[HIGH COURT OF AUSTRALIA.]

NOLAN . . . . . APPELLANT;
DEFENDANT,

AND

CLIFFORD . . . . . RESPONDENT;
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *June* 22, 23, 24, 27, 29.

Griffith C.J., Barton and O'Connor, JJ.

Crimes Act (1900, *No.* 40) *sec.* 352—*Arrest—Power of constable to arrest without warrant—"Such crime"—Offence under sec.* 47 *of Impounding Act* (1898, *No.* 6)—*Construction of Statutes—Consolidating Acts—Interlocutory judgment—Appeal without leave—Point not taken in Court below.*

The law as to the power of constables to arrest without warrant has not been altered by sec. 352 of the *Crimes Act*, 1900.

Sub-sec. (2) (*a*) of that section does not authorize a constable to apprehend without warrant a person whom he, with reasonable cause, suspects of having committed an offence which is not an indictable offence.

Semble, notwithstanding sec. 47 of the *Impounding Act*, 1898, "rescue" remains a misdemeanour at common law.

In dealing with a consolidating Statute the Court will consider the pre-existing law, and, if the Statute is one affecting the liberty of the subject, will not construe it as amending the Statutes consolidated, or as altering the common law, unless the intention of the legislature to make such a change in the law is shown by clear words.

Quære, whether an order of the Supreme Court refusing to grant a Rule Nisi for a New Trial on certain grounds, but granting it on others, is, *quoad* the refusal, an interlocutory judgment.

Where a defendant obtained a verdict, the Judge having directed the jury in his favour on a certain ground, and the verdict was subsequently set aside and a new trial granted by the Supreme Court, he was allowed, on the hearing of his appeal from the judgment of the Supreme Court, to support the original direction of the Judge, upon a ground not taken at the trial or before the Supreme Court.

Order of the Supreme Court (16th Feb., 1904), affirmed.

APPEAL from an order of the Supreme Court refusing to grant a Rule Nisi for a new trial on certain grounds.

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

The following statements of the facts and proceedings is taken from the judgment of *Griffith*, C.J.:—

This was an action brought by the respondent against the appellant, who is a police constable, for assault and false imprisonment. The defendant pleaded not guilty, by Statute, and his justification was that he had arrested the plaintiff on reasonable suspicion of having committed an offence against sec. 47 of the *Impounding Act*, 1898 (*a*). At the first trial of the action, before *Pring*, J., that learned Judge directed the jury that if the defendant had reasonable cause to suspect that the plaintiff had committed the alleged offence, which he treated as an offence punishable on summary conviction, the defendant should have a verdict. The jury found for the defendant. The plaintiff then applied for a new trial on the ground of misdirection, and the Supreme Court held (in a judgment reported as *Clifford* v. *Nolan*, (1903) 3 S.R. (N.S.W.), 504), that the learned Judge was wrong, and that the defendant was not justified in arresting without a warrant a person whom he suspected, on reasonable grounds, of having committed an offence punishable on summary conviction. The question whether the offence was a misdemeanour was not taken at the trial, or argued before the Supreme Court. A new trial was had, which, in view of the decision of the Full Court, was practically only a matter of assessment of damages. The plaintiff obtained a verdict for £350. The defendant then moved for a Rule Nisi for a new trial, and raised the same point, and also others which had not been raised formerly, and the Full Court, on 16th February, 1904, following their former decision on the first point, refused the rule on that ground. A rule was granted on other grounds, and at the date of the appeal it had not been disposed of. The defendant now, without leave, appealed from the order of the Full Court refusing to grant a Rule Nisi on the first ground.

Sir Julian Salomons, K.C., (with him, *Wise*, K.C., and *Boyce*), for the appellant.

(*a*) 47. Every person who rescues or incites or assists any other person in rescuing any animals lawfully impounded, or seized for the purpose of being impounded, shall be liable in any competent Court to all costs and damages lawfully chargeable thereupon and also to a penalty not exceeding twenty pounds.

Mocatta, (with him *Mitchell*), for the respondent, by way of preliminary objection submitted that, upon certain grounds appearing in a notice of motion filed, the appeal should be struck out; (1) that the notice of appeal had been given without leave of the Court in a case in which there was no appeal as of right, the judgment appealed from not being a final, but an interlocutory judgment, and the amount involved being under the appealable amount; (2) that the appellant, by his laches, and acquiescence in the first judgment of the Supreme Court on this point, had precluded himself from raising it now.

Taking the second ground first, judgment was delivered by the Supreme Court twelve months ago, at a time when the appellant could have appealed to the Privy Council. So far from appealing, he acquiesced in the judgment of the Court, and applied for leave to pay money into Court. Then, although he could have appealed to the High Court, he allowed the case to go to trial a second time. No reference was made to this point at the second trial, nor was any evidence given that would enable the point to be raised.

[GRIFFITH, C.J.—On an appeal from a final judgment, all points raised in the course of the case are open to the unsuccessful party. If a point is decided against him on an interlocutory application, there is no need for him to keep on raising it. He referred to *Maharajah Moheshur Sing* v. *Bengal Government* (1859), 7 Moo. Ind. Ap., 283, at p. 302.]

A litigant is entitled to know when the ligitation is at an end, and if the other party takes a step which leads him to believe that the appeal has been abandoned, and to incur heavy costs in that belief, the appeal cannot be revived; *Walker* v. *Walker*, (1903) A.C., 170. By the application for leave to pay money into Court, the appeal has been perempted; *Loughnan* v. *Haji Joosub Bhulladina*, 7 Moo. P.C., 372; *The Ship Clifton*, 3 Knapp, 375.

[*Wise*, K.C., referred to *Campbell* v. *Commercial Bank*, 2 N.S.W.L.R. 375.]

[GRIFFITH, C.J.—How can it be contended that what happened in October, 1903, can perempt an appeal the right to which first arose in February, 1904?]

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

The appellant, not having taken the point at the second trial, was not entitled to take it in the memorandum for a Rule Nisi.

[GRIFFITH, C.J.—The second trial was merely for the assessment of damages, and consequently the point could not have arisen.]

As to the other ground of the notice of motion, this is not a final judgment; *Collins* v. *Vestry of Paddington*, 5 Q.B.D., 368.

[GRIFFITH, C.J.—If the Rule Nisi had been refused altogether, it would clearly have been a final judgment. The only difficulty that arises is by reason of the Supreme Court having granted a Rule Nisi on some grounds, and refused it on others.]

Even if it is a final judgment, it does not involve the appealable amount. The appellant has moved the Full Court to have the damages reduced, and a rule has been granted. On the new trial, if granted, the jury may find for less than £300.

[GRIFFITH, C.J.—*Primâ facie* £1000, the amount claimed, is in question.

O'CONNOR, J.—How can the plaintiff be heard to say that less than £300 is involved, when he is claiming £1000 ?]

It is the amount recovered, not the amount claimed, that decides that question.

[*Sir Julian Salomons*, K.C., referred to *Bozson* v. *Altrincham Urban District Council*, (1903) 1 K.B., 547; and also to *Nilwhadub Doss* v. *Bishumber Doss*, 13 Moo. Ind. App., 85.]

Per Curiam. We are of opinion that, whether the judgment in question is final or interlocutory, we ought to hear the appeal. Even if we allowed this objection, we should grant special leave to appeal immediately.

It was agreed that the costs of the motion should be costs of the appeal.

Sir Julian Salomons, K.C., for the appellant. The question is whether a constable, acting *bonâ fide*, may arrest, without a warrant, a person whom he suspects, on reasonable grounds, of having committed a misdemeanour. "Rescue," the offence made punishable summarily by sec. 47 of the *Impounding Act*, 1898, is also a misdemeanour at common law. The words "such crime"

in sec. 352 (2) of the *Crimes Act*, 1900 (*b*), refer to all the offences mentioned in sec. 352 (1) (*a*) and (*b*), and not only to the last antecedent "felony." The word "crime" is large enough to cover them all, and grammatically it should be taken to refer to them all. It is used in the Act to include both felonies and misdemeanours. The only distinction between these two classes of offences is that felonies are offences punishable by death or penal servitude (sec. 9), and misdemeanours are those punishable by imprisonment with or without hard labour or whipping, or fine (sec. 10). Under the Act some offences are included in both classes. The words "crime" and "offence" are used interchangeably to mean either felonies, misdemeanours, or other offences, not as belonging specially to one or the other class of offence. This part of the section is taken from sec. 429 of the *Criminal Law Amendment Act* of 1883, 46 Vict. No. 17 (*c*). The learned

(*b*) 352. (1) Any constable or other person may without warrant apprehend,

(*a*) Any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,

(*b*) any person who has committed a felony for which he has not been tried, and take him and any property found upon him, before a justice to be dealt with according to law.

(2) Any constable may without warrant apprehend

(*a*) Any person whom he, with reasonable cause, suspects of having committed any such crime,

(*b*) any person lying, or loitering, in any highway, yard, or other place during the night, whom, he, with reasonable cause suspects of being about to commit any felony,

and take him, and any property found upon him, before a justice to be dealt with according to law.

(3) Any constable may, although the warrant is not at the time in his possession, apprehend any person for whose apprehension for a misdemeanour, or an offence punishable as a misdemeanour, a warrant has been issued, and take him, and any property found upon him before a justice to be dealt with according to law.

(*c*) 429. Every constable, or other person, may, without a warrant apprehend any person in the act o committing, or immediately after having committed an offence punishable (whether by indictment or on summary conviction) under this or any other Act—and take such person, together with any property found upon him, before a justice, to be dealt with according to law—and may in like manner apprehend and deal with any offender who has committed a crime punishable by

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

commentators' note to that section is to the effect that the words "such crime" refer to any crime covered by the section, "indictable and summary offences alike." This is a power given to constables, not private persons, to protect them in the exercise of their duty. Constables would never be able to act if they had to decide in each case how the offence was punishable, before proceeding to arrest a suspected person. If there was any ambiguity in the original Act, the consolidating Act has removed it. It is no answer to say that the power given is too great, and that constables might, under the section, arrest on suspicion of trivial offences. A discretion is left to the constable, and the authorities would check any tendency to exercise it wrongly.

The verdict for defendant should be restored and the amount of the verdict recovered in the second trial be repaid to the defendant (sec. 37 of the *Judiciary Act*).

Wise, K.C., followed. The Court below should not have referred to the original Act, as there is no ambiguity in the Consolidating Act. The words "such crime" must refer to the offences mentioned in both (*a*) and (*b*) of 352 (1). The consolidating draftsman has endeavoured to carry out the meaning placed upon the original section by the commentator. This is plain from looking at the commissioner's note. There is no reason of public policy why the power to arrest should be limited to cases of felony. The word "crime" in the section should be read in the sense in which it is used throughout the Act, that is, to cover offences of every kind, not in any technical sense. There are so many sections in which the word is used loosely and inartificially that no inference should be drawn from the use of that particular word, that any particular class of offence is intended. The use of the word "such" cannot serve to limit its reference to any one antecedent rather than to another.

"Rescue," though it is made punishable on summary conviction by the *Impounding Act*, is no less a "crime." It was held that an information for "rescue" under the original section, 33 of 29

death or penal servitude, and for which he has not been tried—and every constable may, without warrant, apprehend and in like manner deal with any person, whom he, with reasonable cause suspects of having committed any such crime. . .

Vict. No. 2, was a "criminal proceeding," and that "rescue" and "pound breach" were offences at common law; *Ex parte Kellett*, 1 S.C.R. (N.S.W.) N.S., 148. The words "all other crimes not capital" were held to include a misdemeanour, a fraud committed by a purser in the navy; *Mann* v. *Owen*, 9 B. & C., 595. In that case *Bayley*, J., quotes *Blackstone's Commentaries* in support of his judgment. An application for a summons under certain sections of the *Companies Act*, 25 & 26 Vict. c. 89, secs. 26, 27, imposing a penalty for default in fulfilling certain requirements of registration, was held to be a criminal cause or matter; *R.* v. *Tyler and the International Commercial Co. Ltd.*, (1891) 2 Q.B., 588. "Rescue" is made punishable in the same way by sec. 47 of the *Impounding Act* 1898, but it is an old common law word, and in a statute it must receive its full English meaning; it remains an indictable offence; per *Hargrave*, J., in *Ex parte Kellett* (*supra*).

[GRIFFITH, C.J., referred to *R.* v. *Harris*, (1791) 4 T.R., 205, per *Ashurst*, J., where it was said that, when a Statute imposes a penalty for a common law offence, the common law offence remains.]

Any offence against the Crown for which an indictment will lie at common law is a "crime"; *Conybeare* v. *London School Board*, (1891) 1 Q.B., 118.

In the Act there are certain sections which use the term "criminal proceedings" in a sense which includes all three classes of offences, *e.g.*, secs. 407, 570, 577. The word "crime" in section 352 (2), therefore clearly *may* refer to all three, and grammatically it must.

Mocatta, for the respondent. The point that this offence was a misdemeanour was never raised before. It was simply contended that, under the section, a constable was entitled to arrest upon suspicion of an offence punishable on summary conviction. The offence was all through treated as an offence under the *Impounding Act*, not as a misdemeanour at common law. On that ground the appeal should be dismissed. The appellant cannot, as in the case of a party supporting a nonsuit, make use of any ground which he could have taken below.

The plea was not guilty by Statute, and the *Impounding Act*

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

was referred to in the margin. Consequently there was no justification suggested in respect of any other offence than that which was punishable summarily under sec. 47 of that Act. It was held in *R.* v. *Smith*, 14 S.C.R. (N.S.W.), 419, that a defendant in an action for false imprisonment could not justify on any other ground than that which was charged against the plaintiff in the prosecution. Here the charge was "rescue." "Rescue" is not indictable at common law; *R.* v. *Bradshaw*, 7 C. & P., 233; *R.* v. *Colwell*, 7 S.C.R., 404; *Lodge* v. *Roe*, 1 V.L.R., 69; *Bullen on Distress*, 2nd ed., p. 247. Sec. 33 of 29 Vict. No. 2 (sec. 47 of *Impounding Act*, 1898) was held not to create an indictable offence; *R.* v. *Colwell*, 7 S.C.R. (N.S.W.), 404. "Pound breach" is an offence at common law, but the prosecutor could not proceed in a summary way for that offence under sec. 47. At common law the pound was a very different thing from that constituted by the Act, and the gravamen of the charge of "pound breach" was the breaking in.

[*Salomons*, K.C., referred to *R.* v. *Butterfield*, 17 Cox C.C., 598, a case of indictment for pound breach at common law].

In England there are no general pounds, and there is no Statute giving justices power to deal with offences in respect of them. The offence is no longer indictable here.

[GRIFFITH, C.J.—It is a recognized rule of law that the imposition of a statutory penalty does not displace the common law remedy.]

This Court is asked by appellant to say, that, although the Full Court was perfectly right in deciding as it did on the points raised before it, yet its finding must be reversed, and the verdict of the jury restored, because this point might have been taken before the Supreme Court, and, if it had, that Court ought to have decided the other way.

[GRIFFITH, C.J.—Was not the only material question at the trial, whether the defendant was justified in arresting the plaintiff? If a Judge gives wrong reasons for his direction, which was right on another ground, can the defendant be prevented from giving that right reason now?]

The question now is, not whether the defendant was justified generally, on any ground, but on the particular ground taken at

the trial. The Court is asked to give a decision on a specific point of law, not on the question whether the verdict is to stand generally. There is now pending before the Supreme Court a rule *nisi* for a new trial on grounds altogether distinct from this. This point could have been taken on the second trial and dealt with by the Supreme Court. Then, if the Court followed their previous ruling, the defendant could have appealed from them to this Court. But the point not having been taken at the second trial, the defendant was not entitled to take it on the rule *nisi* or here; *Adelaide Corporation* v. *White*, 55 L.T., 3; and, therefore, there is no judgment from which he is entitled to appeal.

[GRIFFITH, C.J., referred to *Safford and Wheeler, Privy Council Practice*, pp. 852, 853. If a judge directs a jury rightly as to the law, is his reason material? Does it matter, for instance, if he refers to a wrong section of an Act in support of his ruling? The appeal is from the judgment, not from the reasons.]

The Privy Council will not entertain a point raised on appeal for the first time, when it might have been raised below, and, if raised, a different result might have been brought about; *Safford and Wheeler*, 853, citing *Adelaide Corporation* v. *White* (*supra*); *Borough of Randwick* v. *Australian Cities Investment Corporation*, (1893) A.C., 322.

[BARTON, J., referred to *Garden Gully United Quartz Mining Co.* v. *McLister*, 1 App. Cas., 39.]

If the point had been raised, fresh facts could have been put before the jury; *R.* v. *Dadson*, 3 C. & K., 148. The plaintiff will be greatly prejudiced if the point is allowed to be raised now. The Supreme Court might have decided differently, and the plaintiff would not have incurred the costs of a second trial which may prove abortive.

As to the construction of the section, the question is not so much what will be the consequences of one construction or the other, but what the Legislature has said. This is a Statute affecting the liberty of the subject, and therefore, where a section will bear more than one construction, the Court will adopt that which will give the subject the wider liberty, particularly if that is the strictly grammatical construction; *Bowditch* v. *Balchin*, 19 L.J. Ex. (N.S.), 337. Here the word "such" would naturally and gram-

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

matically refer to the nearest antecedent to which its substantive can refer. "Crime" is used in the singular. Looking back from the words "such crime," the first class of crime to which the words can refer is "felony." According to the ordinary rules of grammatical construction, "felony" must be taken to be the class referred to. This will give "such" its proper qualitative meaning, belonging to one particular class. "Any" is merely a general word. The word "crime" can only be used to refer to classes of offences of which all are "crimes." Some misdemeanours, and many of the offences punishable summarily, are not crimes at all. A man may be indicted for a nuisance as a misdemeanour, but the prosecution is in the nature of a civil proceeding; the offence is not a crime and no criminal intent is necessary; the evidence necessary to support a civil action is sufficient to support an indictment; *R.* v. *Stephens*, L.R. 1 Q.B., 702. The mere fact that an offence is indictable does not necessarily make it a crime. Offences punishable summarily are not necessarily crimes, and in some cases the proceedings have been held to be not even in the nature of criminal proceedings; *Ex parte Moffitt*, 10 S.C.R. (N.S.W.), 270; *Crabtree* v. *Hole*, 43 J.P., 799; *Commissioners of Police* v. *Cartman*, (1896) 1 Q.B., 655. The word "crime" is altogether inappropriate, if intended to cover all the classes of offences mentioned in the first part of the section. The only class of which it is universally true is "felony." Therefore, both on grammatical grounds, and in accordance with the meaning of the words, that must be the only class referred to. Moreover, that is in accordance with the common law, and the Act will not be presumed to alter that unless the intention is shown by clear words. The Act is a consolidating Act, and has adopted sec. 429 of the *Criminal Law Amendment Act*. There would have been no difficulty about it but for the commentators' note, which is inconsistent with *Ex parte Moffitt* (*supra*). The only change is that for the words "crime punishable by death or penal servitude," the legislature has substituted the word "felony"; which, by sec. 9 of the consolidating Act, sec. 4 of the original Act, is made a synonym for the longer expression. That part of the section of the original Act was declaratory of the common law on this point. The Court will not hold that there was an intention

to alter the common law, especially in a Statute affecting the liberty of the subject, unless it is shown by clear words; *Hardcastle on Interpretation of Statutes*, 3rd ed., pp. 133, 307. If the legislature had intended to cover all classes of offences, they could have done so by using the one word "offence" instead of "crime." In construing the consolidating Act the Court will refer back to the Acts consolidated, and consider the sources and history of the legislation on the subject; *R.* v. *White*, 20 (N.S.W.) L.R., 12; *Fielding* v. *Morley Corporation*, (1899) 1 Ch., 1. The "long title" of an Act is to be read as part of the Act; *Attorney-General* v. *Margate Pier and Harbour Co.*, (1900) 1 Ch., 749. In *Boulter* v. *Justices of Kent*, (1897) A.C. 556, Lord *Davey*, at p. 573, said that a consolidating Act was "the last place in which you would look for a substantive and important change in the law—imposing new liabilities on Her Majesty's subjects."

[GRIFFITH, C.J.—In a consolidating Act, if the words of the original Act are repeated, they have, *primâ facie*, the same meaning as before.]

Sec. 429 of the *Criminal Law Amendment Act* is composed of 3 parts, (1) "Every constable" to "according to law"; (2) "and may in like manner" to "for which he has not been tried"; and (3) "and every constable" down to the end. The intermediate part is declaratory of the common law. Paragraph 3 of sec. 352 is taken from the Imperial Act 24 & 25 Vict. c. 96, s. 103. It was held in *R.* v. *Whitehouse*, 2 S.C.R. (N.S.W.), 118, that at common law a policeman had no power to arrest without a warrant for a misdemeanour. Then, after the passing of the Act of 1883, in *R.* v. *Tommy Ryan*, 11 (N.S.W.) L.R., 171, it was decided that a constable had no power to arrest without having a warrant in his possession, though one had been issued. If the appellant's contention is correct, all the argument in that case was quite unnecessary, because the constable had power to arrest on reasonable suspicion without any warrant. The Court then must have put upon the section the construction now contended for. That construction was evidently put upon it by the legal profession in general, and the legislature adopted it, and met the difficulty that arose in *R.* v. *Tommy Ryan*, by passing sec. 33 of 55 Vict. No. 5, which is now sec. 352 (3) of the *Crimes Act*, giving a constable power to arrest

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

for a misdemeanour, if a warrant has been issued, even though not in his possession at the time. That section would be unnecessary if a constable could arrest for a misdemeanour on mere suspicion, because the knowledge that a warrant was out would in itself be a reasonable ground for suspicion. That construction having been put upon the section by the Courts, the legislature and the legal profession in general, this Court will adopt it as the correct one; *Southwell* v. *Bowditch*, 1 C.P.D., 100, at p. 103.

The commissioner's note should not be looked at; *Hardcastle on Interpretation of Statutes*, 3rd ed., 140; *Hilder* v. *Dexter*, (1902) A.C., 474; *Union Bank* v. *Munster*, 37 Ch. D., 51; *Beale on Rules of Interpretation*, pp. 1, 2. The Act will therefore be construed in reference to the Acts consolidated, and the common law declared by those Acts, and will be construed as not altering them. The construction contended for by the appellant would make the provisions in the *Justices Act*, 1902, No. 27, for the issue of warrants, useless. There would be no necessity to satisfy a magistrate on oath that an offence had been committed, because the prosecutor could go to a constable, and, by giving him information, have a person arrested for any offence whatever.

The *Justices Act* provides that no prosecution under the Act may be initiated more than six months after the commission of the alleged offence. There is, however, no limitation of time with regard to the power of arrest given in sec. 352 of the *Crimes Act*. Therefore, upon the appellant's contention, a man might be arrested on suspicion of having committed an offence punishable on summary conviction, at a time when he could not be prosecuted for it. It cannot be assumed that the Legislature intended such an anomaly.

The cases cited for the appellant upon the meaning of the word "crime," have reference merely to sec. 47 of the *Judicature Act*, which gives the Court of Appeal the right to entertain appeals in civil matters. They decide, not that the offences in question were "crimes," but that the proceedings in respect of them were in the nature of criminal proceedings, so as to bar an appeal; *R.* v. *Barnardo*, 23 Q.B.D., 305; *Ex parte Woodhall*, 20 Q.B.D., 832; *Seaman* v. *Burley*, (1896) 2 Q.B., 344.

Mitchell followed. If the appellant's contention is right, the *Police Offences Act*, 1901, No. 5, creates a curious anomaly, because, although in 1900 the *Crimes Act* had given a constable power to arrest on suspicion for any offence whatever, there was express provision made in the Act of 1901 for the issue of summonses in respect of a large number of offences. This offence is punishable on summary conviction only, not by indictment. The remedy by way of indictment, if it ever existed, has become obsolete, and sec. 47 of the *Impounding Act* provides the only remedy known to the present law. [He referred to *Hardcastle on Interpretation of Statutes*, 3rd ed., p. 368]. *Chitty* says that there is a great deal of doubt as to the nature of the offence ; 2 *Crim. Law*, p. 204, note. The nature of the penalty imposed tends to show that it was intended to abrogate the common law. Where the punishment is altered to what is in the nature of a penalty, recoverable civilly, it may be inferred that the intention was to rid the offence of its previous criminal characteristics at common law. There is here a maximum penalty of £20 substituted for the common law liability to imprisonment up to two years. In *Fortescue* v. *St. Matthew's, Bethnal Green*, (1891) 2 Q.B., 170, it was held that where a Statute provides a punishment and a method of enforcing it, different from that provided by an earlier Statute, the later Statute impliedly repeals the earlier. The presumption should be stronger in favour of a repeal where the earlier law is common law, not Statute.

[GRIFFITH, C.J.—The opinion of *Ashurst*, J., on this point, in *R.* v. *Harris* (*supra*), has never been called in question.]

The Act is a code, but it provides that proceedings under the Act are no bar to a civil action for trespass, "the common law right of proceeding for damages" (sec. 58). Sec. 46 prescribes a penalty for an offence, but provides that it "shall not affect any criminal proceeding," if applicable. The Act having provided certain remedies, and having expressly mentioned certain common law rights as not being affected thereby, the presumption is that common law remedies that are not mentioned are taken away. After the decision in *R.* v. *Colwell*, (1869) 7 S.C.R., 404, in which the Court held that the offence of "rescue" was no longer indictable at common law, and that the only Court in which the offence

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

was triable, since the *Impounding Act* of 1865, was a Court of Justices, the legislature passed a short Act in 1869, 32 Vict. No. 11, to remove doubts which had arisen as to the meaning of the words "competent Court" in the Act of 1865. Sec. 1 of the Act of 1869, which is in the interpretation clause of the consolidating Act of 1898, provided that "competent Court" should mean any two or more justices sitting at Petty Sessions. It should be presumed, from the passing of that Act, coming after the decision in *R.* v. *Colwell* (*supra*), that the legislature intended to destroy the common law incidents of the offence, and to treat it as no longer indictable.

Sir Julian Salomons, K.C., in reply. This point could not have been raised in *R.* v. *Tommy Ryan* (*supra*), because the knowledge of the existence of a warrant would not be evidence of reasonable grounds of suspicion. If it had been pleaded as justification under sub-sec. (1) (*a*), it could have been demurred to. The reason of passing sec. 33 of 55 Vict. No. 5, was that there was no doubt in anyone's mind that, except for a felony, a constable could not arrest without having a warrant in his possession. That was the law as laid down by *Blackstone*; *Harris on Criminal Law*, 8th ed., p. 312.

In *R.* v. *Barnardo*, 23 Q.B.D., 305, the act complained of was not criminal in any sense; it was not an "offence"; see definition under "offence" in *Stroud's Judicial Dictionary*, 2nd ed.

[*Per Curiam.*—We only wish to hear you on the question of the meaning to be given to the word "crime" in sec. 352.]

The word "crime" as used in sec. 352 is only properly open to one construction. The use of the word "any" shows that a number of things are referred to, any one of "such crimes." "Offence" and "crime" mean the same thing in the Act, sec. 231 uses the word "offence" to mean the "crimes" mentioned in sec. 230. Sec. 244 speaks of one offence as rendering a person liable to penal servitude, as well as to imprisonment for 3 years, so that it comes within the definition of both "felony" and "misdemeanour" in secs. 9, 10. To construe the word "crime" strictly, as meaning only felonies, would lead to absurdities all through the Act.

R. v. *Whitehouse* (*supra*) was decided in 1863, before either the original or consolidating Act came into force. Consequently it can have no bearing on the question whether one or the other of those two Acts altered the common law.

Cur. adv. vult.

29th June.

GRIFFITH, C.J. [His Honor, having stated the facts reported above, proceeded as follows :] An objection has been taken that the judgment appealed from was in the nature of an interlocutory judgment, and that there could therefore be no appeal from it without the leave of this Court or of the Supreme Court. It is an interesting point, but of an entirely academic nature. In one sense the judgment was final, because that part of the defendant's defence was finally concluded against him ; in another sense it was interlocutory, because a decision has not yet been given on the whole case, but the matter is before us now, and we can give special leave, if necessary. As the matter has been fully argued, there is no reason why we should not express an opinion on the main point, which we think is of great importance in the administration of justice in New South Wales.

The real question is whether a constable is justified in arresting without a warrant for any offence less than a felony. The question for our determination depends entirely upon the construction of sec. 352 of the *Crimes Act*, a consolidating Act passed in 1900. That section provides [His Honor read sec. 352].

The main question for us to determine is, what is the meaning of the term "any such crime" in the second paragraph of the section : "Any constable may without warrant apprehend any person whom he, with reasonable cause, suspects of having committed any such crime." The contention for the appellant is that the term includes any offence, whether punishable by indictment or on summary conviction. For the respondent it is contended, following the opinion of the Full Court, that the word "crime," as there used, means only "felony." If I were at liberty, speaking for myself, to conjecture what was the intention of the draftsman or legislature, merely from all the information that is in one sense at our disposal, partly historical, partly arising from the practice of the police department, and partly from the notes

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

in a text-book by learned authors, I should be inclined to think that it was intended that the word "crime" should mean any offence whether punishable on indictment or on summary conviction. If I were at liberty to form an opinion as to the meaning of the section merely by looking at it, without any regard to the previous law on the subject, I should be inclined to the opinion that "crime" is intended to include felonies and misdemeanours. But neither of these methods of interpretation is proper to be applied judicially.

It is always necessary in dealing with any law that alters the common law, and especially where the common law rights of the liberty of the subject or relating to property are concerned, to consider what was the previous law, and what were the apparent reasons for the alterations made, and then to see what reasons there were for altering the law, and what the legislature has done to remedy what it conceived to be defects in the law. Now, the common law with regard to this subject was well settled. It was that a constable could arrest, without a warrant, any person whom he suspected on reasonable grounds of having committed a felony. He could not do so in the case of a misdemeanour, or in the case of an offence punishable on summary conviction, unless on the authority of some Statute, such as the English *Larceny Act*, sec. 99, which was referred to. There is a similar section in the *Malicious Injuries to Property Act*. But generally he could not arrest for a misdemeanour on suspicion. Another distinction was that in the case of a felony a constable was not obliged to have a warrant in his possession, while in the case of a misdemeanour he was. That was not decided until comparatively recently, but it is settled law in England, and it has been held to be the law of New South Wales.

It might be asked why there should be any difference between the right of a constable to arrest without a warrant in the case of a felony, and in the case of a misdemeanour. But there is a settled rule, the reason for which seems to be the application of the principle that he may arrest on reasonable suspicion, and that, if a constable is aware on credible authority that a warrant has been issued, on a properly sworn information, by a justice against any person, that is held to be reasonable suspicion that the person has

committed a felony. We know that is the way in which the administration of the police laws is conducted, and has been, as long as we have known anything about it. But that is not the law in the case of a misdemeanour.

These then were the rules, and the legislature set about to alter them. The *Criminal Law Amendment Act*, passed in 1883, contained a section, which sec. 352 in the consolidation represents. That section was:—"Every constable or other person may without a warrant apprehend any person in the act of committing, or immediately after having committed an offence punishable (whether by indictment or on summary conviction) under this or any other Act—and take such person, together with any property found upon him, before a Justice to be dealt with according to law—and may in like manner apprehend and deal with any offender who has committed a crime punishable by death or penal servitude and for which he has not been tried—and every constable may, without warrant, apprehend and in like manner deal with any person, whom he, with reasonable cause, suspects of having committed any such crime—."

The rest of the section I need not read. That section was intended to alter the Common law, and it altered it to this extent; that a constable was empowered to apprehend without a warrant any person, in the act of committing, or immediately after committing, an offence punishable under any Statute, whether by indictment or on summary conviction. That was a most important change in the law, because, although any constable or private person could have arrested a person found committing a felony, neither a constable nor a private person could, in general, arrest a person found committing a misdemeanour or an offence punishable on summary conviction. If the misdemeanour involved a breach of the peace he might do so, otherwise it must be under the authority of a Statute. That, then, was an important change in the common law.

The Statute went on to say: "A constable may without warrant apprehend and in like manner deal with any person whom he, with reasonable cause, suspects of having committed any such crime." These words follow after the words "any offender who has committed a crime punishable by death or penal servitude." By the

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

interpretation clause in this Statute the crimes "punishable by death or penal servitude" are felonies, and the test whether they are felonies is whether they are punishable by death or penal servitude. On the necessary grammatical construction of the words, whatever might have been the object, and in one sense the intention, of the framers of the Act, the meaning of the language that is there contained, is that the word "crime" in the sentence "whom he with reasonable cause suspects of having committed any such crime," means such a crime as has just been mentioned, that is, a "crime punishable by death or penal servitude." I do not think that the grammatical construction will allow of any other interpretation. In that respect therefore the legislature did not alter the common law, and did not allow a constable to take into custody on reasonable suspicion a person who was supposed to have committed a misdemeanour.

Then later, in 1891, the legislature passed an Act, a section of which now stands as the third paragraph of sec. 352, authorizing a constable to apprehend for a misdemeanour, although the warrant is not in his possession, provided the warrant has been issued. That Act was passed immediately after the decision of the Supreme Court in the case of *R.* v. *Tommy Ryan*, in which, following the earlier decision in *R.* v. *Whitehouse*, they, in accordance with the law declared in England, held that a constable could not arrest for a misdemeanour unless he had a warrant in his possession. It was pointed out in the argument with considerable force—and I do not see any answer to it—that it had not occurred to anybody, in the case of *R.* v. *Tommy Ryan*, that, under sec. 429 of the *Criminal Law Amendment Act*, a constable might have taken the offender into custody on reasonable suspicion, although, upon the construction which the learned annotators of the *Criminal Law Amendment Act* thought to be the correct one, he would have been entitled to do so. The legislature, then, passed an amending Statute, which authorized a constable to apprehend a person for committing a misdemeanour, although he had not a warrant in his possession, so putting misdemeanour on the same footing as crimes and felonies, but not making any other alteration in the law in that respect. That being the state of the law, that a constable could not arrest on reasonable suspicion for a misde-

meanour, unless a warrant had been issued, nor for any offence punishable on summary conviction, the law was consolidated in 1900. This is described to be an Act to consolidate the Statutes relating to Criminal Law. There is nothing to indicate that the legislature intended to make any substantial alteration in the law. It is entitled an Act to consolidate the Statutes. There is nothing to suggest that they intended to make an important alteration in the common law on a matter materially affecting the liberty of the subject. If, notwithstanding that, the Act did contain provisions which could only bear one construction, we should, as pointed out in another case, be obliged to give effect to the plain words of the Statute; but, *primâ facie*, there is nothing indicating that this Act was intended to make an important alteration in the common law on a point affecting the liberty of the subject.

Reading sec. 352, what do we find? It certainly presents difficulties in construction. If the contention for the appellant is correct, the natural word to have used in paragraph 2 would not have been "crime" but "offence." If that part of the section was intended to cover the same class of cases as the first part of the section, clearly the word "offence" would have expressed that intention without ambiguity. On the other hand, if it was intended to limit it to felonies, the word "felony" would have been naturally used. The very word is used in the next subparagraph: "about to commit any felony." No doubt, using different words in the same section to convey the same idea gives rise to confusion and ambiguity, but the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found. I cannot think that, if the legislature had intended to say that a constable could arrest without a warrant for a misdemeanour, it would have used the word "crime" to describe a misdemeanour, and to introduce so important an amendment of the law. I think that in such context it is impossible, applying recognized rules of construction, to say that "crime" is intended to mean "misdemeanour." It might be that, if I were left to my own speculation as to what the framers intended, I

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

should come to a different conclusion, but, applying judicial rules of interpretation, I cannot do otherwise than hold that the common law with regard to arrest upon suspicion for offences other than felony has not been altered by this section.

BARTON, J. I am of the same opinion. Dealing first with sec. 429 of the old *Criminal Law Amendment Act*, which was passed "to consolidate and amend the criminal law," I think, as the *Chief Justice* has said, that the construction of the sentence is plain. The section says: [at this point His Honor read the section.]

It is to me clear that the grammatical construction to be placed on the words "any such crime" is, that they refer to the last group of things (the crimes), which are antecedent. In the case of this section, the last group of crimes which can be so treated is expressed in this term of "crimes punishable by death or penal servitude." It seems to me to be beyond all question that it would be a violation of the language used to apply the words "any such crime" to any antecedent beyond those "crimes" which are clearly indicated, and to which, indeed, upon the construction in favour of the liberty of the subject, it most naturally applies. I do not find that this construction of sec. 429 has been disputed. It does not seem to be contended with any vigor at all that the words "any such crime" are, in that section, to be extended beyond "crimes punishable by death or penal servitude," and I think, with the *Chief Justice*, that the fact that the point here raised with regard to the old *Criminal Law Amendment Act*, never occurred to anyone in the very much argued case of *R.* v. *Tommy Ryan* is some evidence, to us at any rate, that members of the profession accepted the construction. If this construction is right, and if also the contention on the part of the appellant is right, sec. 352 makes a sweeping amendment, and makes it as part of an Act passed professedly to consolidate, and not, like the prior Act, to both consolidate and amend. The title is "to consolidate the statutes relating to the criminal law." It deals, therefore, professedly, with the then existing statutes by way of repeal and re-enactment.

In *Hardcastle on the Interpretation of Statutes*, 3rd ed., p. 197, it is stated:—"Again, it is a rule as to the limitation of the

meaning of general words used in a Statute" (like the word "crime" here), "that they are not to be, if possible, construed so as to alter the common law." And lower down on the same page the writer gives this illustration of the principle:—"A right to demand a poll is a common law incident of all popular elections, and as such 'cannot be taken away by mere implication, which is not necessary for the reasonable construction of a Statute,' said *Brett*, L.J., in *R.* v. *Wimbledon* (1882) 8 Q.B.D., 459, where it was contended that the Public Libraries Acts, 1855, 1866, and 1877, had abolished the common law rule."

That principle is applicable to strengthen the construction I have placed on sec. 429. As I was saying, if that construction is right, and if the appellant's contention is also right, then a later Act professedly framed merely to consolidate Statutes, has effected a marked amendment, because, again referring to the principle I was dealing with, it does seem to be clear that the corresponding portion of sec. 429 is really declaratory of the common law. I share the view of Mr. Mocatta, that it is so declaratory.

Coming then to sec. 352, we find that, down to the point to which I have quoted sec. 429, the two sections, one in the Act which consolidates and amends, and the other in the Act which only consolidates existing Statutes, are practically identical, unless the new meaning contended for is to be affixed to the words "any such crime." As to the earlier portion, it has been rightly said that what is called the first segment is taken from 24 & 25 Vict. c. 96, the Imperial Statute, sec. 103, but, if the meaning contended for is to be attached to the last words of the second segment of the section, "any such crime," then a new feature has been introduced into our criminal law, which, it has been urged, does not exist in the criminal law of any other part of the British dominions. That change in the law, it is contended, has been made in a consolidating statute. We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said. But, if the brevier is to be considered, it will be seen how little departure is intended from the work of consolidation with respect to these

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

Statutes, and that apparently no departure was intended in this very section. I leave that question of the brevier at this point, because it is quite correct to say that the matter is as broad as it is long, and if we should not give any attention to the note or memorandum of the consolidating commissioner for one purpose, we should not do so for the other.

But, with reference to consolidating Statutes, one must consider that some everyday principles are strengthened in their application when we have in view the express purpose of such Statutes. If it is true that very clear terms are necessary to take away common law rights, then the necessity for such terms must become all the stronger when the general intention of the Act is merely to repeal and re-enact existing provisions. Now, in that connection the case of *Boulter* v. *Kent Justices*, which was cited at the Bar, affords us an expression, applicable to this case. The dispute there was as to a decision of licensing Justices, and involved the question whether the Statute law, the words of which were wide enough for such a purpose, did constitute the Justices a Court of summary jurisdiction, so as to bring about, in applying the Act, the consequences contended for. *Davey*, L.J. (on page 573), says:—"I now come to the Act of 1889. Its title is 'An Act for consolidating enactments relating to the Construction of Acts of Parliament, and for further shortening the language used in Acts of Parliament.' A most laudable object assuredly; but an Act for that purpose is the last place in which you would look for a substantive change in the law—imposing new liabilities on Her Majesty's subjects."

Now, it is true that in that case the purpose of the Act was to consolidate the Interpretation Acts and further shorten the language of future Acts of Parliament, and that naturally would not be a likely place in which to look for a substantive change in the law; but the language quoted is, if not with precisely the same force, certainly in a great degree, applicable to an enactment the mere purpose of which is re-enactment and repeal. It is of great weight in considering whether changes in the law are intended to be brought about by an enactment with this restricted object. I consider that legal principle and fair implication are both against the affirmative view. The whole force of the argument, if I could

bring my mind to follow it at all, would not lead me any further than to say that the omission of the words "crime punishable by death or penal servitude" and the substitution of the word "felony" raised an ambiguity as to the construction of the words "any such crime," but I am not prepared to hold that, even if an ambiguity is raised, a change in the criminal law is made in an act for its mere consolidation.

The alteration from "crime punishable by death or penal servitude" to "felony" has reference to another section which finds its place in the consolidation, as sec. 9:—"Whenever by this Act a person is made liable to the punishment of death, or of penal servitude, the offence for which such punishment may be awarded is hereby declared to be and shall be dealt with as a felony, and wherever in this Act the term 'felony' is used, the same shall be taken to mean an offence punishable as aforesaid."

Now, leaving out all questions about the draftsman, and confining oneself to the meaning of the terms used, it is clear that the legislature, in using the word "felony" in paragraph (b), sub-sec. 1 of sec. 352, has applied a synonym. It has used a word which it had already made interchangeable with the expression used in the previous Act, which was under consolidation. I should not go so far unless that intention were clear from the Statute as passed, but it is unquestionably made of identical meaning, because the section declares:—"Wherever in this Act the term 'felony' is used, the same shall be taken to mean *an offence punishable as aforesaid.*"

That brings us to this point, that, if we look to sec. 352, we are bound to read it in terms of sec. 429 of the previous Act, that is to say, we are bound, by the interpretation demanded of us by sec. 9 of the Act we are now considering, to say that in paragraph (b) of sub-sec. 1 the words are still to be read, "an offence punishable by death or penal servitude for which he has not been tried." Now, just as I pointed out, that it is clear, and it has scarcely been contested, that the words "any such crime" in the previous Act must be held to refer to the full form of words antecedently occurring in that Act: so it is impossible to hold, even on the grammatical construction, that the expression "any such crime" in the new Act refers to anything but "offence punishable by death

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

or penal servitude," for which lengthy expression the synonymous term "felony" has been substituted in sub-sec. 1, paragraph (b).

It seems to me, therefore, that we cannot adopt the argument which has been addressed to us for the purpose of assigning to this provision a meaning different from that which plainly belongs to the corresponding portion of the prior Act, which was one of the factors of the consolidation. I go a little further than my learned brother, the *Chief Justice*, because I consider that, having in view the effect of sec. 9, and the terms at the end of it, the grammatical construction of this section, if you read it with sec. 9, as you are bound to do, is that "any such crime" is a "crime punishable by death or penal servitude." By the construction we are now placing on it, the ordinary purpose of a consolidating Act is preserved, and it will not be wrested from its declared objects and applied to others, by which process an amendment in the law would be placed in a Statute where the public and the profession would not be in the least degree on their guard to look for it. On all the arguments I have heard I have come to the conclusion, for the reasons I have ventured to advance, as well as for those given by the *Chief Justice*, that the right contended for on the part of the police is not conferred by legislation, and therefore that this appeal fails.

O'CONNOR, J. Sec. 352 of the *Crimes Act*, the construction of which is in question in this case, may be divided into two parts. The first, consisting of sub-sec. (1), gives certain powers of arrest both to constables and private persons, and the second, consisting of the second and third sub-sections, gives certain powers of arrest to constables only. The first sub-section deals with three classes of offences: with offences punishable on indictment, which include felonies and misdemeanours, and with offences punishable on summary conviction. Now, in the powers which are given to constables only in sub-sec. (2), power is given to apprehend without a warrant any person whom he with reasonable cause suspects of having committed "any such crime." The words "such crime" have reference, of course, to the matter dealt with in the preceding sub-section. It is contended, on the one hand, that "such crime" must refer to each of the three classes of crimes mentioned

in that sub-section. It is contended, on the other hand, that "such crime" refers only to the immediate antecedent, which is felony as mentioned in clause (b) of sub-sec. (1), and that therefore the power to arrest without a warrant does not include either a misdemeanour or an offence punishable on summary conviction. The question for our consideration is which of these contentions is correct.

Either construction would be admissible grammatically, and it has to be determined now which of these two constructions will best carry out the expressed intention of the legislature. The first and most important rule in the construction of Statutes is to give effect to words according to their grammatical meaning. If that meaning is clear, then, whether an alteration is made in the common law or the statute law or not, and, whether of a serious character or not, is of no moment; effect must be given to the words the legislature has used. But, in looking at this section, it does not appear that the legislature has used clear words, because, when we come to examine the words in question, we find that a word is used, "crime," which, according to its ordinary and popular meaning, is certainly not applicable to one of the classes of offences mentioned in the first sub-section, that is, offences punishable on summary conviction. I think, if the contention were urged anywhere outside of a court of justice, that offences punishable on summary conviction are crimes, it would be thought rather a straining of the English language.

If the appellant's contention is correct, this word "crime" is used to describe three classes of offences: felony, misdemeanour, and offences punishable on summary conviction; and the question naturally arises, why was that word "crime" used, if it was intended to apply to the three classes of offences mentioned, when the word "offences," which was so obviously the correct word, might have been used. These considerations throw so much doubt on the sense in which the word "crime" is used, that it becomes necessary to inquire what would be the consequence and effect of putting a construction upon the word "crime" which, according to the ordinary, popular signification, it does not bear.

I may stay here to observe that the word "crime" is not used in a technical sense in any part of the *Crimes Act*. In one section, sec.

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

404, it is evidently used to include both felony and misdemeanour. I cannot find any section in which the word "crime" can be held to apply to an offence punishable on summary conviction. There are several sections in which the words "criminal proceedings" are used evidently in regard to offences punishable on summary conviction, but the expression "criminal proceedings" is one of much wider application than the word "crime." So that we get no light on the meaning of the word "crime" from the Act itself.

Applying the principle that has been already referred to, we must now look at what the intention of the legislature was in passing the Act, which is to be gathered from the state of the law before the Act was passed. The state of the law when the Act was passed was this. At common law a constable could not apprehend without a warrant a person whom he with reasonable cause suspected of having committed a misdemeanour or an offence punishable on summary conviction. The statutory law at that time was in accordance with the common law, and therefore it is quite clear that to interpret the word "crime" in accordance with the appellant's contention would be to hold that the *Crimes Act* has made a very sweeping change in the common law, and in the statute law. That immediately places us upon inquiry to see whether the legislature could have intended to make any such change. Now, looking at the Act which is consolidated here, we find at once the key to the true interpretation of the section, and also the explanation of the ambiguity which has arisen.

To my mind there is no doubt whatever as to the proper interpretation to be placed upon sec. 429 of the *Criminal Law Amendment Act*. As was pointed out by Mr. Mocatta, in the middle of that section there is interpolated a statutory declaration of the common law power to apprehend and deal with an offender who has committed a crime punishable by death or penal servitude and for which he has not been tried, and then power is given to a constable to arrest a person whom he with reasonable cause suspects of having committed any such crime. And that portion of the section is the only portion in which the word "crime" is used. The words are: "And may in like manner apprehend and deal with any offender who has committed a crime punishable by death or penal servitude for which he has not been tried, and every con-

stable may, without warrant, apprehend and in like manner deal with any person whom he with reasonable cause suspects of having committed any such crime."

"Any such crime" can have no reference in that section except to a crime punishable by death or penal servitude, or, in other words, a felony. Now, in transferring that portion of the section into sec. 352, it is quite clear that what has happened is this: instead of using words describing felony as a "crime punishable by death or penal servitude," the draftsman of the *Crimes Act* has adopted the synonym provided in sec. 9, where there is in effect a definition of felony, as an offence punishable by death or penal servitude. If one looks at clause (b) of sub-sec. (1) of sec. 352, and, instead of the word "felony" in that sub-section, inserts the words of the original Act, "crime punishable by death or penal servitude," then there can be no doubt as to the meaning of sub-sec. (2), the felony section, because "any such crime" could there have reference only to the crime covered by that description. It appears to me, therefore, that the whole ambiguity has arisen because of the substitution of the word "felony" for the words descriptive of felony, which are used in sec. 429 of the original Act.

Now, seeing what was the law which was then sought to be consolidated by sec. 352, and seeing what the common law was at that time, it seems to me, with the two alternative interpretations before us, it is impossible for us to construe the words "any such crime" as including all three classes of offences dealt with in the first sub-section of sec. 352. To give the word "crime" such a meaning would, it appears to me, be to defeat the obvious intention of the legislature, to be gathered from the whole of this Statute, which is a consolidation of the law. The obvious intention of the Statute can, on the other hand, be completely carried out by the other interpretation, which, as I say, is also the grammatical interpretation, that is, to read "any such crime" as referring to the immediate antecedent, "felony." The immediate antecedent is contained in clause (b) of the first sub-section:— "Any person who has committed a felony, for which he has not been tried."

Reading sub-sec. (2) in the way I have indicated, power is given to any constable, without warrant, to apprehend any person

H. C. OF A. 1904.

NOLAN v. CLIFFORD.

whom he with reasonable cause suspects of having committed "any such crime," that is, a felony. That interpretation is in accordance with the previous law and in accordance with the common law, and it appears to me to be the interpretation which we are forced to adopt in reading this Statute. That being so, I agree with their Honors in the judgment already delivered, that the appeal cannot be sustained.

Appeal dismissed with costs.

Solicitors, for appellant, *Crown Solicitor for New South Wales.*
Solicitors, for respondent, *Wilkinson & Osborne.*

[HIGH COURT OF AUSTRALIA.]

CHANTER . . . . . PETITIONER;

AND

BLACKWOOD . . . . . RESPONDENT (No. 3).

H. C. OF A. 1904.

MELBOURNE, *August* 10, 11, 16.

GRIFFITH, C.J.

IN CHAMBERS.

Costs—Taxation—Expenses of party attending trial—Party not a witness—Election petition—Costs of party up to particular day—Reduction of fees on counsel's brief.

On taxation of costs, the expenses of a party who may reasonably be expected to be required as a witness, may be allowed although no subpœna to him was issued.

On an election petition a party claiming or defending the seat is *primâ facie* a probable witness.

Where the respondent had been ordered to pay a part of the petitioner's taxed costs, the fee paid to petitioner's counsel in respect of the whole petition may, on taxation, be allowed in full, if the amount is a fair and reasonable fee in respect of the matter on which the petitioner succeeds.

SUMMONS to review taxation.

By the Riverina Election Petition (reported *ante*, p. 121), the petitioner, Chanter, sought a declaration that the respondent, Blackwood, was not duly elected, and that he, the petitioner, was