TAGALOA v. INSPECTOR OF POLICE

FUATAGA v. INSPECTOR OF POLICE

NEW ZEALAND SUPREME COURT (Full Court). Wellington. 1927. 10, 11, 21, October. SIM A.C.J., HERDMAN J., REED J., ADAMS J., and OSTLER J.

Mandated Territory - Legislation of New Zealand Parliament for Western Samoa - Whether ultra vires of New Zealand Legislature - Samoan Ordinance made thereunder - Repugnancy - Power vested in Administrator by Ordinance to make Banishment Order - Whether Exercise thereof punitive or examinable by Court - Foreign Jursidiction Act, 1890 (Imperial) - New Zealand Constitution Act (Imperial), 1852 - Treaty of Peace Act, 1919 (Imperial) - Samoa Act, 1921 - Samoan Offenders Ordinance, 1922.

APPELLANTS, who were convicted of breach of a banishment order made by the Administrator of Western Samoa and sentenced to six months' imprisonment, appealed from such conviction to the Supreme Court of New Zealand.

HELD by the Full Court (Sim, A.C.J., Herdman, Reed, and Adams, JJ.; Ostler, J., dissenting on the question of repugnancy), That New Zealand had been constituted the Mandatory Power of Western Samoa, and that the Samoa Act, 1921, was a valid exercise of jurisdiction effectively conferred on the Legislature of New Zealand by Order in Council of His Majesty the King, made in pursuance of the Foreign Jurisdiction Act, 1890 (Imperial), notwithstanding the limits of jurisdiction prescribed by the New Zealand Constitution Act (Imperial), 1852.

Jerusalem-Jaffa District Governor v. Suleiman Murra /1926/ A.C. 321, R. v. Earl of Crewe /1910/ 2 K.B. 576, Sobhuza II v. Miller /1926/ A.C. 518, and Attorney-General for Canada v. Cain /1906/ A.C. 542 followed.

R. v. Lander /1919/ N.Z.L.R. 305; G.L.R. 181 distinguished.

HELD, further, That the Samoan Ordinance, 1922, made by the Legislative Council of Western Samoa, conferring power on the Administrator to make the banishment order complained of, was not repugnant to the Samoa Act, 1921; nor did the fact that no provision was made for an inquiry prior to the making of the order render the Ordinance invalid, and the exercise of the discretion in the making of the banishment order conferred on the Administrator thereunder was not examinable by the Court.

R. v. Leman Street Police-station Inspector 89 L.J. K.B. 1200, Jones v. Robson 70 L.J. K.B. 419, and Ex parte Walsh and Johnson 37 C.L.R. 36, 67 followed.

APPEALS from the convictions of two Natives of Western Samoa for the breach of a banishment order made by the Administrator of that Territory under and by virtue of an Ordinance of the Legislative Council thereof.

Sir John Findlay, K.C., and Harding for the appellants.
Myers, K.C., and Currie for the respondent.

Sir John Findlay:-

This appeal is under s. 83(c) of the Samoa Act, 1921, against the conviction of a Samoan Native for breach of a banishment order made under the Samoan Offenders Ordinance, 1922. If the construction placed upon this Ordinance by the High Court of Samoa is correct, a person may be arrested and banished without trial or other opportunity of proving that there was no occasion for such order of banishment. Although an information was laid in respect of the proceedings for breach of the banishment order, the order itself was not founded on any such information. The

judgment of the Court below proceeds on the assumption that no inquiry is necessary prior to the making of the order under the Ordinance. The Ordinance implies that there will be an inquiry, which the order shows was not held. If it implies that no inquiry is necessary, then the Ordinance is ultra vires. It is submitted the order is bad, firstly, because it was made without inquiry, and, secondly, because it imposed a punishment not authorised by the Samoa Act, 1921. The Court below is wrong in the view it has taken of the offence of banishment. The order is plainly a punishment for an offence. It is punishment within the meaning of our Criminal Code: State ex relatione Reid v. Walbridge 41 Am. State Rep. 645, quoted in Words and Phrases judicially defined Vol. 7 p. 5850; Cummings v. State of Missouri 4 Wallace's Rep. 277, 320. Where powers almost unlimited in character are conferred on a person or tribunal the Court will regard such powers as valid under British law only if the validity is clear and unquestioned. The Samoa Amendment Act, 1927, now provides for an accused person being summoned and heard before an order is made. What is in the Act of 1927 should be implied in the Offenders Ordinance of 1922: See s. 211 of the Samoa Act, 1921, which applies banishment only to persons who were not born in Samoa, but does not provide banishment for persons born in Samoa. The Act of 1927 is the first provision dealing with banishment within Samoa, and the Administrator had no power to make such an order until the passing of the 1927 Act. The exhaustive Criminal Code appended to the Samoa Act, 1921, provides for such an offence as that in which the order for banishment was made, yet the offence was legislated for by the Samoan Ordinance of 1922: See s. 46 of the Samoa Act, 1921. The Ordinance of 1922 is repugnant to the provisions of the Criminal Code contained in the Samoa Act of 1921. To the extent to which the Samoa Act of 1921 provides for an ordinary trial for offences and the Ordinance of 1922 does not do so, as is the case in respect of banishment orders, the latter is repugnant to the Act and ultra vires. Further, a Samoan Ordinance cannot be made as to offences covered by the Samoa Act, 1921, for it would then be repugnant to the Act. It is submitted, firstly, that the Samoa Act, 1921, under which the Ordinance of 1922 was enacted, is ultra vires of the General Assembly of New Zealand; secondly, even if the Act is within the powers of the General Assembly of New Zealand, nevertheless the Offenders Ordinance of 1922 is ultra vires of the Legislature of Samoa. His Majesty the King, by the mandate, is the Mandatory entrusted by the League of Nations with the administration of Western Samoa. No doubt His Majesty undertakes to exercise his powers through the Government of New Zealand; but the question arises, In whom does the sovereignty of the Territory lie? It is submitted His Majesty is the trustee and responsible person for the due administration of Samoa. New Zealand has no authority under its Constitution Act to accept such a mandate as this. The New Zealand General Assembly can do nothing, and can undertake to do nothing, beyond the scope of the jurisdiction conferred upon it by the Constitution Act (Imperial), 1852. His Majesty was competent to delegate the exercise of his powers under the mandate. The territorial confines of the jurisdiction of New Zealand are specifically limited by s. 80 of the Constitution Act (Imperial), 1852. The General Assembly is consequently, in the request to exercise the mandate, asked to do the very thing which the Constitution Act (Imperial), 1852, says it shall not do. The boundaries of the Dominion of New Zealand have only been altered by means of an Order in Council followed by an Act confirming the Order, or else by an Act of Parliament in the first instance: In re Lundon and Whitaker Claims 2 N.Z.C.A. 41; In re Gleich O.B. & F. (S.C.) 39, 41, 45; In re Award, Wellington Cook and Stewards' Union 26 N.Z.L.R. 394; 9 G.L.R. 214; Semple v. O'Donovan /1917/ N.Z.L.R. 273; G.L.R. 137; In re Bishop of Natal 16 E.R. 43; 3 Moo. P.C. (N.S.) 115, 148; Campbell v. Hall 98 E.R. 1045. An Imperial statute alone could have given the General Assembly of New Zealand power to legislate in respect of Samoa. The mandate is certainly not sufficient for this purpose. The Order in Council issued in England authorising New Zealand to exercise the mandate will not effect the necessary extension of the New Zealand Legislature's powers: See opinion of Sir Frederick Lugard in Encyclopaedia Britannica 13th ed. Vol. 2, p. 787. If His Majesty, by his Order in Council conferring the mandate as to Samoa on New Zealand, affects to be acting under the Foreign Jurisdiction Act (Imperial), the Order in Council can have no effect, as New Zealand, by

its Constitution, cannot accept such mandate to legislate for territory beyond the limits of New Zealand. The preamble of the Samoa Act, 1921, refers to the Treaty of Peace Act, 1919 (Imperial); but this Act confers no sufficient power on the General Assembly of New Zealand to exercise the mandate. The mandate entrusted to New Zealand is not part of the Treaty of Peace. An Order in Council under the Treaty of Peace Act, 1919 (Imperial), made by His Majesty could not extend the powers of the General Assembly of New Zealand under its Constitution: See Foreign Jurisdiction Act, 1890 (Imperial); Halsbury Vol. 6, p. 448, para. 692. This Act did not contemplate such a jurisdiction as is conferred by the mandates under the late Treaty of Peace. The Act contemplates sovereignty, but this is not intended to be given under the mandates. Jerusalem-Jaffa District Governor v. Suleiman Murra /1926/ A.C. 321 is distinguishable from the present case. The competency of the Commissioner in that case to exercise the mandate was not questioned. The competency of the New Zealand Legislature to exercise jurisdiction over Samoa is the very question at issue in this case: See Halsbury Vol. 6, p. 372, para. 544. No exercise by the King of his prerogative is valid if it contravenes a statute: See the Commonwealth of Australia Constitution Act, 1900 (Imperial), s. 122, providing for an extension of the territorial jurisdiction to new territory. There is no similar provision in the New Zealand Constitution Act. The mandate itself and the preamble of the Samoa Act, 1921, provide for the exercise of the mandate by the Government in New Zealand. For definition of "Government" see Encyclopaedia of the Laws of England 2nd ed. Vol. 6, p. 407. The word may mean the Ministers of the Crown in contradistinction to the General Assembly. As to the second submission - that the banishment order was invalid owing to the fact that the Offenders Ordinance, 1922, was ultra vires of the Administrator - it is submitted that the discretion to be exercised by the Administrator is a judicial discretion, and some form of trial should have taken place before the banishment order was made. Phillips v. Eyre 40 L.J. Q.B. 28 deals with a quite different set of circumstances from the present case. The duties referred to in that case were Ministerial, not judicial: See R. v. Leman Street Police-station Inspector 89 L.J. K.B. 1200; also sub nom. R. v. Secretary of State for Home Affairs /1920/L.J. K.B. 1200. See Bryan v. Moore 81 Ind. Rep. 9, 12, referred to in Words and Phrases judicially defined Vol. 7, p. 6328; Linford v. Fitzroy /1849/ 13 Q.B. (A. & E.) 240. Sections 100-212 (inclusive) of the Samoa Act, 1921, constitute a Criminal Code for Samoa completely covering any offence contemplated by the Offenders Ordinance, 1922, and gives an accused person a right to be heard. A Samoan Ordinance cannot be made entirely substituting for the Act of 1921 a new procedure and a new method of dealing with an offence for which the 1921 Act provides. Such an Ordinance would be ultra vires of the Samoan Legislature. The only mention of banishment or exile under the 1921 Act is in s. 211, and applies only to Europeans or persons not born in Samoa. In 1927 the Samoa Amendment Act was passed, providing for banishment of Native-born Samoans.

Harding, in support:-

It is submitted it is clear from the case that no inquiry was held before the making of the banishment order complained of. Section 213 of the Samoa Act clearly contemplates that trial shall be had in respect of offences created by Ordinance. It is ultra vires, as being repugnant to ss. 46 and 349 of the 1921 Act.

Myers, K.C.:-

The party which is invoking the jurisdiction of this Court is at the same time attacking the jurisdiction and setting up that the Court is a nullity: R. v. Burah 3 A.C. 889. The Court cannot be asked to commit judicial suicide. The only jurisdiction this Court has is the jurisdiction conferred by the Samoa Act, 1921: See s. 89. The appellants come to this Court by way of appeal, and then contend that the Act under which the Court affects to be constituted is ultra vires and the Court is a nullity. If the appellants contend that this Court is a nullity and the Act is ultra vires, then the only Court that could deal with the banishment order is the Court of King's Bench in England. The appellants cannot at one and the

same time invoke the jurisdiction of the Court and endeavour to show that the Court itself is a nullity owing to the Act under which it is constituted being ultra vires: R. v. Earl of Crewe /1910/ 2 K.B. 576. The Court of King's Bench is the proper Court to appeal to if there is no Court in existence here. Even assuming that by reason of the Constitution Act some Imperial legislation was necessary to confer on New Zealand any powers regarding Samoa, that legislation in fact exists. Respondent does not rely on the Constitution Act for any power New Zealand has in Samoa. The necessary legislation is in the Treaty of Peace Act, 1919 (Imperial). The peace adopted by this Act was on behalf of the whole Empire, including New Zealand. The power is granted to His Majesty under the Act to do all things necessary to effectually carry out the terms of the Treaty. The English Treaty of Peace Act, 1919, must imply that this was an Act passed empowering the King to carry out the Treaty of Peace for the whole Empire. His Majesty was entitled to confer the authority in respect of the administration of Samoa on the Parliament of New Zealand. It cannot be said the General Assembly cannot accept what His Majesty is given power to grant. If it was an Act to affect Great Britain only, it must necessarily imply that each and every other Dominion had power to legislate and do all things necessary for carrying out the Treaty: See R. v. Christian /1924/ S.Af. L.R. 101, reported in the Year-book of International Law /1925/ p. 211, where the authority of South Africa under its mandate was held unassailable. South Africa, however, in contradistinction to New Zealand, claims to hold its mandate from the Allied and Associated Powers, and not from His Majesty the King. Whichever of the above views is taken as to the Treaty of Peace Act, a reference to the Constitution Act of New Zealand is necessary to found the jurisdiction as to Samoa. It is immaterial whether the Mandatory Power is His Majesty the King or New Zealand, although it would appear that New Zealand is the Mandatory Power. Article 22 of the Versailles Treaty supports this view. New Zealand for the purposes of the Treaty of Peace was regarded as a nation: See pp. 1, 2, and 3 of the Treaty. New Zealand was a party to the execution of the Treaty. Bearing in mind the language of Article 22, it must be clear that the country it was intended should administer Samoa was New Zealand, and not His Majesty the King. New Zealand makes a report of its administration of the Territory to the League direct. In the minutes of the Mandates Commission of the Geneva Conference New Zealand is referred to as the Power holding the mandate over Samoa. Similar reference is made to the Union of South Africa as regards German South-west Africa. New Zealand is recognised as the Mandatory Power by the very body by which the mandate system was set up. Assuming that the Samoan legislation of the New Zealand Parliament is ultra vires, the legal position remains unaltered. The procedure adopted by His Majesty regarding the mandates is under the Foreign Jurisdiction Act (Imperial): See Jerusalem-Jaffa District Governor v. Suleiman Murra /1926/ A.C. 321. The Order in Council /1920/ N.Z. Gazette, p. 1819 conferring the mandate expresses to confer it on the Executive Council of the Dominion of New Zealand. The Executive Council, in pursuance of this power, by Order in Council legislated for Western Samoa in practically identical terms with the Samoa Act, 1921, and if the latter Act falls, as being ultra vires, the Order in Council subsists: See New Zealand Gazette /1920/ p. 1619. The mere fact that the Samoan Ordinance recites that it is made, inter alia, under the Samoa Act, 1921, does not affect its validity, as there was still power under the Order in Council for the making of the Ordinance, which will accordingly stand. As to the constitutional argument raised by the appellant, see Jenkyn's British Rule and Dominions beyond the Seas p. 344, referred to in the case of Sobhuza II v. Miller /1926/ A.C. 518, per Lord Haldane Ibid. 523. A Constitution Act conferring the rights and responsibilities of government on any particular part of the Empire is only pro tanto a surrender of the Royal prerogative, but there is still nothing to prevent His Majesty, in exercise of his Royal prerogative, requesting the Government of that part of the Empire from administering further territory. He could confer this power by Royal Charter if he chose, and there is nothing to prevent such Government from accepting it: Keith's Constitution, Administration, and Laws of the Empire /1924/ pp. 294, 299; Attorney-General for Canada v. Cain /1906/ A.C. 542, 545, 546; McCawley v. The King /1920/ A.C. 691, 706. If the Crown is able by original Act to provide a Constitution for a portion of the Empire, it is submitted there is nothing

to prevent the Crown from granting additional power to such portion, providing it is not in conflict with the Act of Constitution. There are various ways in which territory over which His Majesty holds jurisdiction may be added to other territory of the Empire. For example, the Cook Islands were added under the Colonial Boundaries Act (Imperial), assented to by a resolution of the New Zealand Parliament. Under this procedure the territory became part of the territory of New Zealand. See also the British Settlement Act, 1887: under this Act His Majesty, by Order in Council, conferred jurisdiction on New Zealand over the Ross Dependency. In addition, there is the prerogative right which has always existed: See Kielley v. Carson 4 Moo. P.C. 63, referred to in Phillips v. Eyre L.R. 6 Q.B. 1, 19. The Foreign Jurisdiction Act, 1890 (Imperial), was resorted to in the case of mandates as being the most suitable and appropriate machinery: See preamble to the Act. The Treaty of Peace Act, 1919 (Imperial), brought Samoa within the ambit of the Foreign Jurisdiction Act (Imperial). Sprigg v. Sigcau /1897/ A.C. 238 is distinguishable from the present case. The whole case turned upon the terms of the South African Annexation Act. New Zealand has a supreme and unfettered Legislature so far as Samoa is concerned, but such did not exist in South Africa as to the territory in question in that case. Sprigg v. Sigcau /1897/ A.C. 238 is distinguished in R. v. Earl of Crewe /1910/ 2 K.B. 576, per Vaughan Williams, L.J., the last-named case cited with approval in Sobhuza II v. Miller /1926/ A.C. 518. For the scope of the power conferred to legislate for the peace, order, and good government of a territory see R. v. Burah 3 A.C. 889, 903 et seq. See the further cases of Hodge v. The Queen 9 A.C. 117, 132; Powell v. Apollo Candle Co., Ltd 10 A.C. 282, 289, 290; Riel v. The Queen 10 A.C. 675, 678; R. v. Bernasconi 19 C.L.R. 629, 634, 635. In re Gleich O.B. & F. (S.C.) 39 is not applicable to the present case. The respondent does not rely on the Constitution Act: In re Lord Bishop of Natal 3 Moo. P.C. 115, 146, 150. As to the question of the Offenders Ordinance, 1922, being repugnant to s. 102 of the Samoa Act, 1921, ss. 5 and 6(2) are the only sections of the Ordinance creating an offence. The banishments referred to under the Ordinances are not intended to be punitive, but rather preventive. Section 102 of the Act deals with sedition merely, and a quite different matter from that dealt with by the Ordinance complained of. The acts under clause 3 of the Ordinance for which the Administrator may take the prescribed steps may not constitute any legal offence at all. It is not till clause 5 or 6(2) that an offence is created. The manner in which the Administrator is satisfied under clause 3 is not examinable by the Court, because under that clause the Administrator acts ministerially, and not judicially. The onus was on the appellant to call evidence and satisfy the Court below that he had not had an opportunity of being heard on the making of the order of banishment, if such was the case: Leman Street case 89 L.J. K.B. 1200. Ex parte Walsh and Johnson 37 C.L.R. 36 is distinguishable in that the order under which the authorities affected to act was an immigration order, but Walsh and Johnson were not immigrants: See Commonwealth of Australia Constitution Act. Under this Act the Commonwealth Parliament has not as extensive powers as the Parliament of New Zealand has under its Constitution Act. It is doubtful if it could make legislation for deportation; in fact, it had not done so: Ex parte Walsh and Johnson 37 C.L.R. 36, per Knox, C.J. Ibid. 60, 67, 69, also per Isaacs, J. Ibid. 95, 97, 98, 102, 104. As to the question of repugnancy, see R. v. Marais /1902/ A.C. 51; Attorney-General for Queensland v. Attorney-General of the Commonwealth 20 C.L.R. 148, 167; Union Steamship Co of New Zealand v. Commonwealth of Australia 36 C.L.R. 130, per Higgins, J. Ibid. 153. There is no foundation for the contention that the Offenders Ordinance of 1922 should be construed in the light of the Samoa Act, 1927. The Act of 1927 was only passed after the decisions in the cases appealed from.

Currie, in support:-

The annual report of New Zealand to the League of Nations under the mandate of Samoa is addressed to the Secretary-General of the League and signed by the Prime Minister. As regards the power of the Crown to extend the jurisdiction of a particular portion of the Empire to other territory, the case of British New Guinea affords an example: Strachan v. Commonwealth of Australia 4 C.L.R. Pt. I, 455. The Crown has absolute power to

set up a Government in respect of ceded territory: In re Zaghlul Pasha Times, 24 Jan. and 10 Mar. 1923. In a settled colony the prerogative can only extend to set up a representative Constitution.

Sir John Findlay, in reply:-

The Samoa Act of 1921 was passed by the General Assembly as carrying out the powers conferred on it by the Constitution Act, 1852. An Order under the Foreign Jurisdiction Act, 1890, is entirely inappropriate and ineffective for carrying out the mandates. The only Act under which an effective Order could have been made was the Treaty of Peace Act, 1919. The Foreign Jurisdiction Act is only applicable to territory over which His Majesty has sovereign power. The Samoan Order in Council of the 24th May, 1920, is limited in duration until the General Assembly legislated for the Government of Samoa. Although it would be possible for the Executive Government of New Zealand to administer law with respect to Western Samoa, it could not under the New Zealand Constitution Act legislate for it: See Halsbury Vol. 6, pp. 421, 427.

Cur. adv. vult.

SIM, A.C.J., delivered the judgment of HERDMAN, J., REED, J., and ADAMS, J.:-

The appellant is a Native of Western Samoa. On the 5th July, 1927, an order was made by the Acting Administrator of Western Samoa under the Samoan Offenders Ordinance, 1922, directing the appellant to leave the District of Tuamasaga I Matu, on the Island of Upolu, and to remain outside the said district and outside all other districts in the Island of Upolu (except the Village of Saluafata, in the Island of Upolu), and to reside in the said Village of Saluafata for a period of three months from the date of the signing of the order. The appellant did not obey the order, and his failure to obey it was charged against him as an offence under the Samoan Offenders Ordinance, 1922. He was found guilty by the High Court of Western Samoa and sentenced to six months' imprisonment. Leave to appeal was granted, and the present appeal to this Court has been brought under s. 83 of the Samoa Act, 1921.

It is clear that if the Samoan Offenders Ordinance, 1922, was a valid exercise of legislative power the appellant was properly convicted. That Ordinance was made by the Administrator of Western Samoa, with the advice and consent of the Legislative Council thereof, in intended exercise of the power conferred by s. 48 of the Samoa Act, 1921, to make laws (to be known as Ordinances) for the peace, order, and good government of the Territory. It was contended by Sir John Findlay on behalf of the appellant that for several reasons the Ordinance was not a valid exercise of legislative power. His first main contention was that the Samoa Act, 1921, itself was ultra vires of the Legislature of New Zealand. The Constitution Act, he argued, gave the Legislature power only to legislate for the peace, order, and good government of New Zealand, and the Legislature, therefore, could not legislate for territory outside the boundaries of the Dominion. That is true, no doubt, as a general rule, and the case of R. v. Lander /1919/ N.Z.L.R. 305; G.L.R. 181 illustrates the application of this rule. There the Court of Appeal held the Crimes Act, 1908, to be ultra vires in so far as it purported to make bigamy punishable as a crime in New Zealand when the offence was committed outside New Zealand. If, therefore, the power to legislate for Samoa depended on the Constitution Act the appellant would be right in his contention. But it does not depend on that Act, and the power is derived from other sources. Before the war Western Samoa was a German colony. By an Order in Council made on the 11th March, 1920, in professed exercise of the powers conferred by the Foreign Jurisdiction Act, 1890, after reciting that by the Treaty of Peace Germany renounced in favour of the principal Allied and Associated Powers all her right and title over the Islands of Western Samoa, and that it had been agreed between the principal Allied and Associated Powers that the said islands should be administered by His Majesty in his Government of his Dominion of New Zealand,

subject to and in accordance with the provisions of the said Treaty, His Majesty ordered, inter alia, as follows:-

> "3. The Parliament of the Dominion of New Zealand shall have full power to make laws for the peace, order, and good government of the Territory of Western Samoa, subject to and in accordance with the provisions of the said Treaty of Peace."

By the mandate for the Territory of Western Samoa, dated the 17th December, 1920, the Council of the League of Nations, acting under Article 22 of the Covenant of the League, conferred a mandate over that Territory upon His Britannic Majesty for and on behalf of the Government of the Dominion of New Zealand. Article 2 of the mandate contained the following provision:-

> "The Mandatory shall have full power of administration and legislation over the Territory subject to the present mandate, as an integral portion of the Dominion of New Zealand, and may apply the laws of the Dominion of New Zealand to the Territory, subject to such local modifications as circumstances may require."

It was contended by Sir John Findlay that His Britannic Majesty, and not New Zealand, was the Mandatory under this mandate. But this, in our opinion, is not so. The Government of the Dominion of New Zealand was intended to be the Mandatory. That is clear, we think, from the terms of the mandate; and there is also the fact that New Zealand has been treated by all concerned as the Mandatory, and has reported as such from year to year to the Council of the League as required by Article 6 of the mandate.

It was contended also by Sir John Findlay that the Foreign Jurisdiction Act, 1890, did not give His Majesty jurisdiction to make the Order in Council of the 11th March, 1920. If the view taken by the Supreme Court of South Africa (Appellate Division) in the case of R. v. Christian /1924/ S.Af. L.R. 101 as to the mandate in connection with German South-west Africa is right, then an Order in Council was unnecessary. There was no Order in Council in that case, and the mandate was the same in substance as the mandate in the case of Samoa. It was held that the Mandatory, the Government of the Union of South Africa, was by virtue of the mandate de facto and de jure the Government of the Territory of German South-west Africa, and acquired majestas or sovereignty therein, so that a charge of high treason might be maintained against an inhabitant of the mandated territory. It is unnecessary, however, to consider whether or not we can accept the view taken in South Africa as to the effect of such a mandate, for there is an Order in Council in the case of Samoa. According to the decision of the Privy Council in the case of Jerusalem-Jaffa District Governor v. Suleiman Murra /1926/ A.C. 321, such an Order in Council is authorised by the Foreign Jurisdiction Act, 1890. The question there was as to the validity of an Ordinance made by the High Commissioner for Palestine. The mandate for Palestine entrusted the administration of that territory to Great Britain. This was followed by an Order in Council providing for the administration of Palestine by a High Commissioner, and giving authority to a Legislative Council to make Ordinances for the peace, order and good government of Palestine. This authority was afterwards given to the High Commissioner. It was held that the jurisdiction exercised by Great Britain under the mandate was a jurisdiction within a foreign country within the meaning of the Foreign Jurisdiction Act, 1890. It was held also that the Ordinance was a valid exercise of the Legislative power given to the High Commissioner. It is true that in that case the mandate preceded the Order in Council, and that in the case of Samoa the Order in Council preceded the mandate. But that, we think, does not make any difference. Before the Order in Council was made, His Majesty had acquired jurisdiction in Samoa by virtue of the Treaty of Peace and the subsequent agreement between the principal Allied and Associated Powers recited in the Order in Council. The Palestine case is an authority, therefore, for holding that the Order in Council was authorised by the Foreign Jurisdiction Act, 1890. To the same effect is the decision of the Court of Appeal in R. v. Earl of Crewe /1910/ 2 K.B. 576. There by an Order in Council the

High Commissioner for South Africa had been authorised to provide in the Bechuanaland Protectorate for the administration of justice, and for the peace, order, and good government of all persons within the Protectorate, and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a Native tribe, was detained in custody under a Proclamation purporting to have been made under the powers so conferred. On application for habeas corpus it was held that the Protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, 1890, and that the Proclamation was validly made. This decision was approved of by the Privy Council in the case of Sobhuza II v. Miller /1926/ A.C. 518, and it was there said by Viscount Haldane, delivering the judgment of the Judicial Committee, that the Foreign Jurisdiction Act, 1890, appears to make the jurisdiction acquired by the Crown in a protected country indistinguishable in legal effect from what might be acquired by conquest, and that the Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council. That applies, of course, to all foreign countries within the scope of the Act. The judgment of the Privy Council in the case of Attorney-General for Canada v. Cain /1906/ A.C. 542 contains a clear statement as to the powers of legislation in connection with ceded territory. It is there said that when territory is ceded to Great Britain the Crown of England becomes possessed of all legislative and executive powers within the ceded country, and retains them until parted with by legislation, Royal Proclamation, or voluntary grant. The Imperial Government may delegate those powers to the Government of the ceded territory either by Proclamation (which has the force of a statute), or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If such delegation has taken place, the depository of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown itself could have exercised them.

The Order in Council purports to be made "by virtue of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested." It appears to us that the Treaty of Peace Act, 1919, may be invoked also as an additional statutory authority for the Order in Council. Section 1 of that Act authorises His Majesty to make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the Treaty and giving effect to any of the provisions of the Treaty.

The last point raised by counsel for the appellant in connection with the validity of the Samoa Act, 1921, was that the term "the Government of the Dominion of New Zealand," as used in the mandate, did not mean the Parliament of New Zealand. But a reasonable interpretation must be put on the mandate, and where legislation is necessary it must mean that the legislation is to be passed by the appropriate legislative body. That in the case of New Zealand is Parliament, and the Order in Council of the 11th March, 1920, expressly confers the power to make laws for Western Samoa on the Parliament of the Dominion of New Zealand. We think, therefore, that the appellant has failed to establish that the Act of 1921 is ultra vires.

We proceed now to consider the questions raised by the appellant in connection with the Samoan Offenders Ordinance, 1922. It was contended that the Ordinance was ultra vires because it did not provide for any inquiry before the order authorised by clause 3 of the Ordinance could be made by the Administrator. It was contended also that the Ordinance was repugnant to the provisions of the Samoa Act, 1921, and on that ground was ultra vires. The power to make Ordinances for Western Samoa is conferred by s. 46 of the Samoa Act, 1921. That section provides that the Administrator, acting with the advice and consent of the Legislative Council of Western Samoa, may make laws (to be known as Ordinances) for the peace, order, and good government of the Territory not being repugnant to the Act or to regulations under it, or to any other Act of the Parliament of New Zealand or of the United Kingdom in force in the Territory, or to any regulations there in force. This power is declared by subs. 2 to extend to the imposition of tolls, rates, dues, fees, fines, taxes, and other

charges. Section 61 of the Act provides that it shall not be lawful or competent to legislate in connection with certain specified matters. Section 57 gives the Governor-General of New Zealand power to disallow any Ordinance at any time within one year after the Administrator has assented to it.

Within the limits of subjects and area prescribed by the statute creating it, the Legislature of New Zealand possesses authority as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow: Hodge v. The Queen 9 A.C. 117, 132; Attorney-General for Canada v. Cain /1906/ A.C. 542, 547. And the Legislature possesses the utmost discretion of enactment for the attainment of the specified objects: Riel v. The Queen 10 A.C. 675, 678. The Legislature of Western Samoa is, in our opinion, in the same position, and the question to be determined is whether or not, according to the rule just stated, the Samoan Offenders Ordinance, 1922, can be regarded as a valid exercise of legislative power. Clause 3 of the Ordinance is as follows:-

> "3. If the Administrator is satisfied that the presence of any Samoan in any village, district, or place is likely to be a source of danger to the peace, order, or good government thereof the Administrator may, by order signed by him, order such Samoan to leave any village, district, or place in Samoa and to remain outside such limits for such time as the Administrator shall think fit, and by the same or any subsequent order the Administrator may order such Samoan to reside in any place specified in such order."

Clause 4 supplements this with a power to authorise the arrest of the Samoan against whom the order has been or is being made. Clause 5 provides for the punishment of disobedience to the order by imprisonment for a term not exceeding one year. Now, it is clear that clause 3 has been enacted not for the purpose of punishing a crime of some kind or another, but as a political precaution, and it gives a power which is to be exercised, as Isaacs, J., said in Ex parte Walsh and Johnson 37 C.L.R. 36, 67, 90, by the political department, the Executive, and possibly on considerations not susceptible of definite proof but demanding prevention. The very object of the legislation might be defeated if before exercising the power the Administrator was bound to give notice to the person concerned and to hold something in the nature of a formal inquiry. We think, therefore, that the failure to provide for any such inquiry does not make the Ordinance invalid. For this view of the question the case of R. v. Leman Street Police-station Inspector 89 L.J. K.B. 1200 is a direct authority. The person against whom the order is made may not have been guilty of a crime of any kind, but it may be necessary in the interests of peace, order, and good government that he should depart from some particular place. The Administrator must be the judge as to the necessity, and, if acting bona fide he is satisfied on the subject, the question whether his opinion is justified or not, or whether he should have been satisfied or not on the materials before him is not examinable by the Courts: Jones v. Robson 70 L.J. K.B. 419; Ex parte Walsh and Johnson 37 C.L.R. 36, 67, 90.

We proceed now to consider the other objection taken by the appellant. Part V of the Samoa Act, 1921, provides for the punishment of a number of crimes. It was contended that the provisions of clauses 3 and 4 of the Ordinance were repugnant to the Act, as being an attempt to provide another and different punishment for some of the offences created by the Act, and, in particular, the offences created by s. 102. But, as we have already held, the provisions of clauses 3 and 4 must be regarded as merely preventive and not punitive, and it follows, therefore, that they cannot be in conflict with the provisions of the Act, which are purely punitive. Clause 5 of the Ordinance provides for the punishment of disobedience to an order made under clause 3, but the maximum punishment is within the prescribed limit, and the clause is not in conflict with any of the provisions of the Act.

We think, therefore, that the Ordinance was a valid exercise of

legislative power, and that the appellant was properly convicted under it. The appeal is dismissed, with costs, £10.10s.

The case of Fuataga v. Inspector of Police is governed by this decision, and the appeal in that case is dismissed, with costs, £10.10s.

Ostler, J.:-

I very much regret that I find myself unable to concur in the judgment of the majority of the Court. Especially is this so, as I regard it as absolutely essential that the Administrator exercising the executive powers of government over a backward, semicivilised race, such as the Samoans, should have the fullest power, when he finds it necessary for the peace, order, or good government of the Territory, to act with a strong hand and without any hindrance from constitutional checks such as have been placed on the executive power in civilised countries. I agree cordially with the opinion expressed by the learned Judge in the Court below that in a Native community it would be disastrous if the supreme executive officer were discovered to be lacking in the power, when an emergency arose, to take immediate action to curb the liberties of individuals in the interests of the community. I agree with him that the Natives themselves, "understanding nothing of the constitutional aspect of government, and accustomed to look up to the head of the Government as the repository of all authority, would, whether well or ill disposed to the Government, view the absence of such a power as clear proof of the Government's weakness or timidity, and, if ill disposed, be induced to treat it with the contempt which in their view it would deserve." I am glad to remember that the Parliament of New Zealand has by the Samoa Amendment Act, 1927, conferred such power on the Administrator.

On the question whether the Samoa Act, 1921, is ultra vires I concur in the decision of the Court and in the reasons for that decision. Even if there had been no Imperial Order in Council issued under the Foreign Jurisdiction Act, 1890, as was the case with the mandate over German South-west Africa which was given to the Union Government, I should have been content to follow the judgment of the Appellate Division of the Supreme Court of South Africa in R. v. Christian /1924/ S.Af. L.R. 101. The progress of the Dominion along the path of nationhood has been rapid in recent years. The older conception of subordination to a central legislative authority has been superseded by the conception of a partnership of independent nations bound together by ties of loyalty to the same King, ties of kinship, ties of common interests, common beliefs, common faith in the future. If this was not clear before, it was made abundantly clear by the proceedings of the Imperial Conference of 1926. In my opinion the time has come for recognition of this fact by the Courts. It is not necessary to hold that our Constitution Act has fallen into desuetude, though a strong argument could be put forward to that effect founded on the maxim Cessante ratione legis, cessat ipsa lex. "The tooth of time will cut away ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative": Per Sir J. Salmond in the Law Quarterly Review Vol. 16, p. 383. But whether the Constitution Act has thus become obsolete or not, so far as the mandate is concerned, in my opinion, it is a matter entirely outside the scope of the Constitution Act. The Dominion had a representative at the negotiation of the Treaty of Peace, who signed the Treaty on behalf of New Zealand, which thus agreed as a separate nation to the Government of the League of Nations and became a member of the League. The mandate for Samoa was conferred by the Council of the League of Nations upon His Majesty the King for and on behalf of the Government of the Dominion of New Zealand. That means that it was conferred directly on the Dominion, and the Dominion is the sovereign Power responsible to the League of Nations. The mandate provided in Article 2 that "The Mandatory" /i.e., the Dominion/ "shall have full power of administration and legislation over the Territory subject to the present mandate, as an integral portion of the Dominion of New Zealand, and may apply the laws of the Dominion of New Zealand to the Territory, subject to such local modifications as circumstances may require." The authority is given by the League of Nations directly to the Dominion as a

member of the League. This is a matter of history, of which, in my opinion, this Court must take judicial notice. In my opinion it is ample authority for the legislation now attacked, and it is entirely outside the purview of the Constitution Act. This is the view taken by the Appellate Division of the Supreme Court of South Africa in R. v. Christian /1924/ S. Af. L.R. 101. I agree also with the majority of the Court that the powers given to the Administrator by the Ordinance are not judicial but executive powers, and therefore not examinable by a Court.

The point on which I find myself at variance with my brother Judges is as to the validity of the Samoan Offenders Ordinance, 1922. Section 46 of the Samoa Act, 1921, provides that the Administrator, acting with the advice and consent of the Legislative Council of Western Samoa, may make laws (to be known as Ordinances) for the peace, order, and good government of the Territory not being repugnant to this Act or to any regulations under this Act, or to any other Act of the Parliament of New Zealand or of the United Kingdom in force in the Territory. The Act constitutes an Executive Government, a Legislative Council, a Public Service, and a High Court of Justice. It provides a lengthy Criminal Code, no less than 112 sections being devoted to this subject, and a further thirty-four sections being devoted to criminal procedure. It contains a code of marriage and divorce laws, and in its 376 sections provides most comprehensively for the legal rights, duties, and liabilities of the inhabitants of the Territory. Section 349 provides that the law of England as existing on the 14th day of January, 1840 (the year in which the Colony of New Zealand was established), shall be in force in Samoa, save so far as inconsistent with this Act or with any Ordinance or regulation, or inapplicable to the circumstances of the Territory; provided that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said 14th January, 1840 shall be in force in Samoa unless and except so far as it is in force in New Zealand at the commencement of this Act.

It was held by the Court of Appeal in Cock v. Attorney-General 28 N.Z.L.R. 405; 11 G.L.R. 543 that the statute 10 Car. I, c. 10, which abolished the Court of Star Chamber and declared all Courts but the ordinary Courts of justice illegal, was in force in New Zealand, as was also the statute 42 Edw. III, c. 3, which enacts that no man shall be put to answer for a crime unless in the manner prescribed by law. Therefore by virtue of s. 349 those statutes have become part of the law of Samoa. The Act has, in fact, been at pains to confer on all the inhabitants of Samoa, be they aboriginal Natives, Chinese, or white, the constitutional rights to which every British subject is entitled in a British community.

The question then is whether the Samoan Offenders Ordinance, 1922, is repugnant to the Act conferring these rights. Happily, there have been many decisions on this question as to the meaning of repugnancy, and to my mind they form a clear guide to the right answer to the question. The first authority I can find is a decision of Chapman, J., in Robinson v. Reynolds Mac. 574, in which he says: "I take the true definition of repugnancy to be this: that any law made by the colonial Legislature which shall conflict with any Act of the British Parliament expressly binding on the particular colony, either exclusively or as one of a particular group of colonies, or on colonies generally, shall be deemed to be repugnant, and therefore null and void. . . . But it is quite competent to colonial Legislatures to alter not merely the common law, but any portion of the statute law of England in force in the colony by mere adoption."

The question there was whether a New Zealand statute was repugnant to the law of England within the meaning of s. 53 of our Constitution Act, which provided that it should be competent for the General Assembly to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the laws of England. This was the test that had already been applied by the Imperial Legislature in the Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63), s. 2 of which provides, "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate . . . shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

In R. v. Marais /1902/ A.C. 51, 54 the Lord Chancellor said: "The obvious purpose and meaning of that statute was to preserve the right of the Imperial Legislature to legislate even for the colony, although a local Legislature had been given, and to make it impossible, when an Imperial statute had been passed expressly for the purpose of governing that colony, for the colonial Legislature in that sense to enact anything repugnant to an express law applied to that colony by the Imperial Legislature itself."

In Attorney-General for Queensland v. Attorney-General for the Commonwealth 20 C.L.R. 148 the High Court of Australia considered whether certain statutes were repugnant to certain Imperial statutes, and it was held that taxing Acts passed by the Commonwealth affecting leasehold estates in Crown lands were not repugnant to provisions in the Colonial Laws Validity Act, 1865, which conferred on the Legislature of several States powers of legislation with respect to waste lands of the Crown in those States. Higgins, J., says Ibid. 178: "What does 'repugnant' mean? I am strongly inclined to think that no colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involves, either directly or ultimately, a contradictory proposition - probably contradictory duties or contradictory rights."

In Union Steamship Co. of New Zealand v. Commonwealth of Australia 36 C.L.R. 130 it was held that the Commonwealth Navigation Act was a colonial law within the meaning of s. 2 of the Colonial Laws Validity Act, 1865, and that provisions made in it, or in regulations under it, which were inconsistent with the provisions of the Imperial Merchant Shipping Acts were void for repugnancy: See per Isaacs, J. Ibid. 148, 149.

In my opinion the word "repugnant" as used in s. 46 of the Samoa Act, 1921, must be construed in the same way as in the cases referred to - that is to say, if the Ordinance takes away rights given by the Act it is repugnant, and therefore ultra vires as being beyond the power of the Legislative Council of Western Samoa to enact.

Section 3 of the Samoan Offenders Ordinance, 1922, provides that if the Administrator is satisfied that the presence of any Samoan in any village, district, or place is likely to be a source of danger to the peace, order, or good government thereof he may, by order signed by him, order such Samoan to leave such village, district, or place in Samoa and remain outside such limit for such time as the Administrator may think fit, and by the same or any subsequent order the Administrator may order such Samoan to reside in any place specified in such order.

Section 4 provides that the Administrator, by the same or any subsequent order, and whether default has been made in compliance with such order or not, may authorise the arrest of such Samoan and his removal to the place specified in the order. Section 5 provides that if default is made in compliance with any such order the defaulter shall be guilty of an offence, and is liable to imprisonment for a term not exceeding a year.

In my opinion it cannot be doubted that these provisions are not only preventive, but also punitive. The Administrator is given power, as an executive act, without any trial and without the formality of hearing the party proceeded against, to order his banishment from his own village to any place in the Territory (which would include an outlying island) for any period of time, extending even to the life of the person against whom the order is made. The Samoan in question may be a chief or person of consequence in his own village. He may be banished to a place where he is held in no esteem. I find it difficult to see how it can be argued that such treatment is merely preventive and not punitive. Even in a civilised country the banishment of a subject from his home town to some remote part of the country for an indefinite term could not but be felt to be a heavy punishment.

I wish to guard myself against being taken to be levelling any criticism against the Administrator in respect of the method in which he has used the power which this Ordinance purports to place in his hands.

Far from that being the case, in my opinion the Administrator in the two cases before us made but a very moderate use of the power placed in his hands. I am merely pointing out that the Administrator has the wide powers referred to.

The Parliament of New Zealand has by the Samoa Act, 1921, whether wisely or unwisely, conferred on the Samoans a code of law which gives them the constitutional rights of British subjects. It has applied to them all the English Acts of Parliament in force in the colony, including the statute abolishing the Star Chamber. It has imposed a code of criminal law which includes the crimes of treason and sedition. It has provided a Court and a code of criminal procedure for the trial of such cases. It is true that under the Ordinance the Administrator has the power to order banishment for any reason that touches the peace, order, and good government of the Territory. The Ordinance is wider in its scope than the Criminal Code, but it partly covers the same ground. Under it the Administrator has power to make an order of banishment against a Samoan who has, in his opinion, been guilty of treason, sedition, or any other crime. Such an order would conflict with that person's rights to a trial before the constituted Court in the prescribed way. Therefore, in my opinion, the Ordinance is repugnant to the Act within the meaning of that word as used in s. 46, and, being repugnant, is ultra vires and void.

There is much to be said for the view that the Parliament of New Zealand never intended that the Legislative Council of Samoa should be in the same position as a colonial Legislature has been held to be in such cases as Hodge v. The Queen 9 A.C. 117, Attorney-General for Canada v. Cain /1906/A.C. 542, and Reil v. The Queen 10 A.C. 675 - i.e., that, within the limits of subjects and area prescribed by the statute creating it, it should have authority as plenary and as ample as the Parliament of New Zealand. There are a number of stringent checks on the powers of the Samoan Legislative Council. Its Ordinances must not be repugnant to the Samoa Act or to any other Act of Parliament of New Zealand or of the United Kingdom in force in the Territory. Subsection (2) of s. 46 provides that the power conferred by the section "shall, save as otherwise provided in this Act, extend to the imposition of tolls, rates, dues, fees, fines, taxes, and other charges." It might well be that this subsection was intended to be a limitation of the powers of the Legislative Council and is an expression of the extent or ambit of its powers. But it is unnecessary to come to a decision on this point. Even if the Samoan Legislative Council is in the same position in regard to the New Zealand Parliament as a colonial Parliament is to the Imperial Parliament, it cannot validly enact any law repugnant to the Samoa Act by which it was constituted. This is what, in my opinion, it has purported to do.

For the reasons given, in my opinion, both appeals should be allowed.

Appeals dismissed.

Solicitor for the appellants: Thomas B. Slipper (Apia, Samoa).
Solicitors for the respondent: Crown Law Office (Wellington).

/The foregoing, as reported in /1927/ N.Z.L.R. 883, is reproduced here with the kind permission of Butterworth and Co. (New Zealand) Ltd./.