

If when the rule is taken out by Mr. Edlin he asks therein, as he will be entitled to do, that in the event of the rule being made absolute the prisoner should be ordered to be discharged without being brought up before the Court he will obtain for his client every possible advantage which could have accrued to him by the rule being made absolute in the first instance. That was the course taken in *Eggington's* case 2 Ellis and Blackburn 717, and in *Geswood's* case 2 Ellis and Blackburn 952. In the former case at page 734 Lord Campbell said "I have repeatedly granted it" (the rule *nisi* for a writ of habeas corpus) "in this form to avoid the necessity for bringing up the party." It is the practice also in extradition cases to issue a rule *nisi* calling upon the Home Secretary, the Metropolitan Police Magistrate, and the foreign Government to show cause why the writ should not issue. That course was followed in the *Queen v. Gauz* 9 Q.B.D. 93 in which case, where a rule absolute for a habeas corpus had in the first instance been granted and the writ of habeas corpus had issued, upon the suggestion of the Attorney-General the matter was argued as if the prisoner's counsel was moving for a rule *nisi* on affidavits, and the Crown showing cause against the rule. It therefore appears that the course I have adopted is the right one.

re RATU SAVANACA RADOMODOMO.

[Civil Jurisdiction (Berkeley, C.J.) March 14, 1902.]

Disaffected Natives Ordinance 1887¹—s. 2—confining order—whether subject is entitled to be heard in his defence—whether the order and warrant should show the cause for which they are issued.

A confining order was issued under s. 2 of the Disaffected Natives Ordinance 1887¹ ordering the confinement of a Fijian native for a period of three years. This was followed by a warrant purporting to be issued under the same Ordinance and the native was accordingly arrested. Neither the order nor the warrant showed on its face the cause for which it was issued. No complaint or charge had been made or laid against the native nor had he been afforded any opportunity to defend himself before the confining order was made. An order to show cause against issue of a writ of habeas corpus was issued to the Attorney-General on behalf of the Crown.

HELD.—(1) It is not competent for the Governor in Council to sentence a man to imprisonment under the Disaffected Natives Ordinance, 1887,¹ without first having given him an opportunity of being heard in his defence.

(2) It is necessary that any order or warrant issued under the Disaffected Natives Ordinance, 1887, should show on its face the cause for which it is issued.

¹ Cap. 90, Revised Edition, Vol II, p. 908.

Cases referred to: —

- (1) *ex parte Corbett* [1880] 14 Ch. D. 122 ; 49 L. J. Bcy. 74 ; 42 L.T. 164 ; 42 Dig. 629.
- (2) *Plumstead Board of Works v. Spackman* [1884] 13 Q.B.D. 878 ; 53 L.J.M.C. 142 ; 51 L.T. 757. On appeal [1885] 10 A.C. 229.
- (3) *Willis v. Sir George Gipps* [1846] 5 Moo. P.C.C. 379 ; 13 E.R. 536 ; 17 Dig. 451.
- (4) *Bonaker v. Evans* [1850] 16 Q.B.D. 162 ; 20 L.J.Q.B. 137 ; 117 E.R. 840 ; 19 Dig. 425.
- (5) *Hammersmith Rent-charge* [1849] 4 Exch. 87 ; 19 L.J. Ex. 66 ; 154 E.R. 1136 ; 30 Dig. 216.
- (6) *Capel v. Child* [1832] 1 L.J. Ex. 205 ; 149 E.R. 235 ; 19 Dig. 423.
- (7) *Reg. v. Baines* [1840] 12 Ad. and Ell. 210 ; 113 E.R. 792 ; 42 Dig. 608.
- (8) *Christie v. Unwin* [1840] 11 Ad. and Ell. 2 ; 113 E.R. 457.
- (9) *Howard v. Gossett* [1847] 10 Q.B.D. 411 ; 16 L.J.Q.B. 345 ; 116 E.R. 158 ; 16 Dig. 74.

MOTION for a rule absolute for habeas corpus. The facts are fully set out in the judgment.

The Attorney-General, *C. H. H. Irvine*, for the Crown and the Buli Na Yau.

F. O. Edlin for Ratu Savanaca Radomodomo.

BERKELEY, C.J.—This is a motion for a rule absolute for a writ of habeas corpus directed to the Buli of the island of Na Yau, in the province of Lau, in this Colony to bring up the body of Ratu Savanaca Radomodomo with the object of having the said Ratu Savanaca released from what is alleged to be illegal confinement in the said island of Na Yau. The facts disclosed on the affidavits which relate to the arrest and detention of Savanaca are so far as material as follows :—On the 15th November, 1901, an order styled “ Confining Order,” was made by the Administrator in the following terms :—

“ I do hereby order that Savanaca Radomodomo, a Fijian native, of Bau, in the province of Tailevu, be confined for the period of three years from the date of his order to the following locality, namely the island of Na Yau in the province of Lau.”

This order for the confinement of Savanaca for three years is signed “ W. L. Allardyce, Administrator,” and between the heading “ Confining Order,” and the operative words of the order itself the following appear : “ made by the Administrator in Council under s. 2, Ordinance XX of 1887.”

On the morning of the 20th November, Ratu Savanaca was arrested by an officer of Police, under a warrant issued by the Administrator.

The warrant is dated the 15th of November, 1901, and runs as follows :—

“ ORDINANCE XX OF 1887. SCHEDULE B. WARRANT OF ARREST.

“ Fiji to Wit.

“ To all Constables and Peace Officers within the Colony.

“ W.L.A. These are to command you in His Majesty's name to arrest Savanaca Radomodomo, a Fijian native, and to take him in custody to the island of Na Yau, in the province of Lau, and there to deliver him over to Avimeleke Waqa, Buli of Na Yau, the person having for the time being chief authority in the said locality.

W.L.A. Dated the fifteenth day of November, 1901.

“ W. L. ALLARDYCE,
“ Administrator.”

This warrant is endorsed as follows :—

" I hereby certify that I have duly executed this warrant by arresting the within-named
" Savanaca Radomodomo on the 20th day of November, 1901," (and is signed)
" GEORGE WALL,
" Capt. Insp."

Under the warrant above set out Ratu Savanaca was taken from Suva where he had been arrested to the island of Na Yau, where he now is detained under the authority of the " Confining Order " before mentioned.

The Ordinance XX of 1887 referred to in the confining order and noted in the margin of the warrant of arrest declares by s. 2 that " It shall be lawful for the Governor in Council by order under his hand to confine any native whom he shall believe to be disaffected to the Queen or dangerous otherwise to the peace and good order of the Colony, to a particular locality in Fiji, for any period not exceeding 10 years from the date of such order."

By s. 1 the term " native " shall include " every aboriginal native " and " every person wholly descended therefrom, and every person wholly descended from aboriginal natives of any island in the Pacific Ocean " and s. 2 prescribes a " Form " of confining order which is to be adopted as nearly " as circumstances will admit of ".

By s. 3 it is declared that " it shall be lawful for the Governor, immediately or at any time after a confining order has been made against a native, to issue a warrant under his hand for the arrest of such native, and for the removing him in custody to the particular locality to which by the terms of such order he is to be confined," and a form of warrant to be followed as near " as circumstances will admit of " is prescribed.

The form of confining order, " Schedule A," runs as follows :—

" CONFINING ORDER.

" Fiji to Wit.

" I do hereby order that.....of.....
" be confined for the period of.....years, from the date of this order
" to the following locality, namely.....
" Dated this.....of.....one thousand
" eight hundred and.....

"
" Governor."

The confining order, it is to be observed, is addressed to nobody !

By s. 4 a copy of the " Confining Order " is to be given to the native arrested " as soon as possible after the arrest of such native " and the " nature and effect of such order " is to be " duly explained " to him.

By the same section a native may at any time after a warrant against him has been issued be arrested and taken to the particular locality to which by the terms of the confining order he is to be confined.

By s. 7 the Governor-in-Council may at any time, revoke or modify a confining order.

On the 20th November, 1901, Ratu Savanaca shortly after his arrest, saw a solicitor, and in reply to questions put by the solicitor, stated that he was unaware of the cause for which he had been arrested, and that no complaint had ever been brought against him.

It is admitted by the Attorney-General, who appeared to oppose this rule being made absolute, that no complaint or charge was made or laid against Savanaca, or any opportunity afforded him to defend himself before the confining order was made against him by the Administrator,

and the Attorney-General contends that Ordinance XX of 1887, does not contemplate that a charge or complaint shall be made against a native proceeded against under the Ordinance, or that any opportunity of defending himself shall be given to any such native before a confining order is made against him.

At the interview with his solicitor on the 20th November, 1901, Ratu Savanaca requested him to take proceedings by way of habeas corpus to test the validity of his arrest and detention.

On the same day, before application for the writ could be made, Ratu Savanaca was removed in custody from Suva and taken to a distant island in the Lau group, forming part of this Colony. On the 15th February, I granted a rule absolute in the first instance for a habeas corpus. On a subsequent day, on the motion of the Attorney-General, I set aside the order absolute, and by an order dated 14th February, ordered that the Attorney-General on behalf of the Crown, should show cause, why a writ of habeas corpus should not issue to Buli Na Yau to have the body of Ratu Savanaca before the Court immediately to undergo, and receive all, and singular such matter, and things as the Court shall then, and there consider of, and concerning him; and that in the event of this Court being of opinion that the writ of habeas corpus should issue, it may order that Ratu Savanaca Radomodomo be discharged, without being brought before this Court.

This order to show cause was argued before me on the 6th, 7th, 10th, and 11th March, with much care, and learned research by the Attorney-General on behalf of the Crown, and Buli Na Yau, and by Mr. Edlin on behalf of Ratu Savanaca.

The grounds upon which Mr. Edlin now moves for the rule absolute for a habeas corpus are as follows :—

1. That Ratu Savanaca Radomodomo should not have been deprived of his liberty without having had an opportunity offered him, of being heard before the Governor in Council.

2. That Ordinance XX of 1887 is void and inoperative because it was not enacted as by law required.

3. That the " Order " directing Ratu Savanaca Radomodomo to be confined in the island of Na Yau is bad in law for the following reasons :—

- (a) No offence is stated on the face thereof.
- (b) That the description of Savanaca does not show on the face of the order, or warrant, that he is a person coming within the requirements of the Ordinance XX of 1887.
- (d) That the signature " W. L. Allardyce, Administrator," is insufficient in law, and not in accordance with the requirements of the Ordinance.

A further objection (c), " that the place of confinement was not sufficiently described " was, during the argument abandoned.

In considering these grounds I shall depart from the order in which they were argued before me, and will consider the first and third grounds before proceeding to the consideration of the second.

Ground 1.—As to the first ground it is strongly urged upon me that it is clearly against every principle of natural law and justice, that a man should be condemned to be deprived of his liberty without having

the charge upon which he is condemned communicated to him, and without any opportunity being afforded to him of defending himself against the charge or of explaining his conduct in relation to such charge ; and it is argued that if Ordinance XX of 1887, really does confer that power upon the Governor-in-Council, that it confers upon the Governor-in-Council authority and power which the King himself does not possess, namely, to imprison at his mere will His Majesty's Fijian subjects without bringing them to any sort of trial by due course of law ; and to confer such power upon the Governor-in-Council, it is urged, would be to do a palpable injustice to His Majesty's Fijian subjects. Such a construction it is contended, should not be placed upon this Ordinance as will do palpable injustice.

The Attorney-General on the other hand contends that on the true construction of Ordinance XX of 1887 the Governor-in-Council is relieved from the obligation which ordinarily rests upon a Court of Justice of hearing a person or at least giving him an opportunity of being heard before condemning him to loss whether of life, liberty or property ; arguing that, having regard to the purpose for which the Ordinance was formed, the legislature could not have contemplated that a suspected native should be heard before being condemned to loss of his liberty. The Ordinance he contends further cannot be construed as requiring the Governor-in-Council to hear the accused because there is no such express provision and there is a contrary implication from the fact that no power is vested in the Governor-in-Council to compel attendance before them or to proceed in default in the absence of the accused ; because the power over the body of the accused arises after the confining order has been made ; because the Ordinance itself prescribed the " Confining Order " as the first step to be taken ; and because the necessary implication from the language of section 4, which requires that the " nature and effect " of a confining order shall be explained to the native on his arrest, negatives the idea that he shall already have undergone a trial and had a hearing : arguing that there would be no necessity in such cases for the " nature and effect " of the order to be explained. It is further urged by the Attorney-General that the intention of the legislature to relieve the Governor-in-Council from the obligation to hear the accused is to be gathered from the fact that by s. 6, where jurisdiction is given to a magistrate in certain events, there it is provided that the native is to be brought " before " such magistrate, urging that had the legislature intended that the native should be brought before the Governor-in-Council, or be heard by the Governor-in-Council before being condemned it would have so expressed itself ; and, finally, the Attorney-General presses upon me that on the ground of inconvenience, where the Colony consists of many and scattered islands, with infrequent communication, the legislature intended to relieve the Governor-in-Council from the necessity of hearing before confining ; arguing that otherwise the object of the Ordinance might in any case be defeated owing to the fact that the native believed to be disaffected or otherwise dangerous lived in a distant outlying island or in some other remote or inaccessible part of the Colony. And the Attorney-General also relies upon the fact that the " form " provided in the statute contains no direction or indication that there shall be a hearing before a decision is arrived at with respect to making the confining order. But on the other hand it is to be observed that the

"form" is to be followed as "near as circumstances will admit", and it must be remembered that the Ordinance does not say the accused shall not be heard before being condemned; and if his right to be heard be not taken away expressly or by necessary implication it continues to exist.

The Ordinance cannot be construed to intend that an opportunity shall not be given to a man who is willing to come before the Governor-in-Council merely because it has given no power to compel an unwilling one to come; nor does it follow that because no power is given to arrest until after the confining order is made, there should be no opportunity afforded of showing why no order at all should be made. To argue that the order prescribes the confining order as the first step is only to repeat in effect that the Ordinance is silent as to the right of the accused or suspected person to be heard before being condemned. The argument that a right to a hearing is negated by the provisions in s. 6 that the "nature and effect" of the order shall be explained to the prisoner, is not conclusive; for the requirement is not inconsistent with a prior hearing; because having regard to the ignorance of English among the Fijians and their inability to follow clearly the proceedings before the Governor-in-Council, and to the fact that in all probability a native before the Governor-in-Council would not be represented by counsel it would be essential, subsequently, to explain very carefully to him the "nature and effect" of any confining order that might be made against him, even though he had been present throughout the proceedings. The argument from the use of the words "before a European magistrate" in s. 6 loses its force when it is remembered that it was absolutely necessary, after the word conviction, to say "before" a magistrate, if the conviction was to be so obtained; for unless it had been so expressed the conviction would have had to be obtained before the Supreme Court.

The argument from inconvenience is no doubt to be given great weight to, in determining question of intention. If there are equivocal expressions, and there are two constructions possible, and great inconvenience must follow from one, it is strong grounds to show that that could not have been the true intention of the legislature. But before the argument *ab inconvenienti*, is given the great weight to which it is entitled the fact of inconvenience, or the likelihood thereof has to be established. The argument from inconvenience here is that if persons believed to be "disaffected or dangerous otherwise," were given an opportunity of being heard being condemned, the opportunity so afforded would, or might, be taken advantage of, to escape, or in some other way, evade the Ordinance, defeat its object, and perhaps become a greater danger than ever; and this owing to the scattered character of the Colony, and the infrequency of means of communication. This is put by way of hypothesis; but this Court is bound to take cognizance of the fact that the entire Colony is divided into magisterial districts, and is also divided politically for native government into provinces, and subdivided into districts, and towns over which, and in which there is a large staff of executive, and administrative officials, European and native; and that throughout the provinces, and districts, and in the native towns there are officers of the law such as native magistrates, and provincial police; and that, throughout the Colony to its remotest parts, there

are regular meetings of native provincial councils and district councils, and regular sittings of native provincial courts and native district courts. In view of this the hypothesis upon which the argument *ab inconvenienti* rests appears not to be sustainable ; and the argument adduced from supposed inconvenience, has therefore not the weight which would otherwise be attached to it. There can be no inconvenience in the true sense of the phrase, in giving a man an opportunity of defending himself against a charge, or it may be a suspicion, before depriving him of his liberty. If having been given the opportunity he does not choose to avail himself of it, he has nothing to complain of if the powers of the law are put in force against him in his absence.

No subject of His Majesty the King, may, in time of peace, lawfully be deprived of his liberty, or his property, by any tribunal in this Colony, without first having been brought to a trial upon a charge made against him, and communicated to him, or without first having had an opportunity offered to him of being heard in his defence.

For offences against the ordinary law of the land the trial must take place before, and the sentence be imposed by, the ordinary legal tribunals, according to the procedure prescribed by law in each case. The Supreme Court of the Colony has all the jurisdiction of the High Court in England and of the Courts of Oyer and Terminer. Proceedings in the Supreme Court, are conducted with that formality which the experience of ages has shown to be essential between man and man. The proceeding in the European Magistrate's Courts are also required to be conducted with strictness and formality. There are also Provincial Courts, and District Courts presided over, in the case of the former partly, and in the latter case wholly, by natives in which the essential element of formality is not observed : whose proceedings are conducted with much informality, and consequent confusion in many cases. These last named tribunals have jurisdiction solely among the native population : there is no appeal provided for from their determinations, and consequently their proceedings seldom, or never, come under notice. In 1887, the legislature, by Ordinance XX of that year, erected the Governor-in-Council into a special tribunal, with power over persons being of the aboriginal race, whom the Governor-in-Council might believe to be " disaffected to the Queen," or " dangerous otherwise " to the peace, and good order of the Colony. It is not easy, nor is it necessary for the present to define exactly the meaning of this expression, " disaffected to the Queen," or, " dangerous otherwise." The latter expression especially is elastic at any time, but it is made more so in this Ordinance by the " belief " of the Governor-in-Council, being declared sufficient to being a person within the danger of the penal clauses. In cases coming within the purview of Ordinance XX of 1887, there must at least be some sort of a trial, some sort of enquiry, however, informal ; there must be proceedings of some sort, to lead to the " belief " of the Governor-in-Council in the guilt of the accused native party, before the Governor-in-Council can proceed to impose the severe punishment of loss of liberty, it may be to the maximum limit of ten years, which the Ordinance authorizes. Those proceedings may be of the most informal description, for the Ordinance prescribes no procedure : but, however, informal they may otherwise be, they must include a hearing of the accused, or an opportunity to him to be heard, before being condemned.

The Attorney-General has pressed upon me that there is no compulsion on the Governor-in-Council to pursue that course, when dealing with an accused native party under the Ordinance. That the charge need not be communicated, nor the accused person afforded an opportunity of defending himself, because it is not so stated in the Ordinance, either expressly, or impliedly ; but that the implication is the other way, and he argues that as the Ordinance is silent as to the procedure to be adopted the Governor-in-Council might adopt whatever procedure he pleased. To that contention I think the answer is that the inherent right of every British subject to be heard before he is condemned, cannot be taken away from him except by express words ; and that where a statute constitutes a tribunal with powers to deprive the subject of his liberty, and is silent as to the procedure to be observed, such a tribunal, however informal it may be, must conduct its proceedings in accordance with the principles of natural law and justice.

It is not competent for the Governor-in-Council to sentence a man to imprisonment, under Ordinance XX of 1887, without first having given him an opportunity of being heard in his defence ; because to do so is repugnant to natural law and justice, and to the common and statute law of this Colony, as adopted from the law of England, and there is no express enactment of the Colonial Legislature enabling the Governor-in-Council to override the law of the land in respect of this principle, which is one of the great bulwarks of British liberty. I have already stated why I do not think it right to make the implication contended for by the Attorney-General. I cannot by implication come to the conclusion that the legislature could have intended to confer upon the Governor-in-Council power to take a man without having heard him, or given him an opportunity of being heard in his defence, away from his home and his family, and exile him to some distant part of the Colony for, it may be, a long term of years, without disclosing to him the evidence, or information, or allegation, or suspicion, or whatever it may have been, that led to the " belief " in his being a person coming within the category of those " disaffected to the Queen " or " otherwise dangerous."

In *ex parte Corbett* 14 Chan. Div., at page 129, Lord Justice Brett, referring to the general rule of construction of statutes, said " there is a general rule of construction that unless you are obliged to do so you must not suppose that the legislature intended to do a palpable injustice ; and again the same learned judge later, when Master of the Rolls, said in the case *Plumstead Board of Works v. Spackman*, 13 Q.B.D. at page 204, " when the words of an act of Parliament, being read in the ordinary meaning, are capable of an interpretation which would work manifest injustice, yet if it is possible within the bounds of any grammatical or reasonable construction to read the act so that it will not commit a manifest injustice, the Court ought to construe it on the assumption that the legislature did not intend, by the words it has used to perpetrate a manifest injustice."

Moreover the right of being heard before being condemned is a right founded on the first principles of natural justice, and as laid down over and over again by eminent and learned judges in England, that right can only be taken away by express enactment, or by necessary implication amounting to express enactment.

The cases *Willis v. Sir George Gipps*, and *Bonnaker v. Evans*, 16 Q.B.D. cited, among others, by Mr. Edlin are very much in point. In the former case it was held that though the Governor-in-Council of New South Wales had power to remove the appellant from his office, yet inasmuch as he had done so without giving the appellant some opportunity of being heard, the order of removal ought to be reversed. In the latter case Parke B. said, at p. 171, "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence, by a judicial proceedings, until he has had a fair opportunity of answering the charge against him; unless indeed the legislature has expressly or impliedly given authority to act without that necessary preliminary." Now the proceeding by the Governor-in-Council under s. 2 of Ordinance XX of 1887 are in the nature of a "judicial proceeding." Indeed in my opinion they cannot be considered in any other light than that of a judicial proceeding, and in the light of a judicial proceeding in a criminal matter; for as a result of those proceedings the Governor-in-Council is empowered to imprison for any term not exceeding ten years. The Attorney-General denies that when acting under Ordinance XX of 1887 the Governor-in-Council is to be regarded in any way as a Court which is in any sense liable to have its proceedings reviewed or supervised by the Supreme Court; but he concedes that in the exercise of the powers conferred by the Ordinance, the Governor-in-Council must act "judicially" in the legal sense of that word. I think myself that is tantamount to an admission that the proceedings are "judicial." With respect to judicial proceedings Parke B. in *Hammersmith Rent-charge* said "But it has long been a received rule in the administration of justice that no one is to be punished in any judicial proceedings unless he has had an opportunity of being heard."

The case of *Capel v. Child*, seems to me very much in point, and to support very strongly the view which I take that upon the true construction of Ordinance XX of 1887, Ratu Savanaca was entitled to be heard, before being ordered to be confined for three years in the island of Na Yau. In *Capel v. Child* the question arose of the true construction of s. 50 of 57, Geo. 3, Cap. 99, which enables a Bishop, whenever it shall appear to his "satisfaction," "either of his own knowledge" or upon "proof by affidavit," that the ecclesiastical duties of any benefice are inadequately performed, to nominate a curate etc. In the course of his judgment on the question whether the authority of the Bishop had been properly exercised, Parke B. said, p. 573, quoting the words of the statute, "when it shall appear to the satisfaction of any Bishop either of his own knowledge, or by proof on affidavit, . . . does not this import enquiry?" To apply that reasoning here, Ordinance XX of 1887, of s. 2, empowers the Governor-in-Council to imprison a native "Whom he shall believe to be disaffected" etc., does not that import enquiry?

Continuing his judgment in *Capel v. Child* Parke B. says, "He is to form his judgment from affidavits: but is it possible to be said that . . . he is to form his judgment from affidavits laid before him on the one side without giving the other party an opportunity of meeting the affidavits by counter affidavits, and without being heard in his own defence without having an opportunity even of being summoned for that

purpose?" . . . and again, further on, the learned judge says : " now if this be the case with respect to that part of the Act of Parliament where the proceeding is on affidavit, it appears to me as a necessary consequence that when the Bishop proceeds not on affidavit, but of ' his own knowledge ' the same course of proceeding is necessary ; because a party has a right to be heard for the purpose of explaining his conduct ; he has a right to call witnesses for the purpose of removing the impression on the mind of the Bishop ; he has a right to be heard in his own defence." Applying that rule to this case it appears to me to be clear that the Governor-in-Council, when acting under the authority of Ordinance XX of 1887, is acting judicially ; that before he can say he " believes " any person under the Ordinance to be " disaffected " or " dangerous otherwise " he has to make " enquiry " ; and to arrive at a decision on that enquiry. He has to form a judgment ; and every person affected by such judgment has a right to be heard for the purpose of explaining his conduct, for the purpose of removing, if he can, any adverse impression which the Governor-in-Council may form in the course of the enquiry ; has a right to be heard in his defence before being deprived of his liberty.

The Attorney-General submitted that it was not competent for this Court, on this application, to enquire into the validity or propriety of the proceedings by the Governor-in-Council. I do not concur. Anything which goes to show that the confining order is invalid, and that it therefore does not, as it purports to do, justify the detention of the prisoner, can be made the subject of enquiry by this Court on this application. " A person illegally detained is not confined to the return, he may bring all the facts before the Court." Those words were used by Lord Campbell, when Attorney-General, in the case of the *Queen v. Baines*, 12 Ad. and Ell. at p. 224 in the year 1840, and that is undoubtedly the law in this year of grace 1902. To condemn, in time of peace, to 3 years imprisonment a man who is involuntarily absent, who has never been informed of what he is accused, who has never been afforded an opportunity of being present before his judges to explain the facts alleged against him, who has been allowed no opportunity to defend himself against his accuser, is a violation of natural justice, and is contrary to the law of England and of this Colony ; and this Court undoubtedly is competent and in duty bound to enquire into the validity of all proceedings affecting the liberty of the subject, and the alleged violation of law.

I hold therefore that in making the confining order of the 15th November, 1901, against Ratu Savanaca, in supposed pursuance of Ordinance XX of 1887, without hearing Ratu Savanaca or giving him any opportunity of being heard, the Administrator-in-Council acted beyond his power : for, adopting the language of Parke B., in *Capel v. Child* at p. 577 " here is a new jurisdiction given,—a new authority given " : a power given to the Governor-in-Council to pronounce judgment : and accordingly to every principle of law and equity such judgment should not be pronounced, or if pronounced could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence which in this case he had not : and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge.

On these grounds I am of opinion that the confining order of the 15th November, and the warrant of arrest which followed, and is founded on it, are invalid and void, and cannot be sustained.

The next ground I will deal with is the third namely that the confining order and the warrant are bad in law because no offence is stated on the face thereof.

Now nothing is more clearly established than that where Courts, or other tribunals, or indeed when any persons, act under special statutory authority, outside of the ordinary law, the instrument by which they act must show on its face by direct averment or reasonable intendment the circumstances which give authority for the act done ; though that is not so in the case of the Superior Courts acting by the authority of the Common Law. Now the authority of the Governor-in-Council to make a confining order against a native, rests solely upon the authority of the Ordinance XX of 1887 which empowers the Governor-in-Council to imprison any native whom he may "believe" to be "disaffected to the Queen" or "dangerous otherwise." The Governor-in-Council has no authority to imprison unless one of two essentials exists. He must either "believe," (which means as I have shown "after enquiry made") that a native is "disaffected to the Queen," or he must "believe" that though the native is not so "disaffected" he is "dangerous otherwise." In either case he may make a confining order against such native, but when he does so he must state on the face of the order for which of the two offences the man is confined. The offences are different in their character altogether. A man may be perfectly "well affected" to the Queen, and yet be perhaps considered "dangerous otherwise"—that is a most elastic phrase and might with ingenuity be made to have a very extended meaning.

The Governor-in-Council is, in my opinion, constituted by Ordinance XX of 1887, a tribunal—a Court—with a limited statutory power outside the course of the common law ; and it is necessary that any order which he makes should show on its face the circumstances—the cause—which gives the authority to make that order ; must show what it is that gives such a Court jurisdiction to confine one of His Majesty's subject ; and the circumstances relied on to give jurisdiction must appear on the face of the instrument authorizing confinement.

I do not think this case is distinguishable from *Christie v. Unwin*, 11 Ad. and Ell. ; where it was held that an order made by the Lord Chancellor under 6 Geo. 4, Cap. 16, s. 18, must show on the face of it whatever is necessary to give the Court jurisdiction.

6 Geo. 4, Cap. 16, s. 18, empowers the Lord Chancellor to make a certain order upon the application of creditors "having proved any debt or debts sufficient to support a commission."

The Lord Chancellor made an order which recited an "application of certain creditors," but omitted to recite that the application was that of a creditor "having proved" a sufficient debt before applying. The order of the Lord Chancellor was held to be bad, because his authority to make the order was limited to an order to be made on the application of creditors "having proved," and not on the application of any creditor, and the order did not show on its face that the applying creditor had "proved." So here Ordinance XX of 1887 does not empower the Governor-in-Council to make a confining order against any "Fijian native," but only against such Fijian natives as are in his belief

"disaffected to the Queen" or "dangerous otherwise"; but the confining order made by the Administrator merely refers to Savanaca as a "Fijian native," and does not refer to him as a Fijian native disaffected to the Queen or dangerous otherwise. In giving judgment Lord Denman, p. 979, said "No creditor can apply to the Lord Chancellor unless he has first 'proved' a debt sufficient to support a commission. The present order does not show that." So here no Fijian can be confined by the Governor-in-Council unless he be "disaffected to the Queen" or "dangerous otherwise"; the order confining Savanaca does not show that. And Mr. Justice Littledale said "It does not appear by the order that the debt has been proved as s. 18 requires." So here it does not appear by the order that Savanaca is "disaffected to the Queen" or "dangerous otherwise," as s. 2 requires. And Mr. Justice Coleridge said "We cannot intend for or against the order, but must decide according to the words. However high the authority may be, where a special statutory authority is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of peace the 'facts' which gave the authority must be stated." Applying the principle of that case here, it is clear that the facts which gave the Administrator in Council authority to imprison Ratu Savanaca under the 2nd section of Ordinance XX of 1887, must be stated in the confining order, and on the "warrant of arrest" consequent thereon.

That, however, has not been done. Neither the confining order nor the warrant state the cause for which it is issued.

In *Howard v. Gossett*, 10 Q.B.D., Parke B., in delivering the judgment on appeal to the Exchequer Chambers at p. 454, places "magistrates" and "person having a special jurisdiction unknown to the Common Law" (that is persons acting under statutory authority outside the Common Law) in the same category, and declares them to be under the obligation to show on the face of their proceedings "facts" giving jurisdiction.

The case of *Howard v. Gossett* is therefore authority for my view that the confining order of the Administrator-in-Council of the 15th November, and the warrant of the Administrator of the same date, should show, each on its face, "facts" which gave the Administrator power to make such order.

"The cause of the commitment," said Chief Justice Holt, quoted by Parke B. in 1 Cro. M. and R., cited in *Howard v. Gossett* at p. 408 "ought to be certainly stated to the end that the party may know for what he suffers and how he may regain his liberty"; and, proceeding, the learned Baron said: "And if it be not, it is not only ground for discharging the party, but the warrant is void, and no justification in an action for false imprisonment."

In his judgment in *Howard v. Gossett*, p. 484, Mr. Justice Denman refers to Baron Parke's ruling (that the cause of the commitment must be shown) as "This ancient and indisputable principle"; it seems to me that "this ancient and indisputable principle" is fully recognized in Ordinance XX of 1887; for s. 4 requires that on a native being arrested the "nature and effect," of the confining order shall be explained to him. Now, before that could be done the cause of the confining order must appear on its face. How otherwise could the officer executing the warrant answer a question by the native as to the reason

of his arrest? To the question "Why do you arrest me?" he could but reply "Because I am ordered to do so." To the further question "but for what reason, for what cause do you arrest me?" the officer could only reply "I do not know. I only know that I am to arrest you and take you away to confinement." But in such case the Ordinance has not been complied with for "the nature and effect" of the order has not been explained to the native. It is not that the Ordinance either expressly or impliedly relieves from the obligation to state the cause but those acting under the authority of the ordinance have not done so.

The view which I take of the invalidity of the confining order and warrant makes it unnecessary for me to determine the other objection under the ground of objection 3; and it also renders unnecessary any decision on the point raised on the second ground namely that "Ordinance XX of 1887 is void and inoperative because it was not enacted as by law required." My decision on grounds 1 and 3 have gone on what may be considered objections of a technical nature; but as Lord Denman said in *Howard v. Gossett* "they would be found on consideration to involve principles of vital importance to the liberty of the subject."

The rule for habeas corpus to bring up before this Court the body of Ratu Savanaca Radomodomo is therefore made absolute; and the writ returned into Court by my order may be reissued; and it is now further ordered that the said Ratu Savanaca be forthwith discharged from confinement without waiting for a return to the said writ of habeas corpus.

IN *re* BARKER (IN CONTEMPT) *ex parte* SAVANACA.

[Civil Jurisdiction (Berkeley, C.J.) In Chambers, April 4, 1902.]

Solicitors Certificate unstamped—costs awarded to client—whether client can recover from opposite party.

Mr. Edlin had acted as solicitor for Ratu Savanaca Radomodomo in the matter of a motion to commit Thomas William Allport Barker for contempt; Barker was ordered to pay to Ratu Savanaca the costs of the motion on the higher scale to be taxed as between solicitor and client. The taxing master refused to tax the bill of costs on the ground that Mr. Edlin did not have in force at the time a duly stamped certificate.

HELD.—(1) A client is entitled to pay his solicitor and is thereupon entitled to recover from a party ordered to pay costs.

(2) The taxing master should not refuse to tax the bill but should require proof that the amount claimed for costs has been paid to the solicitor presenting the bill for taxation.

(3) The Attorneys and Solicitors Act, 1874 (37 and 38 Vict., c. 68) is not in force in Fiji.