from the judicial functions. There is no authority for such a doctrine and no such power is given by the Councils Act.

Markby, J., in his judgment apparently argued thus (p. 482 of the report):—"The Legislature is only forbidden to pass laws affecting that part of the constitution on which allegiance depends. But the subject's duty of allegiance does not in any way depend on the conduct of the sovereign towards him. He is bound to continue loyal, although all his rights and liberties are taken away. Therefore, Act III of 1858 did not affect allegiance, and, therefore, the Indian Legislature had power to pass it." The **[645]** conclusion is no doubt correct if the premises are

(1) 6 B.L.R. 392 (451). (2) L.R. 6 Q.B. 16, (17). (3) 3 C. 63, (101).
(4) 19 How. State Trials, 1112. (5) 14 Q.B.D. 273.

granted. If this Court accepts them as a true statement of English constitutional law, further argument on this point is useless. These doctrines have seldom, if ever, been heard in an English Court of Law since the Revolution.

I submit, therefore, that, having regard to the principles on which *Ameer Khan's case* was decided, it ought not to be followed.

Next I contend that, even if Act III of 1864 is valid, it has been misapplied. The whole Act was clearly intended to be applied to insure "peace and security," and it is not suggested that the arrest of the appellants is for this purpose. It is now apparently applied to protect and improve the morals of the community. That is quite outside the object of the Act. Sections 3 and 4 cannot be read and construed independently and without regard to the rest of the Act. They are part of an Act the object of which is manifest. A Statute passed for one purpose ought not to be used for another—Maxwell on Statutes (2nd Ed.), 146, 320, &c.; *Shidlingapa* v. *Karisbasapa* (1); Stephen's Blackstone, Vol. I, pp. 72-76 (5th Ed.). The Court will bring up the prisoners on *habeas corpus* or under s. 491 of the Criminal Procedure Code to inquire into the reasons of their imprisonment—Broom's Constitutional Law, pp. 110, 112, 209-10; *In re Omirtolall* (2); *In the matter of Khattija Bibi* (3).

The warrants are bad in form. They contain both the orders of removal and the authority to arrest. The orders of removal should have been given in writing and should have been served separately. They exceed the powers given by the Act. The description of parties contained in them is not definite. The warrants to arrest should have been separate from the orders.

Lang (Advocate General), for the Crown:—Magna Charta and the Petition of Rights do not protect from imprisonment *according to law*. Act III of 1864 is law in British India, and, therefore, the imprisonment of the appellants under it is no infringement of the former Acts. The Indian Legislature has full power to make laws for India, and foreigners are bound to obey these laws. [646] The limitation on the Legislature not to pass laws affecting allegiance, cannot apply to laws affecting foreigners, as they owe no allegiance except so far as they are bound to observe the laws they find in force. The orders and warrants in this case were sufficient in form and did not exceed the power given by Act III of 1864 or infringe its provisions.

Kirkpatrick in reply:—The argument for the Crown is that Act III of 1864 is "the law of the land," and, therefore, Magna Charta, &c., is not infringed. That, however, merely begs the question, which is whether Act III of 1864 *is* the law of the land. That is the very point at issue, and my contention is that Act III of 1864 is not law, as it was *ultra vires* of the Indian Legislature. The Advocate General then argues that the validity of an Act affecting foreigners cannot depend on considerations relating to the allegiance of British subjects. But it is quite clear that under the Councils Act it does: 1st, because under the Councils Act any Act which touches a constitutional right on which the allegiance of *any person* (not necessarily the person against whom the particular Act is directed) depends is invalid, inasmuch as it affects the constitution; and secondly because the power to legislate for foreigners is the same as the power to legislate for Englishmen, and, therefore, any test which shows that a similar Act

(1) 11 B. 599 (601). (2) 1 C. 78. (3) 5 B.L.R. 557.

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would be invalid if enacted as to Englishmen is sufficient to show the invalidity of an Act affecting foreigners. The Acts belong to one and the same class, and must stand or fall together.

Cur. adv. vult.

JUDGMENT.

August 9th. BAYLEY, J.—This is an appeal against so much of an order made by Mr. Justice Farran on the 9th July, 1894, as discharged a rule *nisi* dated the 4th July, 1894, which called upon Mr. A. G. Mackenzie, the Superintendent of the Common Jail, Bombay, to show cause why Alter Chaufman and four other foreigners, alleged to be illegally or improperly detained by such Superintendent in the said Jail, should not be delivered; and by which rule *nisi* it had been ordered that the said Superintendent should bring up to the High Court the bodies of the said five persons there to be dealt with according to law.

[647] In the memorandum of appeal filed on behalf of the said five persons it was alleged (1) that the learned Judge was in error in holding that the passing of the Foreigners Act, III of 1864, was within the powers conferred upon the Governor General in Council; (2) that he erred in refusing to inquire whether the presence of the appellants did, in fact, endanger the peace and security of British India; (3) that he erred in refusing to inquire whether the power given by Act III of 1864 was properly exercised in the appellant's case; (4) that he erred in refusing to make an order liberating the appellants from custody; (5) that he was wrong in refusing to admit the appellants to bail and in referring them to the Magistrate; (6) that the order shoud be set aside with costs, and an order made for the appellants' release.

The appeal was argued before us on the 3rd instant by Mr. Kirkpatrick on behalf of the five appellant foreigners, and by the Advocate-General, who, instructed by the Acting Government Solicitor, appeared on behalf of the Government of Bombay.

The learned Advocate-General, when the Court inquired whether the appellants were out on bail, informed us that four of the appellants had on the 2nd instant left by sea for Europe and that the appellant named Solomon Moses *alias* Waxfigoor was the only one of the five appellants now in Bombay, where he was detained under the warrant against him in Her Majesty's Common Jail.

The warrants under which the appellants were arrested were precisely similar in form, except as to the names of the persons and as to the direction by which route each was to remove himself by sea.

As part of the argument on behalf of the appellants turned upon the alleged insufficiency of the warrants, it will be convenient to give here the one under which Solomon Moses *alias* Waxfigoor was arrested and is now detained in jail:—

"*Warrant.*

"In exercise of the power conferred by s. 3 of Act III of 1864 the Right Honourable the Governor of Bombay in Council is pleased hereby to direct that Solomon Moses *alias* Waxfigoor do forthwith remove himself from British India by sea to Roumania.

[648] "And all officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being

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infringed, to apprehend and detain the said Solomon Moses *alias* Waxfigoor in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom.

" By order of His Excellency the Right Honourable the Governor in Council,
" (Signed) W. LEE-WARNER,
Secretary to Government.

" *Political Department*,
" *Bombay Castle*, 8*th June*, 1894.

" To

" The Commissioner of Police, Bombay.

" The Superintendent, Her Majesty's Common Jail, Bombay."

It was contended on behalf of the appellants—

(i) That Act III of 1864, being " An Act to give the Government certain powers with respect to foreigners," was *ultra vires* of the Government of India to enact.

(ii) That that Act had been improperly applied.

(iii) That in any event the appellants, who had been arrested under that Act, were entitled to a writ of *habeas corpus*, or to an order under s. 491 of the Criminal Procedure Code (Act X of 1882), the warrants, it was alleged, being absolutely insufficient.

First, as to the argument addressed to us, that Act III of 1864 was *ultra vires* of the Government of India, and that it infringed the rights conferred by Magna Charta, the Petition of Rights, and the *Habeas Corpus* Statutes.

The right of arbitrary arrest and detention in prison without assigning any cause therefor, which Act III of 1864 confers upon the Governor General of India in Council and the Local Governments—however contrary such right may be to the ordinary notions of Englishmen—was not conferred upon these authorities for the first time by that Act, and it may be useful to refer briefly to the powers which by legislative enactment were granted during the present century to those who were responsible for the government and the peace and security of British India and of those dwelling in it.

In the last year of the tenure of the office of Governor of Bombay by Mountstuart Elphinstone, that distinguished statesman [649] passed a Code of Regulations, one of which was Reg. XXV of 1827, which is still in force throughout the Presidency of Bombay and is entitled 'a Regulation for the confinement of State-prisoners and for the attachment of the lands of Chieftains and others for reasons of State.' It appears to have been based mainly upon a previous Regulation of the Bengal Government, Reg. III of 1818 of the Bengal Code.

After reciting that 'Reasons of State embracing the due maintenance of the alliances formed by the British Government with Foreign Powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any legal judicial proceedings, or when such proceedings may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper, and that it is fit that in every case of

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the nature therein referred to the measures adopted should emanate immediately from the Governor in Council . . . . the following rules have therefore been enacted' it proceeded to enact first that 'when any of the considerations stated in the preamble of this Regulation may seem to the Governor in Council to require that an individual should be placed under restraint without any immediate view to ulterior proceedings of a judicial nature it shall be lawful for the Governor in Council, provided always that with reference to the individual, the measure shall not be in breach of British law, to cause such individual to be apprehended in such manner as the Governor in Council may deem fit, and when apprehended, to be delivered over to any officer in whose custody it may be deemed expedient that he shall be placed with a warrant of commitment to such officer's address.' The second clause states 'the warrant of commitment shall be in the form specified in Appendix (A), and shall be sufficient authority for the detention of any State-prisoner in any fortress, jail, or other place within the zillas subordinate to Bombay.

So much of the first clause as provided that, with reference to the individual, the apprehension and confinement therein referred [650] to shall not be in breach of British law, was repealed by Act III of 1858 of the Governor General in Council, except so far as the said provision applied to European British subjects.

By Act XXXIV of 1850, 'An Act for the better custody of State-prisoners,' after reciting that doubts had been entertained whether State-prisoners confined under Reg. III of 1818 of the Bengal Code could be lawfully detained in any fortress, jail or other place within the limits of jurisdiction of any of the Supreme Courts of Judicature established by Royal Charter, and it was expedient that such doubts should be removed, and the powers of the said Regulation extended to all the territories under the Government of the East India Company, enacted that the warrant of commitment under Reg. III of 1818 of the Bengal Code might be directed to the Sheriff of the jail of any of the Supreme Courts established by Royal Charter in the said territories, and that such warrant should be sufficient authority for the detention of such State-prisoner in the fortress, jail or other place mentioned in the warrant, and by s. 3 it was enacted that any State-prisoner thus confined under any such warrant within the jurisdiction of any of the said Supreme Courts, under the warrant of the Governor General in Council, should be deemed to have been lawfully committed thereunto.

By Act III of 1858, 'An Act to amend the law relating to the arrest and detention of State-prisoners,' it was enacted by s. 2 that the provisions of Reg. III of 1818 of the Bengal Code, Reg. II of 1819 of the Madras Code, and Reg. XXV of 1827 of the Bombay Code as altered by s. 1 of that Act relating to the arrest and confinement of persons as State-prisoners should be in force within the local limits of the jurisdiction of the Supreme Courts at Calcutta, Madras and Bombay respectively, and by s. 3 all powers for the better custody of State-prisoners which by Act XXXIV of 1850 were vested in the Governor General in Council were stated to be possessed and might be exercised by the Governor in Council of Fort St. George and the Governor in Council of Bombay respectively for the better custody of State-prisoners arrested within their respective Presidencies.

[651] I will next consider Act III of 1864, under the authority of which the warrants now under consideration were issued. It is entitled

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"An Act to give the Government certain powers with respect to foreigners." It contains 25 sections, but it appeared to be admitted before us that only the first four sections are in force in the Bombay Presidency, the Governor General in Council not having as yet exercised the powers conferred upon him by s. 5, of extending that section and the subsequent sections to this Presidency.

The Act recites that 'it is expedient to make provision to enable the Government to prevent the subjects of foreign States from residing or sojourning in British India, or from passing through or travelling therein without the consent of the Government,' and enacts, by s. 3, that 'The Governor General of India in Council, may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government. And by s. 4 it is enacted that 'If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse to do so, ... such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order of the Governor General of India in Council, or of the Local Government within whose jurisdiction he shall be so apprehended or detained, upon such terms and conditions as the Governor General of India in Council or Local Government shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States.'

Now the points argued before us on behalf of the appellants, *viz.*, that the Government of India had no power to pass Act III of 1864, and that such Act was in violation of Magna Charta, the Bill of Rights and the Habeas Corpus Acts, are the same as were urged on behalf of one Ameer Khan, a European British subject, (who had been arrested and imprisoned under Reg. III of 1818 of the Bengal Code), when he applied in the [652] High Court of Calcutta for a writ of *habeas corpus* in 1870, and when it was contended that the two Acts I have cited, *viz.*, Act XXXIV of 1850 and Act III of 1858, (the former of which Acts re-enacted the substance of Reg. III of 1818), were beyond the powers conferred on the Indian Legislature by the Statute 3 and 4 Will. IV, c. 85, s. 43. Mr. Justice Norman after a very lengthened argument by Mr. Anstey for Ameer Khan and by the Advocate General for the Crown refused the application for a *habeas corpus*, and on appeal Mr. Justice Phear and Mr. Justice Markby held that he had rightly done so, and decided that as it appeared that the prisoner was in custody under a warrant in the form prescribed by Reg. III of 1818, the detention was legal, that the detention to be legal need only be covered by an actually existing warrant of the Governor General in Council in the form prescribed, without regard to the lawfulness of the arrest; that by the combined operation of Reg. III of 1818, Act XXXIV of 1850, and Act III of 1858 the detention was legal, and that those Acts were not contrary to the powers conferred on the Indian Legislature by 3 and 4 Will. IV, c. 85, s. 43—*In the matter of Ameer Khan* (1).

Mr. Kirkpatrick strenuously contended that Act III of 1864 violated the concluding paragraph of s. 22 of "the Indian Councils Act, 1861" (24 and 25 Vict., c. 67) which enacts that the Governor General in Council

(1) 6 B.L.R. 392 (459).

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shall not have the power of making any laws or regulations 'which may affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the Crown over any part of the said territories.' That paragraph is word for word the same as the concluding paragraph of s. 43 of 3 and 4 Will. IV, c. 85, which empowered the Governor General in Council to legislate for India except as to the matters therein mentioned, and such words in 3 and 4 Will. IV, c. 85, s. 43, were much relied on by the counsel for Ameer Khan on the question as to *ultra vires* then before the High Court at Calcutta. The conclusion arrived at by **[653]** the learned Judges in *Ameer Khan's case*, that Act XXXIV of 1850 and Act III of 1858 were not contrary to the powers conferred on the Indian Legislature by 3 and 4 Will, IV, c. 85, s. 43, seems to me a perfectly sound one, and can well be used in support of the contention of the Advocate-General in the present case, that Act III of 1864 is not in violation or excess of the powers conferred on the Indian Legislature by the Statute 24 and 25, Vict., c. 67, s. 22. I may remark that by s. 22 authority is given to 'make laws and regulations for all persons whether British or Native, foreigners and others,' words which are identical with those in s. 43 of 3 and 4 Will. IV, c. 85.

The concluding paragraph of s. 22 of 24 and 25 Vict., c. 67, has, so far as I can see, no application to foreigners like the appellants, who came to Bombay for the purposes of their business, and who owe, save temporarily, no allegiance to the Crown of the United Kingdom. The only duty they owe to the Crown whilst they remain in British India is to obey the laws in force in this country.

The right, the greatly cherished right, which Englishmen possess in their native country, of residing and travelling where they please, was not considered by the Imperial Parliament to be compatible with the political and prudential measures necessary for the safety of the Paramount Power which the British Government exercises in India. This is apparent from the provisions of the 3 and 4 Will. IV, c. 85, for whilst by s. 81 of that Act authority was given for His Majesty's subjects to reside in certain specified parts of India without licence, s. 82 enacted that it shall not be lawful for any subject of His Majesty, except the servants of the Company and others then lawfully authorized to reside in the said territories, to enter the same by land or to proceed to or reside in any place or places in such parts of the said territories as were not therein before mentioned without licence from the Board of Commissioners, the Court of Directors, the Governor General in Council, or a Governor or Governor in Council of any of the Presidencies for that purpose first obtained; and s. 84 contained this important enactment—'That the Governor General in Council shall be and he is hereby required **[654]** as soon as conveniently may be, to make laws or regulations providing for the prevention or punishment of the illicit entrance into or residence in the said territories of persons not authorized to enter or reside therein.' The provisos in s. 81 and s. 82 were repealed by the Statute Law Revision Act, 1874, (37 and 38 Vict., c. 35), whilst s. 84 appears to be still in force.

By s. 51 of 3 and 4 Will. IV, c. 85, a section which appears to be still in force, it was enacted that that Act was not to affect the right of Parliament to legislate for India, and that a full and constantly existing right and power was intended to be reserved for Parliament to repeal and

alter at any time any law or regulation made by the Governor General in Council; and the better to enable Parliament to exercise at all times such right and power, all laws and regulations made by the Governor General in Council shall be transmitted to England and laid before both Houses of Parliament; and by "The Indian Councils Act, 1861," s. 21, it was enacted that whenever any law or regulation made by the Council of the Governor General at a meeting for the purpose of making laws and regulations has been assented to by the Governor General he shall transmit an authentic copy thereof to the Secretary of State for India, and it shall be lawful for Her Majesty to signify through the Secretary of State for India in Council her disallowance of such law, and such disallowance shall make void and annul such law from the day on which the Governor General shall make known by proclamation or by signification to his council that he had received the notification of such disallowance by Her Majesty.

No instance was cited to us in which an Act of the Legislative Council of the Governor General has been disallowed, or repealed by higher authority as being *ultra vires*. The point was taken in a case which came before the Privy Council in 1878 on appeal from a judgment of the High Court at Calcutta—*The Queen* v. *Burah* (1), where it had been contended that Act XXII of 1869 of the Indian Legislature, which excluded the jurisdiction of the High Court within certain specified districts, was not within the legislative power of the Governor General in Council. **[655]** The Judicial Committee of the Privy Council, reversing the judgment of the majority of the Judges of the Full Bench, held that the Act was in its general scope within the legislative power of the Governor General in Council, and in the judgment of their Lordships, delivered by Lord Selbourne, it is said (p. 193) "Their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large and of the same nature as those of Parliament itself."

In *Abdulla* v. *Mohan Gir* (2), which was decided by a Full Bench of five Judges of the High Court at Allahabad in 1889, where one question was whether the Governor General in Council had power to pass the Jhansi and Morar Act (No. XVII of 1886) by virtue of the provisions of which civil and criminal jurisdiction was given to the High Court over the town and fort of Jhansi, or whether the Act was in excess of the powers conferred on the Indian Legislature by s. 22 of the Indian Councils Act, 1861, the Court held that the Act was not *ultra vires* of the Governor General in Council; and also held that it must be presumed that the laws and regulations of the Governor General in Council are known to Parliament.

Seeing, therefore, that the Indian Legislature both before and after the passing of the Indian Councils Act, 1861, had express authority from the Imperial Legislature to make laws and regulations for foreigners, and in passing Act III of 1864 violated no express condition or restriction by which that power was limited (see per Lord Selborne in 5 Ind. App. 194).

(1) 5 I.A. 178.

(2) 11 A. 490.

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I am of opinion that Act III of 1864 was not *ultra vires* of the Governor General of India in Council.

[656] I will next consider whether that Act has been improperly applied with regard to the five appellants.

It was contended that the order to remove themselves from British India was illegal, as it was based upon a cause of alleged immorality and was not necessary for the peace and security of British India. This argument appears to have been founded upon the language of the concluding paragraph of s. 4 of Act III of 1864, which enacts that "such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order . . . of the Local Government within whose jurisdiction he shall be so apprehended or detained upon such terms and conditions as the . . . . Local Government shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States."

Such words cannot, in my opinion, be imported into or be taken to control the absolute and unqualified power given by s. 3, which authorizes the Governor General of India in Council or any Local Government, without assigning any cause, by writing, to order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order. The Government of Bombay, so far as concerns the appellants, who were admittedly foreigners within the meaning of the Act, were constituted the sole Judge as to whether or not the power of expulsion given by s. 3 should be enforced or not, and having come to a decision on the point, issued orders that the appellants should remove themselves from British India, as they were justified in doing. It is to be remarked that in s. 17 of the Act, which relates to the removal of foreigners apprehended for travelling without or contrary to the conditions of a licence and thereby violating s. 14, there is no reference to the peace and security of British India, whilst there is such reference in ss. 18 and 19 in regard to persons apprehended and detained for violating the provisions of those two last mentioned sections. Such sections, as already pointed out, are not in force in the Bombay Presidency. The words relied on in the concluding paragraph of s. 4 appear to be used as a direction or guide to the Government ordering the removal, and it is left to such Government [657] to impose any terms or condition, or not to impose any, as in its judgment it thinks best.

To adopt the construction contended for on behalf of the appellants would tend to limit the powers conferred by the Act with respect to foreigners—powers no doubt summary and arbitrary, but which the Indian Legislature has granted in what appears to me to be reasonably clear language. The object of the Act must be looked to, which in the recital is stated to be to make provisions to enable the Government to prevent the subjects of Foreign States from residing or sojourning in British India, or from passing through or travelling therein without the consent of the Government.

In a case decided by the Judicial Committee of the Privy Council in 1886 on appeal from the Supreme Court of Natal—*Salmon* v. *Duncombe* (1), their Lordships held that where the main object and intention of a Statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used. There the clearly expressed intention

(1) 11 Ap. Cas. 627.

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of the Natal Ordinance No. 1 of 1856 was to give to any subject of the Queen resident in Natal the power of disposing by will, according to English law, of property, both real and personal, which otherwise would devolve according to Natal law. Section 1 was operative for that purpose, except that it concluded with the provision "as if such subject resided in England," the effect of which was to leave both the *lex situs* and the *lex domicilii* in operation, thus reducing the section to a nullity. It was held that these words ought not to be construed so as to destroy all that had gone before, and, therefore, should be treated as immaterial. The Act, thererefore, appears to me to be applicable to the five appellants, although their residence in Bombay may not have been likely to have affected or endangered the peace and security of British India.

Lastly, were the appellants entitled to writs of *habeas corpus*, or to orders under s. 491 of the Criminal Procedure Code of 1882?

It was contended on their behalf that no orders to remove themselves from British India were served upon them, and that **[658]** the orders were too large, as they professed to operate beyond three miles from the shores of British India.

We have sent for and been furnished with the original warrant under which Solomon Moses, the only one of the five appellants now in India, was arrested on the 3rd July last, and under which he has been detained in jail ever since. It is a printed document, with blanks left to be filled up, and is headed "Warrant" in capital letters and in large type, and it says that the Governor of Bombay in Council is hereby pleased to direct that Solomon Moses *alias* Waxfigoor do forthwith remove himself from British India by sea to Roumania, and that all officers to whom the order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Solomon Moses *alias* Waxfigoor in safe custody in the jail of Bombay under s. 4 of the said Act (Act III of 1864) until he shall be lawfully discharged therefrom.

This document appears to me to be wholly irregular, comprising, as it purports to do, two distinct orders—one to remove himself from Bombay, the other to arrest him in case it is not duly obeyed. I think there ought to have been a separate order to remove himself from British India which should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail.

Mr. Inspector Butterfield in paragraphs 5 and 6 of his affidavit says that he reported to the Acting Commissioner of Police that the five appellants had failed to leave Bombay, although they had had an opportunity of doing so, and that he was then ordered by the Acting Commissioner of Police to arrest them in pursurance of the said warrant, and that he accordingly did so on the evening of the 3rd July, and showed the warrant again to them, and that he declined to give copies of the warrants and referred the parties, who asked him for copies, to the Acting Commissioner of Police.

The procedure followed by Courts of Justice in the somewhat analogus case of an injunction ordering a person to do or to abstain from doing a particular act ought, in my opinion, to have been followed, and on failure to comply with the order the matter should have been brought to the notice of the Governor in **[659]** Council, who would then have had before him materials to justify him in odering the person to be

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arrested. Instead of which the arrest and detention of the appellants were left to the discretion of 'all officers, to whom this order may be communicated,' a delegation of authority which, in my opinion, the Governor in Council had no power to make.

There is high judicial authority that such a conditional order for imprisonment is illegal. In *The Queen* v. *Joma bin Balu* (1) decided in 1867 by Couch, C. J., Newton and Gibbs, JJ., an order of a Magistrate under s. 2 of Act XIII of 1859, "that the prisoner should work for a certain period and in case he failed to do so should suffer imprisonment for one month," was annulled as to the latter part, as the Magistrate had no power to make that order until the failure had occurred and has been proved to his satisfaction. The present case is a stronger one than that one, as here it is left to the officers, to whom the orders may be communicated, to see that they are duly obeyed, and it is left to their discretion whether or not the persons are to be apprehended and detained. The same course, *viz.*, the annulling of the objectionable part of the document, cannot be adopted here as was done by Couch, C. J., and his colleagues in *Queen* v. *Joma bin Balu* ; as, if the order for the arrest and detention of the appellants is struck out, or treated as surplusage, the document ceases to be a warrant altogether, and nothing remains but an order to remove themselves from British India.

There is another ground which, though not taken in the argument before us, is, in my opinion, equally fatal to the validity of these five warrants, *viz.*, that the persons named in them are not described with sufficient certainty and particularity. There is also high judicial authority in support of this objection. In two of the warrants the names only of each of the two persons, Osias Melitroff and Miskel Leaff, are mentioned ; in the five other warrants the names are given with one or more *aliases* ; but there is no place of residence of the individuals mentioned such as is required by the Form 2 in Schedule V of the Criminal Procedure Code, 1882, which is the form of a warrant of arrest issued under s. 75 of that Code.

[660] A similar point was decided by Sir C. Sargent in 1872 in the case of one James Hastings who had been brought up under a writ of *habeas corpus* granted by Westropp, C.J. The warrant had been issued under s. 76 of the Code of Criminal Procedure (Act XXV of 1861). Sir C. Sargent held that the prisoner was not in custody under a valid and legal warrant. After dealing with the first objection, which was that the instrument was without a seal, and stating that upon that ground alone he should have had great difficulty in saying that the warrant was a valid one, he proceeded thus:—

"There is, however, another objection put forward to its validity to which I attach even greater force. The warrant authorizes the committal of James Hastings without giving any description whatever as to what James Hastings is indicated thereby." Then, after stating the form of warrant given in the Appendix to the Code, he said : "Under a warrant in this form, if it were held to be a legal and valid warrant, the Commissioner of Police would be justified in arresting any one of that name. In *Hood's case* (2) the Christian name only of the person arrested was omitted, but a full description was given of him. The warrant there was 'to take the body of—Hood, of the hamlet of Bemerton, in the Parish of Fugglestone, St. Peter, in the same county, by whatsoever name he may be called or

(1) 4 B.H.C.R.Cr.Ca. 37. (2) *Rex* v. Hood. 1 Moody's Cr. Cases, 128.

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known, the son of Samuel Hood, to answer,' &c.; and in that case the Judges were unanimously of opinion that the warrant was bad. That case was decided comparatively recently by Lord Tenterden and all the other Judges with the exception of three, and the Judges who sat were unanimously of opinion that the warrant was bad because it omitted the Christian name. It was said it should have assigned some reason for the omission and have given some distinguishing particular of George Hood. I think I am bound to follow the principle involved in that ruling, which is that a warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and this, too the more especially as the form of warrant provided by the Code requires that his residence should be inserted The issuing of general warrants is, it is well known, illegal, and this [661] though not, properly speaking, a general warrant, which means a warrant to apprehend all persons committing a particular offence or class of offences, is, however, of such a general nature as to justify the police in arresting any person of the name of James Hastings, whoever he may be or wherever he may be found, the number of persons liable to be arrested under it, being limited only by the limit to the number of persons bearing that name. The warrant in this case is, in my opinion, far more general than was the warrant in *Hood's case*, and I am, therefore, of opinion that it is bad"—*In re James Hastings* (1).

No doubt the names of the five appellants seem to an Englishman somewhat strange; but I apprehend that the same principle must be applied as if the warrants were for the arrest of persons bearing ordinary names, such for instance as John Smith or any other common name.

The warrants in question appear to me to be also objectionable for another reason, *viz.*, they all require the appellants to remove themselves from British India by sea by particular routes. Solomon Moses, the man now in the Bombay Jail, is to remove himself by sea to Roumania, three of the others are to remove themselves by sea to Odessa, one is to remove himself to Austria, another is to remove himself by sea to Roumania, and one is to remove himself by sea to Adrianople, an order which as Adrianople is an inland town, more than fifty miles from the nearest sea, the Black Sea, is as incapable of being strictly complied with as if the order had been that he was to remove himself by sea to Bucharest, Vienna or Moscow. The objection to this part of each order, in my opinion, is that the particular route to be specified in the order referred to in s. 3 of Act III of 1864 is intended to be a route in British India and not a route beyond the high seas.

The Indian Legislature must be taken to have known the extent of its legislative powers. It could confer no power on the Local Government which would be *ultra vires* of its own legislative powers; and the authority given by s. 3 of Act III of 1864 must be taken to be an authority it could grant, *viz.*, a legal authority. When the foreigner, whose expulsion is [662] considered expedient, resides at Lahore, Allahabad or any other inland town, the Local Government can specify, and may have very good reasons for indicating, in the order the particular route by which the individual is to remove himself, but once beyond the three-mile limit I am not aware that the Local Government has any power over him.

In the case of the wilful destruction by fire of the "Aurora" in June, 1870, at a distance of about fifty miles outside the Harbour of

(1) 9 B H. C. R. 154.

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Bombay and on the high seas, it was held by a Full Court, on points reserved for its opinion, that the substantive law applicable to a British-born subject tried in the High Court at Bombay for destroying a British ship, at a distance of more than three miles from the shores of British India was the English law and not the Penal Code, and the question whether the Indian Legislature had power to legislate with reference to offences committed on the high seas was much considered.

In the course of the judgment of the three Judges who heard the case, delivered by Westropp, C.J., it is stated "according to writers on international law the territorial right extends to at least three geographical miles, a sea-league from the coast, that having been supposed to be the range of a cannon shot." This distance of three miles was the limit lately laid down by the Privy Council in *Rolet* v. *The Queen* (1) for the operation of the revenue laws of Sierra Leone. Sir Robert Phillimore in his commentaries (Vol. I, plac. 197,) says: "But the rule of law may now be considered as fairly established, namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty, or an unquestioned usage, beyond a marine league (being three miles) or the distance of a cannon shot from the shore at low tide." And in a later passage in the judgment Sir Michael Westropp after referring to the Statutes I have already quoted (3 and 4 Will. IV, c. 85, ss. 43, and 24 and 25 Vict., c. 67, s. 22) says that other Statutes which he mentions furnish a very strong reason for supposing that the previous general power of legislation conferred by the same Statutes is limited to the territories of British India—*Reg.* v. *Elmstone Whitwell and others* (2).

[663] In *Reg.* v. *Kastya Rama and others* (3) it was held by Kemball and West, JJ., that an offence committed on the high seas, but within three miles from the coast of British India, as being committed within the territorial limits of British India, was punishable under the provisions of the Indian Penal Code, and there was an intimation of opinion on the part of three learned Judges that the Governor General of India in Council had no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he had power to legislate in respect of offences committed on the high seas within three miles of its coasts.

I may here mention that in the case of *Low* v. *Routledge* (4) Lord Justice Turner after stating that every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of the laws which affect all British subjects, said; "As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits"

The directions in the orders (assuming, but not admitting, that the early portion of the warrants in question can be regarded as orders,) that the persons named in them are to remove themselves from British India by sea to the different towns and countries specified, are, in my opinion, *ultra vires* and illegal. Whether, however, such objectionable words can be considered as surplusage and be disregarded altogether, or whether they do not vitiate the warrants, I think it unnecessary to express an opinion, as on the other points I have mentioned I consider that the warrants are clearly invalid and have no legal effect.

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(1) L. R. 1 Pr. C. Ca. 198.
(2) 7 B.H.C.R. Cr. Cas. 89 (104, 108).
(3) 8 B. H. C. R. Cr. Cas. 63.
(4) 1 Ch. App. 47.

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For the reasons I have stated, I think that the warrants under which the five appellants were arrested were not valid warrants, and that the appeal must be allowed; that the order made on the 9th July, 1894, so far as it relates to the five appellants, must be reversed, and that Solomon Moses *alias* Waxfigoor, who is the only one of the appellants that is now detained in jail, must be discharged.

STARLING, J.—In this case certain foreigners were, ostensibly [664] under the power conferred by Act III of 1864, ordered by the Governor in Council to remove themselves from British India. It being alleged that they had not obeyed that order they were arrested under a warrant signed by Mr. Lee-Warner, Secretary to Government, and sent to jail until discharged therefrom in due course of law. On this, the foreigners applied to Mr. Justice Farran to issue a writ of *habeas corpus* or an order under s. 491 of Criminal Procedure Code to release them from imprisonment on the ground that their arrest and detention was illegal. A rule *nisi* was granted which after argument was discharged, and against this discharge the present appeal, has been brought.

The case was argued before us on the 3rd instant when we took time to consider our judgment, for the questions argued are important ones, because while it is necessary on the one hand that Government should not be hampered in the exercise of summary powers entrusted to it by the Legislature, it is also, incumbent on the other, on this Court to see that the liberty of the subject is not restrained, except in due course of law.

The first point argued by Mr. Kirkpatrick was that the Act itself, under which these proceedings have been taken, was *ultra vires* of the Legislative Council of India, and nearly the whole of the time occupied in argument was spent on this point. I, however, agree with the reasons given by the Judges in the High Court in Calcutta in the case of *Ameer Khan* (1) for holding that the series of similar, but more stringent, enactments against British subjects, and not against foreigners, therein discussed were *intra vires* of the Legislative Council, and am of opinion, for similar reasons that Act III of 1864 is a valid Act and one which the Legislative Council had power to pass. To carry Mr. Kirkpatrick's argument to its logical conclusion it would be necessary to hold that any curtailing of the liberty of the subject was *pro tanto* a repeal of the unwritten laws or constitution and thereby caused a diminution of the allegiance due by the subject to the Crown. A great deal was said by him about Magna Charta and other provisions of a like nature, but when these are looked into it will be seen that they do not guarantee an absolute amount of liberty to each man, but only provide [665] that no man shall be deprived of his liberty except in accordance with law. No man was to be imprisoned by a warrant under the king's sign manual, or under the signature of a Secretary of State, unless that warrant was authorized by law. If Parliament authorizes a Secretary of State under certain circumstances to issue a warrant, in a certain form, for the detention of one of Her Majesty's subjects for an unlimited time, imprisonment under that warrant is imprisonment in due course of law, and none of the bulwarks of the personal liberty of the subject are attacked, nor is any cause given for saying that the duty of allegiance due by any subject is thereby in any way diminished.

It was then argued that the powers given by this Act can only be exercised when "the peace and security of British India," &c., require

(1) 6 B. L. R. 392 (459).

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such exercise. Now the phrase referred to only appears in the 4th section in connection with the eventual discharge of the foreigner from imprisonment. The preamble, however, shows that the intention of the Legislature was to enable Government to prevent foreigners residing, sojourning or travelling in British India without their consent; and s. 3 gives the fullest power to the Government to order any foreigner to remove himself from this country without reference to the probable or possible results of such foreigners residing, sojourning or travelling therein. Consequently on the authority of *Salmon* v. *Duncombe* (1), I must refuse to read the words referred to from the fourth section into the third; but even if those words were so read in, it seems to me that the Government would still be the sole judges of what was necessary for the peace and security of British India, and that, if they acted in accordance with the letter of the Act, this Court could not inquire into the sufficiency or otherwise of their reasons for so acting.

The next point to be considered is whether the Government have acted in accordance with the provisions of this Act. Section 3 provides that any Local Government with respect to foreigners residing within its jurisdiction "may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by any particular route to be specified in the order." Now such order must, of course, be communicated [666] to the foreigner, but the section does not say in what way. A verbal order given to a tradesman is given by the customer speaking to him across the counter; a written order would be handed or sent to him, so that instead of having only words, the remembrance of which existed only in his memory, he would have in his possession the same words, in black and white, to which he could refer if necessary. It seems to me that the essence of an order in or by writing is that the person to whom it is given may have it by him, and be able to refer to it if necessary, so that I do not consider that the mere showing, reading and explaining a written order to a foreigner, and then taking it way, is a compliance with the terms of this section. That the order ought to be in the possession of the person ordered, I think is further shown by the fact that the order may contain directions as to the route by which he is to remove himself from British India, and if the foreigner be up-country and it be desirable that he should not pass through certain places while leaving the country, that route might be a complicated one, and the details ought to be in his possession in writing, for if he deviates therefrom, he may be arrested. The Advocate-General suggested that, if the order was left with the foreigner, he might destroy it, and so there would be no record of it, but that is merely a matter of detail which could be provided for by having a duplicate of the order, also signed by the Secretary to Government, which could be kept on record while the other was given to the foreigner.

As the orders, by writing, were not given to the appellants, but, as appears from the affidavits, only shown, read, and translated to them, I do not think the terms of the 3rd section have been complied with, and consequently that they were not bound to leave British India.

Further, looking at the form of the document by which the order is said to have been given, it appears to be a warrant, it is so headed, and nothing else. It is not an order to the foreigner, but an authority to arrest him, addressed to a third person, with what is called the order as a

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recital at the beginning, and I do not think that any Court should hold that a document in this form is a compliance with s. 3 of the Act.

[667] There is also a defect in the terms of the orders. The Government may order a foreigner to remove himself from this country by a particular route; therefore it was lawful to order these persons to leave "by sea"; but the Act does not give power to direct where the foreigner is to go when he has left British India. I should be inclined under some circumstances to treat the words following "by sea" as surplusage, but it seems to me that the addition of the ultimate destination might work harshly and be the means of doing injustice. For instance, a foreigner is ordered to go by sea to Trieste. Instead of taking a ticket by the Austrian Lloyd's line he takes one by the P. & O. for Ceylon. He would be quite justified in doing this, because all the Act provides is that he is to remove himself from British India by a particular route, *i.e.*, by sea, which he would do by going to Ceylon, but a police officer *might* say he had not complied with the order, and arrest him, which, in my opinion, he would not be justified in doing.

Then the document, which is headed "warrant," contains first an order to a person to do a thing, and then an order that, if he does not do it, he is to be arrested. This form of order has constantly been condemned by the Courts. See *Reg.* v. *Jooma* (1); 6 Mad. H. C. Rep., App. 24, and two criminal rulings of this High Court—*In re Babaji*, on the 26th April, 1888, and *Empress* v. *Sakharam* on the 3rd May, 1888.

The mischief of the form used is that on the face of it the determination as to whether the person to whom the order is addressed has obeyed it or not, is left to the officer in charge of the warrant; whereas it is the authority which issues the order which ought to determine that point. The mere fact that, after the order is given to a foreigner, he does not remove himself from British India, is not necessarily disobedience. After receiving the order he might slip down and break his leg; he might have a wife so ill that he could not possibly leave her without danger to her life, not having means to provide attendance for her in his absence; he might be absolutely without the means of removing himself. In such cases the mere non-removal of himself could not be said to be a neglect or refusal to remove [668] himself, and the determination as to whether a particular act or omission amounted to a neglect or refusal ought to rest with no authority other than the one which gave the order.

After the order is communicated to the person who is to obey it, the authority issuing it should determine whether he has disobeyed it or not, and if he has disobeyed it, a warrant should be issued for his apprehension and imprisonment. Such a warrant ought to recite that, under the provisions of s. 3 of this Act, A. B. had been ordered by the Governor in Council to remove himself from British India (by sea), that the said A. B. had neglected (or refused as the case may be) to do so, and then go on to order him to be apprehended and conveyed to such and such a jail and there to be kept in custody until discharged therefrom in due course of law. If the warrant in the present case had been in that form, all that would have been required on the return to the rule herein would have been for Mr. Mackenzie to have stated, on affidavit, that he held the prisoner under that warrant, and as it would then have appeared from the warrant itself that it was issued by a competent authority in the exercise of powers

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granted by the Legislature, the Court would have refused to have made any further inquiries.

By reason of the order appearing at the top of the warrant, it may possibly be inferred that the person named therein has been ordered to leave, but it does not definitely appear on the face of the warrant, because there is nothing to show that it has been communicated to him that he *has been* ordered; and then it does not appear that he has disobeyed the order, in my opinion a very much more important omission, and one which invalidates the warrant entirely, because unless that has happened there is no power to imprison.

The warrant is also defective in another way. It bears no seal, an addition which is essential to a warrant under ordinary circumstances. Regulation XXV of 1827 gives a form of warrant which is to be sufficient under that Act, and in the form no mention is made of a seal; consequently a warrant under that Act might be valid without one. The present Act provides no form of warrant; consequently, in my opinion, the ordinary form of warrant must be adopted. By common law a warrant without a [669] seal is invalid, and the Criminal Procedure Code has adpoted the provisions of the common law and directs that a warrant should be both signed and sealed. In the absence of statutory provision, the absence of a seal will render a warrant void, which will appear from the case of *In re Phipps* (1).

Sargent, J., in the case of *In re Hastings* (2) expresses an opinion that a warrant under the Criminal Procedure Code is invalid without a seal, and I should have great difficulty in coming to the conclusion that there is any reason why a seal should not be necessary for the validity of a warrant authorizing the imprisonment of a foreigner under Act III of 1864.

The last defect in the order and warrant which I will point out is that there is no description or designation of the person to whom it is directed or against whom it is to be executed. The name of the foreigner who is still in jail is Solomon Moses. Now Moses is not an uncommon surname in this city, and I should think that there were probably more than one inhabitant having the name of Solomon Moses. A warrant should not merely bear the full name of the person to be arrested, but also his description, *i.e.*, the place where he resides, if not also his occupation, so that there may be no doubt as to the identity of the person in custody with the person named in the warrant. See the judgment of Sargent, J., in *Hastings case* (2). The order, too, should contain a like description, in order that the person to whom it is given may know that he, and no one else, is the person to whom it is addressed.

I am of opinion, therefore, that all the warrants in this case are bad in law, and that Solomon Moses, the only appellant now in custody, is not in custody in due course of law. Consequently the order made by Farran, J., discharging the rule obtained on the 5th July must be reversed, and the rule must be made absolute, and Solomon Moses discharged from custody.

Appeal allowed.

Attorneys for the appellants: Messrs. *Turner and Hemming.*

Attorney for the Crown: Mr. *E. F. Nicholson*, Acting Government Solicitor.

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(1) 11 W.R. Eng. 730.

(2) 9 B.H.C.R. 154.