1880.

NEW ZEALAND.

NEW ZEALAND FOREIGN OFFENDERS APPREHENSION ACT, 1863.

(PAPERS RELATING TO THE CASE OF FREDERICK GLEICH.)

Presented to both Houses of the General Assembly by Command of His Excellency.

MEMORANDA FOR HIS EXCELLENCY.

THE Premier presents his respectful compliments to the Governor, and forwards for His Excellency's perusal certain papers relating to the case of Frederick Gleich.

2. In a proceeding connected with that case, the Supreme Court (all the Judges being present) decided that the New Zealand "Foreign Offenders Apprehension Act, 1863," was *ultra vires;* and, consequently, that a person guilty of a misdemeanor in any of the Australian colonies, will not be liable to arrest in New Zealand, supposing he makes his escape to this colony.

3. The Premier will, if His Excellency approves, direct that a statement of the case be prepared, so that it may be transmitted to the Secretary of State for the Colonies, as suggested by the Attorney-General.

Wellington, 29th December, 1879. JOHN HALL.

Ministers present their respectful compliments to the Governor, and enclose a memorandum respecting the case of Frederick Gleich, and the judgment of the Supreme Court thereon.

Papers as to the effect of this judgment—the New Zealand "Foreign Offenders Apprehension Act, 1863," being held to be *ultra vires*—were submitted to His Excellency, under cover of the Premier's memorandum of 29th December; and Ministers have now the honor to advise that, in compliance with the Attorney-General's recommendation, the memorandum be forwarded to the Secretary of State for the Colonies, with a request that, if necessary, the Imperial Government will provide a remedy.

H. A. ATKINSON
(In the absence of the Premier).

Wellington, 5th March, 1880.

(Enclosures.)

MEMORANDUM from the SOLICITOR-GENERAL to the Hon. the PREMIER.

IN accordance with your request I have prepared a statement of the facts appearing in the case of one Frederick Gleich, formerly of Adelaide, South Australia, and subsequently resident in Wellington, in this colony.

Gleich, when in Adelaide, became bankrupt according to the bankrupt laws of South Australia, and absconded from that colony, taking with him, it was alleged, a large sum of money (£3,700) which belonged to his creditors. He arrived in Wellington in this colony and entered into business as an hotel-keeper. A warrant for his arrest was issued in Adelaide, and a constable from South Australia, with depositions taken before Justices of the Peace in Adelaide, came to Wellington for the purpose of procuring his arrest and return to South Australia.

Under the provisions of an Act passed by the General Assembly of New Zealand intituled "The Foreign Offenders Apprehension Act, 1863," information was given to the police here, and proceedings were taken under this Act.

Gleich was remanded to Her Majesty's Gaol in Wellington until a warrant could be issued by His Excellency the Governor, as is required by sections 5 and 6 of the Act above mentioned. Pending the issue of this warrant the Supreme Court granted a rule *nisi* to show cause why a writ of *habeas corpus* should not issue, and why he should not be discharged. The rule came on for argument before the whole of the Supreme Court Judges in the colony, who then happened to be in Wellington attending the Court of Appeal, and the Judges, by a majority, made the rule absolute ordering the prisoner to be discharged. The judgments as published in the *New Zealand Times* of the 31st May and 2nd June, 1879, are attached.

The effect of this decision is to declare the Foreign Offenders Act *ultra vires* of the New Zealand Parliament, and also to declare that any person committing a misdemeanour in any of the Australian Colonies will be free from arrest should he arrive in New Zealand. The Imperial Act, 6 and 7 Vict., c. 34, provides for the apprehension of persons charged with felony, and it is therefore only so far as misdemeanants are concerned that there is need of an extension of the remedy.

The Bill prepared in England in 1876, copies of which were sent to this colony, would of course have covered such a case as that of Gleich, and the attention of the Home Government should, I think, be specially called to the need there is for Imperial legislation on a subject of such great importance to the colonies in the Australasian group, including Fiji.

Crown Law Office, Wellington, 19th February, 1880. W. S. REID.

REGINA *v.* GLEICH.

(*New Zealand Times*, 31st May, 1879.)

Chief Justice Prendergast said: In this case the members of the Court differ in opinion, and the judgment which I am about to deliver is that of myself alone. I think the Act of the New Zealand Parliament, "The Foreign Offenders Act, 1863," was, and is, beyond the power of the Legislature of the colony so far as it professes to empower the Governor to give authority to others to take a prisoner out of the colony. The learned counsel for the prisoner argued that the Act was generally repugnant to the Imperial Statutes recited in its preamble. Upon this point, if it were necessary to give an opinion, I should probably decide that the Act is not repugnant so far as its provisions apply to misdemeanours. But the sole object which the Legislature had in view was to give the Governor authority to remove from this colony prisoners who have committed offences in another colony to that in which the offence was committed. I find no authority or power for the Legislature of this colony so to legislate. The power given by the Constitution Act is to provide for the peace and good government of the colony—that is, within the boundaries of the colony. The true test is, whether the production of the Governor's warrant would be an answer in England to an action brought in England for false imprisonment, or assault, by the prisoner against the constable who had him in charge while on the high seas or within any other territory than this while in course of conveyance. And I think it clear that it would not be an answer. I repeat that the sole object of the Legislature when it passed the Foreign Offenders Act was to provide for the deportation of offenders; all other provisions of the Act are ancillary to that object. In treaties or Statutes relating to extradition, it is provided that criminals shall not be deported till a preliminary inquiry has been held, and our Act in that respect follows the precedent of Imperial Statutes and treaties. I may say that while considering my judgment I have looked over the correspondence which took place when the Foreign Offenders Act was sent to England, and I find that the Attorney-General then directed the attention of the Home Government to the possibility that the Act might be held to be *ultra vires*. In forming my opinion I am much influenced by the fact that the Imperial Parliament, in passing the Act 6 and 7 Vict., and the amending Act mentioned in the preamble to our Colonial Act, has actually legislated on the subject for all the colonies, and by the further fact that ever since the passing of the Foreign Offenders Act doubts have been expressed as to its validity; doubts which were mentioned by my brother Johnston in his book "The New Zealand Justice of the Peace," first published many years ago. I therefore think the warrant is bad, and the rule must be made absolute.

Mr. Justice Johnston said: I regret that, when for the first time I am called upon to express an opinion which may seem to derogate from the powers of the Legislature of this colony, I should not have had more time and better opportunities for a careful consideration of the questions involved; but, this being a matter relating to the liberty of the subject, the prisoner has a right to ask for a speedy judgment. Although I am not able to express so clear and decided an opinion as I should wish, I still feel bound to concur in the judgment which has been delivered by the Chief Justice. On many former occasions, although not in open Court, this question has been mooted, and it was anticipated that long before this the Imperial Parliament, which undoubtedly has the power, would have legislated upon the subject. I think it well to allude to the principles of the law of extradition for the purpose of arriving at the true *status* of a person in custody on the high seas. By the comity of nations there has gradually grown up what may be colloquially called a give-and-take arrangement, such an arrangement as must be made to enable the social intercourse of civilized nations to be carried on; and it is now settled that, while no country pretends to exercise any jurisdiction with respect to offences committed in another country, it is for the common benefit of mankind that treaties should be made enabling a nation, whose laws have been infringed, to vindicate them in a manner which would be impossible if escape gave immunity. For this purpose extradition treaties have been made between different nations, and municipal laws passed by the Legislatures of the contracting countries to carry the treaties into force. Therefore a person extradited by a law passed in pursuance of a treaty cannot say, when on the high seas, that he has reason to complain of the custody in which he finds himself. But such a reasoning does not wholly apply to the case of two or more colonies of the same power. There can be no doubt that the Imperial Parliament may, without treaty, enable all its colonies to have the same powers, *inter se*, as exist between foreign Powers by virtue of extradition treaties. Moreover, the Imperial Parliament may empower the Colonial Legislatures to do that which otherwise they could not do—that is, to affect the liberty of British subjects beyond their local jurisdiction. But no such law has been passed. The only foundation upon which such a proceeding as we have now to consider can be based is "The Foreign Offenders Act, 1863." Had that Act enacted only that persons found in this colony, who were charged with offences in another colony, should be detained in custody here, such an enactment, however opposed to the constitutional principles as affecting personal liberty, would probably have been within the powers of the Legislature. But the object of the Act is to deport such persons from this colony, and in this is necessarily implied a transit over the high seas, over which only the special jurisdiction of the Admiralty Court, or the Courts of a colony as specially empowered by Imperial legislation, can extend. If, then, the Colonial Legislature attempts to make legal a detention upon the high seas, that seems to me to be going beyond its powers: it is not a law for the peace, order, and good government of the colony—it is a law which deprives a man of his liberty in a place over which the local Legislature has no local jurisdiction, and such a law our Colonial Parliament is not, I think, entitled to pass within the powers granted to it by the Imperial Legislature. I express this opinion not without hesitation, though ever since the passing of this Act I have felt grave doubts respecting its validity.

Mr. Justice Richmond: I concur with the judgments of the Chief Justice and my brother Johnston. The Act of 1863 was passed with a view to authorize the deportation of persons charged with indictable misdemeanours, committed in other parts of the Australasian group, and their surrender to the authorities of the colony in which the offence was committed. That such was the purpose of the Act fully appears on the face of the Act itself. It does not perhaps purport expressly to authorize the detention of the supposed offender during his passage from this colony to the colony to which he is to be sent, but it plainly contemplates such detention. Unless he can be lawfully so detained the purpose of the Act fails entirely. But this Court must take judicial notice of the fact that he cannot lawfully be so detained, because, during the transit, the supposed offender must pass the high seas. No Imperial law warrants such detention, and no colonial law can warrant such detention. It follows that this Court has judicial notice that the purpose of the Act must fail as being *ultra vires*. It is argued that the Act is valid inasmuch as it only purports to authorize detention within the colony. Supposing that to be the case, which is far from clear, detention within the colony is not the purpose of the Act, but is only instrumental to the purpose. It is certain that the Colonial Legislature would never have authorized detention within the colony for a period of two months, except with a view to that ulterior action which this Court sees, and must declare, to be illegal. The purpose is indivisible; failing in part, it fails altogether.

Mr. Justice Williams said: I concur in the opinion of the majority of the Court. I agree in thinking that this branch of our jurisdiction should be exercised with great care and caution, but I see no reason why we should consider the question of whether or no an Act of the Legislature is *ultra vires* from any other point of view than we should consider whether the by-law of a Corporation is *ultra vires*. What we have to consider is the view that may ultimately be taken of our decision by the Privy Council, and that tribunal would not have any special leaning in favour of the validity of the Acts of the Colonial Legislature. The 5th section of "The Foreign Offenders Apprehension Act, 1863," enables the Justice, before whom an offender, charged with having committed a treason, felony, or indictable misdemeanour in any of the Australasian Colonies, shall have been brought, to commit such offender to prison, "there to remain until he can be sent back to the colony in which the offence is alleged to have been committed, and delivered to the proper authorities there," in the manner mentioned in the Acts of the Imperial Legislature 6 and 7 Vict., c. 34, and 16 and 17 Vict., c. 118. The 5th section of the former Act provides that it shall be lawful for the Governor, by warrant under his hand and seal, to order any person who shall have been apprehended and committed to gaol under that Act "to be delivered into the custody of some person or persons, to be named in the said warrant, for the purpose of being conveyed into that part of Her Majesty's dominions in which he is charged with having committed the offence, and, being delivered into the custody of the proper authorities, there to be dealt with in due course of law as if he had been there apprehended, and to order that the person so committed to gaol be so conveyed accordingly." Then follows a proviso that if any person so apprehended shall escape out of any custody to which he shall have been committed he may be retaken. If our Act of 1863 is to carry out the object for which it is plainly enacted, it must be assumed that it confers upon the Governor, in the case of a misdemeanour committed in any of the Australasian Colonies, the same power to issue a warrant for the removal of the alleged offender as by the 5th section of the 6 and 7 Vict., c. 34, is conferred upon him when the alleged offence is a felony. So far as the Justice is concerned our Act only authorizes a committal to prison, but the removal from the prison and all subsequent proceedings must be done under the Governor's warrant, and what that warrant is to authorize is found in the 5th section of the Imperial Act, and there only. Now the warrant is to order that the accused shall be delivered into the custody of some person named in it, shall be conveyed to the colony where the alleged offence was committed, and be delivered into the custody of the proper authorities there. Has, then, the Legislature of this colony any power to authorize the conveyance on the high seas to another part of the world, and the detention outside its jurisdiction, of any person whatever? I know of no authority by which the Legislature can do so. Had provision been made simply for putting the accused beyond the jurisdiction, that would probably have been within the powers of the Legislature; but the Legislature purports to authorize his conveyance to another colony, and to constitute a lawful custody during his passage on the high seas from one colony to another. Had this colony and South Australia been contiguous, the difficulty might not have arisen; he could have been put across the border in charge of a South Australian constable, and, being then in South Australia, could be properly detained under the law of that colony. Even then, however, there might have been a question as to the authority of the Legislature to direct the issue of a warrant purporting to authorize detention of a person in South Australia till he could be delivered to the proper authorities there. If then the Act of the Legislature in directing the removal of offenders is *ultra vires*, and the intention of the Legislature as evidenced by the provisions of the Act of 1863 cannot be carried into effect, it seems to follow that the Court should not give effect to those minor provisions, which it was within the power of the Legislature to enact, but which are merely subsidiary to the main object of the Statute, and which apart from such an object are insensible. For these reasons I think the rule must be made absolute.

(*New Zealand Times*, 2nd June, 1879.)

The following is the judgment of Mr. Justice Gillies in the above case, which was omitted from our report on Saturday last. It will be perceived that his Honor does not concur in the ruling of the Court:—

Judge Gillies said: I regret that the time and opportunities which I have had for consideration of this question have not enabled me to come to the same conclusion as the other members of the Court. I wish it to be understood that I express no very strong opinion, and it is with some diffidence that I venture to differ from my brother Judges. The Court is here called upon to exercise one of its highest powers, that of declaring that the Legislature of this colony has exceeded its powers in passing an Act which has been assented to by the Governor on behalf of Her Majesty, and has been left to its operation by Her Majesty on the advice of the English Law Officers. After attention had been called to doubts which existed as to its validity, such a power ought, I think, to be exercised with the utmost

caution, and we should only declare an Act of the Legislature *ultra vires* upon the strongest and most conclusive evidence, and these considerations should have the greatest weight given them in a case like this, where the Statute impugned on the one hand the liberty of the subject, and on the other the suppression of crime in this and the neighbouring colonies. It seems to me that the question now before us is only whether the prisoner is now, at the present time, held in custody under a legal warrant, not whether something illegal may hereafter be done. The contention on behalf of the prisoner is, that "The Foreign Offenders Act, 1863," under which the warrant has been issued, is invalid, as being one which the Legislature of this colony had no authority to pass. Now, on the face of the Act, I am unable to discover any reason why it should be considered as not within the authority of our Legislature to pass it; it applies only to apprehension, custody, and detention of offenders found within the colony, whose offences have been committed outside its boundaries. But it is contended that the words of section 5 of our Act contemplate that under section 5 of the Imperial Act the Governor shall issue a warrant for conveyance of the prisoner beyond the colony. It may be replied that we ought not, in considering the validity of the warrant under which the prisoner is now held, to determine what the Governor's authority hereafter to do may be. It may be that he has no authority to sign a warrant ordering the conveyance of the prisoner outside the colony, but that is a future question for him and his Advisers to determine, not for us now hypothetically to determine. We have before us now neither the Governor nor his warrant, but only the warrant of the Magistrate, and we must here presume that the Governor will not exercise powers which he has not. It seems to me that section 5 of the Imperial Act contemplates the possibility of two orders, the first for delivering the prisoner into the custody of a person who wishes to remove him to the other colony, the second ordering his removal; and the Governor may make the first order, which would be perfectly legal, and leave it to the person who has the prisoner in custody to take the risk of an action for false imprisonment on the high seas. Nor am I prepared at present to assent to the general proposition that the Colonial Legislature can give the Governor no power to deport prisoners beyond the seas. I think that question very doubtful, but I have not had time carefully to consider it, and I express no opinion upon it. For these reasons I regret that I cannot concur in the judgment of the Court.

By Authority: George Didsbury, Government Printer, Wellington.—1880.

Price 3d.]