Cons/Appr Mitchell v Scales (1907) 5 CLR 405
Appl Walker v State of New South Wales (1994) 69 ALJR 111
Cons Walker v State of New South Wales (1994) 76 ACrimR 173

[HIGH COURT OF AUSTRALIA.]

QUAN YICK . . . . . APPELLANT;

DEFENDANT,

AND

HINDS . . . . . RESPONDENT.

COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 21, 22, 23. *April* 10.

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

Law of New South Wales—Lotteries—Imperial Acts 4 *Geo. IV. c.* 60, *and* 5 *Geo. IV. c.* 83—*Construction of* 9 *Geo. IV. c.* 83, *sec.* 24.

The Imperial Acts, 4 Geo. IV. c. 60, which, *inter alia*, makes it an offence to sell tickets in a lottery not authorized by that or some other Act of Parliament, and 5 Geo. IV. c. 83, as far as they relate to proceedings before Justices, are not in force in New South Wales.

In considering whether an Imperial Act passed after the settlement of the Colony of New South Wales, and before 9 Geo. IV. c. 83, can be "applied in the administration of justice" in New South Wales, within the meaning of sec. 24 of the latter Act, the test is whether the provisions of the Act under consideration were suitable to the conditions of the Colony, and capable of being reasonably applied there, when the 9 Geo. IV. c. 83 was passed.

Mitchell v. *Ah King*, 21 N.S.W. L.R., 64, and dictum in *Anderson* v. *Ah Nam*, (1904) 4 S.R. (N.S.W.), 492, overruled.

Attorney-General v. *Edgley*, 9 N.S.W. L.R., 157, approved.

Decision of *Pring* J. (2nd December, 1904) reversed.

APPEAL from a decision of *Pring* J. in Chambers, upon a special case stated under the *Justices Act* (N.S.W.), No. 27 of 1902.

The following statement of the facts and proceedings is taken from the judgment of *Barton* J.

Quan Yick, the appellant, was prosecuted by police Sub-Inspector Hinds, the respondent, for selling a ticket in a Chinese

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lottery known as "pak-ah-pu." The information was laid under the Imperial Act 4 Geo. IV. c. 60, s. 41, and it appeared that the appellant did sell a ticket in a lottery not authorized by that or any other Act of Parliament, in terms of the section. The Stipendiary Magistrate dismissed the charge on the ground that the Act in question was not in force in New South Wales. On a special case stated for the opinion of the Supreme Court under the *Justices Act* 1902, *Pring* J. answered the question, whether the Act was in force, affirmatively, and directed that the case be remitted to the Magistrate accordingly.

The learned Judge based his decision on the opinion of the Full Court in *Anderson* v. *Ah Nam* (1). He did not deliver a detailed judgment because he relied on the reasons given by the Court in that case.

From that decision Quan Yick now appealed by special leave, and the question is whether the Act 4 Geo. IV. c. 60 sec. 41 is in force in New South Wales.

The titles and the material sections of the various Statutes referred to appear in the judgments.

Dr. *Cullen* K.C. and *Lamb* (with them *Watt*), for the appellant. The Act 4 Geo. IV. c. 60 was an Appropriation Act. Its main purpose was the establishment of certain public lotteries in order to raise revenue. *Primâ facie* therefore it was a local and temporary Act. It was exhausted before the passing of 9 Geo. IV. c. 83, and never came into force in New South Wales. The object of the restrictive and punitive sections of the Act was subsidiary to the main object, and therefore, when the lotteries were completed, the subsidiary object ceased to exist. Many Acts of a similar nature had been passed previously, containing provisions in restriction of competition by private lotteries. These Acts were all treated as exhausted when the particular lottery established in each case had been completed. The only new feature in 4 Geo. IV. c. 60 was sec. 19, by which the clauses relative to the suppression of illegal lotteries, and the sale of foreign lottery tickets were continued in force. Except as to the provisions which were thus made permanent, the Act had ceased to be in force at the

(1) (1904) 4 S.R. (N.S.W.), 492.

date of 9 Geo. IV. c. 83. The words "relative to the suppression of illegal lotteries and insurances therein" do not include the sale of private lottery tickets. If it had been intended that they should, that would have been clearly stated, in the same way as in reference to the sale of foreign lottery tickets. This is an Act creating specific offences, and must be strictly construed, not extended in the direction of the general purpose of the Act: *Macnee* v. *Persian Investment Corporation* (1).

If, however, that prohibition came within the words "relative to the suppression of illegal lotteries," and was made permanent by sec. 19, it was not introduced here by 9 Geo. IV. c. 83. It was not an Act which could "be applied in the administration of justice" in the Courts within the meaning of 9 Geo. IV. c. 83, sec. 24. The Statute must be such as can reasonably be applied at the time when 9 Geo. IV. c. 83 was passed: *Attorney-General* v. *Stewart* (2); *Jex* v. *McKinney* (3); *Whicker* v. *Hume* (4); *R.* v. *Vaughan* (5); *MacDonald* v. *Levy* (6). 4 Geo. IV. c. 60 could not reasonably be applied here, because the sections which provide the punishment and the method of recovering the penalties, secs. 41 and 62, are applicable to procedure in the English Courts alone. By sec. 41 one of the consequences of conviction is that the offender is to be deemed a "rogue and vagabond" and fined £50, with an exception in favour of newspaper proprietors who have registered under certain English Acts. That exception could not apply here. Again, sec. 62 provides amongst other things that the penalties are to be recovered by His Majesty's Attorney-General in the Court of Exchequer at Westminster, if the offence was committed in England, and that any proceeding initiated in any other person's name shall be null and void. The machinery of the Act is therefore inapplicable to this Colony, and the whole Act must be treated as inapplicable: *R.* v. *Schofield* (7).

The English *Vagrancy Act*, 5 Geo. IV. c. 83 repealed the punishment and procedure sections of 4 Geo. IV. c. 60 so far as they applied to "rogues and vagabonds," and provided (sec. 21) that in future such persons should be punished under the later

(1) 44 Ch. D., 306, at p. 312.
(2) 2 Mer., 143.
(3) 14 App. Cas., 77.
(4) 7 H.L.C., 124; 1 D.M. & G., 506, at p. 512.
(5) 2 Mer., (*n.*), at p. 156.
(6) 1 Legge, 39.
(7) 1 Legge, 97.

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Act. In 1829, therefore, the punishment sections of 4 Geo. IV. c. 60 were not in force in England, and could not be introduced here. The punishment provisions of 5 Geo. IV. c. 83 were inapplicable to the conditions existing in this Colony in 1829. Part of them deal with the consequences to the offender, with reference to the English poor law, and could never have been applied here. Another objection is that in England there was by 5 Geo. IV. c. 60 an appeal to Quarter Sessions from a conviction under the Act, whereas in this Colony there were no Courts of Quarter Sessions until some time had elapsed after the passing of 9 Geo. IV. c. 83. There was thus an interval during which a person convicted here would have been in a worse position than one convicted in England.

But even if, in the absence of an authoritative pronouncement, the Act might possibly be deemed applicable here, doubt has been set at rest by Ordinance 6 Wm. IV. No. 6, repealed by the *Vagrancy Act* 15 Vict. No. 4, which dealt with the whole subject afresh. That was amended by 24 Vict. No. 25, and the various Acts were consolidated in Act No. 13 of 1901, and later consolidated finally in Act No. 74 of 1902. The Ordinance 6 Wm. IV. No. 6 was an exercise of the power conferred by sec. 24 of 9 Geo. IV. c. 83 upon the Governor of the Colony to make such limitations and modifications of English Statutes as may be deemed expedient. It was not a mere procedure Act; it dealt with the whole subject of vagrancy, and must therefore be regarded as an implied repeal of any English Statutes dealing with the same subject, superseding them so far as they applied here. From that date the only persons liable to be dealt with as rogues and vagabonds in New South Wales were those stated in that Act. The punishment clauses of 5 Geo. IV. c. 83 were therefore wholly gone: *R.* v. *Maloney* (1). Sec. 21 is the only portion of that Act which is not dealt with by the New South Wales *Vagrancy Act*, but, when an enactment practically superseding the English Act is passed, in words almost identical, and dealing with the whole subject, the colonial enactment should be regarded as in substitution for the English. [They referred to *R.* v. *Hilaire* (2).] The omission of one section is not sufficient reason for holding that

(1) 1 Legge, 74.

(2) (1903) 3 S.R. (N.S.W.), 228.

section to be still in force, unless it is clearly applicable. Moreover, when the sections which deal with the main purpose of the Act have gone, the subsidiary provisions, like sec. 21, should go with them. *Mitchell* v. *Ah King* (1), which is to the contrary, was wrongly decided. The result of leaving sec. 21 standing would be that, all the punishment provisions having gone, a man having been found guilty of being a rogue and vagabond, must be allowed to go free, for there is no existing provision in our law inflicting a further punishment. Buying and selling the tickets has been held to be no offence: *per Martin* C.J. in *R.* v. *Ah Tow* (2.)

At the most there is only a small part of section 41 of 4 Geo. IV. c. 60 which could possibly be applied here. A small part should not be picked out from an Imperial Act and applied, simply because there is nothing to contradict it in local Statutes, if the Act from which it is taken is inapplicable as a whole, or exhausted. [They referred to *R.* v. *Colan* (3).] It is scarcely possible to find an Act from which some small provision could not be extracted which, standing alone, could be applied in the Colony. Where an Act deals with one subject only, the question is whether the Act as a whole is applicable.

English legislation of this class comes under the head of "police" laws, as to which the presumption is that they are intended to fit local conditions and to have only local application: I *Blac. Comm.*, p. 107, and IV., p. 161 C.B. In the absence of adoption by express legislation or declaration as provided by 9 Geo. IV. c. 83, sec. 24, such English Statutes should be presumed to be inapplicable to the Colony.

Blacket, for the respondent. There is nothing peculiar in the circumstances of this country which would render the English law on the subject of lotteries inapplicable here. When the applicability of an English Statute is under consideration, the time to be looked at is the time when the question arises. Many Acts could not be applied at first, but as time goes on those Acts which were not expressly excluded should be held to be in force.

(1) 21 N.S.W. L.R., 64. (2) 7 N.S.W. L.R., 347, at p. 351.
(3) 1 S.C.R. (N.S.W.) N.S., 1.

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When necessity arises, if there is in existence an English Act ready and capable of being reasonably applied, it should be applied. [He referred to *Delohery* v. *Permanent Trustee Company of New South Wales* (1).] The *Nullum Tempus Act* contains a provision which could not benefit the Crown here, though it would in England, yet it is in force here: *Attorney-General of N.S.W.* v. *Love* (2). The mention of the words England and Scotland in the Act does not make it inapplicable. Presumably every English Act is in the first instance intended only to apply to England, but the original intention is immaterial: *R.* v. *Colan* (3). Minor provisions may cause difficulties, but the question is not whether an individual may be injured by its application, but whether the community as a whole would profit, as from the *Sunday Observance Acts*: *Walker* v. *Solomon* (4); *M'Hugh* v. *Robertson* (5). The English Lottery Act, 10 Wm. III. c. 23, was held to be in force here: *R.* v. *Ah Tow* (6); the 42 Geo. III. c. 119, in *Attorney-General* v. *Edgley* (7). [He referred also to *Forsyth, Cases and Opinions on Constitutional Law* (1869), pp. 18, 19; *Blankard* v. *Galdy* (8).]

There is nothing in the machinery or punishment sections of the two Acts rendering them incapable of being applied. Under sec. 41 there are two independent ways of proceeding, one by prosecution, the other by a civil proceeding to recover the penalty. The former could, consistently with the section, be initiated by a common informer; it is only the latter which is reserved to the Attorney-General. 4 Geo. IV. c. 60 has been held to be in force in England now as regards the sale of lottery tickets: *Hall* v. *McWilliam* (9). It must therefore have been in force there when 9 Geo. IV. c. 83 was passed, and should be applied here, certainly so far as the summary proceedings are concerned. The fact that the one proceeding is inapplicable to this Colony does not make it unreasonable to hold that the other could be applied.

But the proceedings by the Attorney-General can be equally well taken here. By the *Charter of Justice* and 9 Geo IV. c. 83

(1) 1 C.L.R., 283.
(2) (1898) A. C., 679.
(3) 1 S.C.R. (N.S.W.) N.S., 1.
(4) 11 N.S.W.L.R., 88.
(5) 11 V.L.R., 410.
(6) 7 N.S.W. L.R., 347.
(7) 9 N.S.W. L.R., 157.
(8) 2 Salk., 411.
(9) 20 Cox C.C., 33.

the powers of the Supreme Court here are equal to those of the High Court of Judicature in England, and any proceedings which may be taken in the Court of Exchequer in England may be taken in it. There is also to be an Attorney-General here representing His Majesty in the same way as the Attorney-General in England; *Charter of Justice*, sec. 16. The powers and attributes of the Attorney-General are dependent upon common law, and attach to whosoever fills the position wherever he may be.

Even if sec. 21 of 5 Geo. IV. c. 83 were not in force here, and no punishment could be inflicted, there would be no reason why the consequence of being deemed a rogue and vagabond should not follow conviction under sec. 41 of the 4 Geo. IV. c. 60. [He referred to *Taylor* v. *Smetten* (1).]

[O'CONNOR J.—Have you not to show that there is a power in the magistrate to inflict a pecuniary penalty in addition to stigmatising the offender as a rogue and vagabond ?]

That can be done under 5 Geo. IV. c. 83. It is in force in England still: *Youdan* v. *Crookes* (2). It is applicable here and has never been repealed or declared not to be in force under 9 Geo. IV. c. 83, sec. 24. In 1829 there were two classes of rogues and vagabonds under English law, those under 4 Geo. IV. c. 60, and those under the 5 Geo. IV. c. 83. Our *Vagrancy Act* either included all these in its provisions and rendered them all punishable under it, or excluded those who were rogues and vagabonds under 4 Geo. IV. c. 60, and left them to be punished under 5 Geo. IV. c. 83. There was no necessity for the New South Wales Act to provide for this particular class, when there was an English Act in force dealing with them. There can be no inference that the local Act was intended to be a code. It was required to deal with certain classes of offenders altogether new to the law, and peculiar to local conditions, and cannot be said to have repealed the English law as to one particular class, merely because it is silent on that subject.

The parts of 4 Geo. IV. c. 60 that were made permanent by sec. 19 must include the restriction upon the sale of private lottery tickets. Prevention of the sale of tickets is clearly "relative to

(1) 11 Q.B.D., 207.

(2) 22 J.P., 287.

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the suppression" of such lotteries. The general term was used, and the sale not specificially mentioned, in order to cover all possible methods of suppression, whereas in regard to foreign lotteries, the only possible way of checking them was by preventing the sale of the tickets. In any case sec. 41 is in its nature permanent, and is not made less so by sec. 19.

[O'CONNOR J. referred to *Mitchell* v. *Ah King* (1) as having dealt with this particular point.]

The fact that there was an interval between 9 Geo. IV. c. 83, and the establishment of Courts of Quarter Sessions in New South Wales does not present an insuperable objection. Part of the machinery of an English Statute may not exist in the Colony and still the Statute may be applicable: *Attorney-General* v. *Edgley* (2). No legislation in England can exactly fit colonial conditions. If, however, an English Act is not to be applied in a Colony unless all the machinery exists there, it is sufficient if it exists at the time when the question of applicability arises. Courts of Quarter Sessions were established here in 1829, and by 10 Geo. IV. No. 7 were given cognizance of all matters cognizable by similar Courts in England, and now there is an appeal from all summary convictions by sec. 122 of the *Justices Act* (No. 27 of 1902). [He referred also to *Stone, Justices' Manual* (1904), p. 633; and *Dunne* v. *O'Reilly* (3)].

Dr. *Cullen* K.C. in reply. It does not appear that this point was taken or considered in *Hall* v. *McWilliam* (4).

The date at which the applicability is to be tested in that of 9 Geo. IV. c. 83: *Ex parte Lyons* (5); *M'Hugh* v. *Robertson* (6). In Plunkett's collection of Statutes in force in 1840 this Statute was not mentioned. [He referred also to *R.* v. *Tuddenham* (7); *Tuck & Sons* v. *Priester* (8); *Graves & Co. Ltd.* v. *Gorrie* (9); *Hildesheimer* v. *W. & F. Faulkner Ltd.* (10); *Dawes* v. *Painter* (11).]

[GRIFFITH C.J. referred to *Swinton* v. *Bailey* (12).]

(1) 16 N.S.W. W.N., 165.
(2) 9 N.S.W.L.R., 157.
(3) Upper Canada C.P.R., 404.
(4) 20 Cox C.C., 33.
(5) 1 Legge, 140.
(6) 11 V.L.R., 410.
(7) 9 Dowl., 937.
(8) 19 Q.B.D., 629.
(9) (1903) A.C., 496.
(10) (1901) 2 Ch., 552.
(11) Freem. K.B., 175.
(12) 4 App. Cas., 70.

[O'CONNOR J. referred to *Brand v. Hammersmith &c. Railway Co.* (1).]

Cur. adv. vult.

The following judgments were read:—

10th April.

GRIFFITH C.J. The question formally raised in this case is whether the Imperial Act 4 Geo. IV. c. 60 is in force in New South Wales. Having regard, however, to the fact that the question arises in a prosecution of the appellant before Justices for selling a ticket in a lottery not authorized by any Act of Parliament, which is made an offence by section 41 of that Act, two points are really involved: (1) Whether the provisions of the section creating the offence are in force, and, if so, (2) whether the provisions of the English laws which authorize a summary prosecution of offenders against it before Justices are in operation in New South Wales.

The Act was passed after the settlement of the Colony, and did not, when passed, extend to New South Wales. If, therefore, it is now in operation, it must be by virtue of the Act commonly called the "New South Wales Act," 9 Geo. IV. c. 83. Section 24 of that Act, which has been the subject of frequent discussion, provides that all laws and Statutes in force within the realm of England at the time of the passing of the Act "shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively so far as the same can be applied within the said Colonies, and as often as any doubt shall arise as to the application of any such laws or Statutes in the said Colonies respectively it shall be lawful for the Governors of the said Colonies respectively by and with the advice of the Legislative Councils of the said Colonies respectively by ordinances to be by them for that purpose made to declare whether such laws or Statutes shall be deemed to extend to such Colonies and to be in force within the same or to make and establish such limitations and modifications of any such laws and Statutes within the said Colonies respectively as may be deemed expedient in that behalf Provided always that in the meantime and before any such ordinances shall be actually made it shall be the duty of the said Supreme Courts as often as

(1) L.R. 4 H.L., 171.

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any such doubts shall arise upon the trial of any information or action or upon any other proceeding before them to adjudge and decide as to the application of any such laws or Statutes in the said Colonies respectively."

Two different forms of words are used in this section: (1) "The laws and Statutes shall be applied . . . . so far as the same can be applied within the said Colonies," and (2) When a doubt arises "as to the application of any such laws and Statutes" the local legislature may by ordinance declare whether such laws and Statutes "shall be deemed to extend to such Colonies and be in force within the same;" and in the meantime the Supreme Court was to decide "as to the application" of any such laws and Statutes. It is, I think, clear that the two forms of expression must be read together as different ways of expressing the same idea, and that the real question in every case is whether the law or Statute in question extends to and is in force in the Colony. This interpretation, so far as I know, has always been put upon the section. No doubt, almost every Statute law in force in England in 1828 could in one sense be applied in New South Wales. That is to say, if the Act of 9 Geo. IV. is read as declaring that every such Statute is to be deemed to be part of the Statute law of New South Wales, some at least of its provisions would be found to be not unintelligible, and in that sense to be capable of application. But these are not the words of the Act. The question being, then, whether any particular Statute "extends to and is in force in New South Wales," on what principle is the question to be solved? In *Whicker* v. *Hume* (1), a case arising under this section, *Knight-Bruce* L.J. said (2) that the words "can be applied," should be read "can reasonably be applied," and this exposition was adopted by the Judicial Committee in *Jex* v. *McKinney* (3). In that case, which was an appeal from the Colony of British Honduras, the question was whether the Statute of 9 Geo. II. c. 31, commonly called the *Mortmain Act*, had been made part of the law of the Colony by virtue of a local Statute which declared that "all laws of universal application relating to" certain specified subjects, which included that under considera-

(1) 7 H.L.C., 124; 1 D.M. & G., 506. (2) 1 D.M. & G., 506, at p. 512.
(3) 14 App. Cas., 77.

tion, "in so far as they are applicable or can be applied to this settlement . . . . shall be and the same are hereby declared to be laws of this settlement." (The section contained the further words "but this is not extended to any law of any local or limited operation," as to which the Judicial Committee expressed no opinion).

It will be observed that the words of this colonial law differed from those of 9 Geo. IV. c. 83 sec. 24 in that they formally declared that the laws in question should be "laws of the settlement" so far as they were applicable or could be applied. The words of the Act of 9 Geo. IV. cannot, at any rate, have a wider operation. Their Lordships were of opinion that the Act of 9 Geo. II. was a law of general application, but that it was not of such a nature as to fall within the description of "laws which are applicable or can be applied to British Honduras." After quoting the words of *Knight-Bruce* L.J., already referred to, the opinion proceeded (1): "If the colonial enactments are to be construed in this way, we are brought back to the question whether the Statute of Geo. II. is suitable to a young English Colony in a new country. The principle on which such questions should turn has been laid down by *Blackstone* in his Commentaries, vol. I., p. 108"; and, after referring to *Attorney-General* v. *Stewart* (2); and *Whicker* v. *Hume* (3), added: "Their Lordships think the reasoning on which those decisions are founded is sound reasoning." In *Cooper* v. *Stuart* (4), an appeal from New South Wales decided in the same year (1889), the passage from *Blackstone* referred to in *Jex* v. *McKinney* is quoted at length with approval by Lord *Watson* (who was a member of the Board in *Jex* v. *McKinney*) in delivering the opinion of the Judicial Committee. It is as follows (5): "It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. LII., 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the

(1) 14 App. Cas., 77, at p. 81.
(2) 2 Mer., p. 143.
(3) 7 H.L.C., 124; 1 D.M. & G., 506
(4) 14 App. Cas., 286.
(5) 14 App. Cas., 286, at p. 291.

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English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what time and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country."

Referring to *Jex* v. *McKinney*, Lord *Watson* said (1): "That case differed from the present in this respect, that there the law of England was introduced into the Colony by Statute, and not by the silent operation of constitutional principles; but its introduction was qualified by words which excluded the application of laws prevailing here which were unsuitable in their nature to the needs of the Colony."

The matter for our determination, then, is whether the Act 4 Geo. IV. c. 60, or that part of it which is now in question, was suitable or unsuitable in its nature to the needs of the Colony. And this question must, in my opinion, be determined by a consideration of the condition of the Colony in 1828, when the Act 9 Geo. IV. was passed. If the provisions of the Statute were intrinsically incapable of application owing to the condition of the laws and institutions of the Colony, its applicability would be negatived on another and quite independent ground.

It is necessary to consider in some detail the Act 4 Geo. IV. c. 60. That Act is in form an Appropriation Act, being the last of a number of similar Acts authorizing State lotteries. Private lotteries had been made unlawful by a series of Acts beginning with 10 Wm. III. c. 23, and persons conducting them were guilty of a misdemeanour. The provisions of the earlier State Lottery Acts

(1) 14 App. Cas., 286, at p. 293.

were of a temporary nature and expired by effluxion of time. In one of the series, 1 & 2 Geo. IV. c. 120, appeared for the first time an enactment which, with some modifications to which I will direct attention, appears in sec. 41, the section under our consideration. It provided (1 & 2 Geo. IV. c. 120 sec. 38) that any person who should sell any ticket in any lottery except such as should be authorized by that or some other Act of Parliament, or should do certain other acts relating to such lotteries, should be liable to certain specified penal consequences. In another later Act (3 Geo. IV. c. 101), this provision was re-enacted (sec. 39) in the same form in which it appears in sec. 41. Neither of these Acts contained any provision making any part of them perpetual, and it is at least open to contention that it was taken for granted that the provisions as to the sale of tickets in unauthorized lotteries were regarded as merely ancillary to the main purpose of the Acts, and as expiring with them. The Act 4 Geo. IV. c. 60, however, contains for the first time in sec. 19 an enactment of a permanent nature. After reciting that it might be expedient to discontinue raising money for the Public Service by way of Lottery after the sale of the tickets authorized by that Act, and that in that case it would be necessary to continue in force such parts of the Act "as will be necessary to repress unlawful insurance in Little-goes and Private Lotteries and prevent the sale and publishing proposals for the sale of Foreign Lottery tickets within the United Kingdom" and for some other purposes, it was enacted "that from and after the drawing of the lottery authorized by this Act and the matters relating thereto the clauses herein contained relative to the suppression of illegal lotteries and insurances therein and to the preventing the sale and publishing proposals for the sale of foreign lottery tickets shall remain in full force and virtue notwithstanding other powers given by this Act may have ceased and determined." Sec. 41 enacts that "if any person shall sell any ticket . . . . in any lottery . . . . authorized by any foreign Potentate or State or in any lottery or lotteries except such as shall be authorized by this or some other Act of Parliament to be sold" or publish proposals for the sale of tickets "except in such lotteries as shall be authorized as aforesaid, such person shall for every such offence forfeit and pay the sum of £50, and shall

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also be deemed a rogue and vagabond and shall be punished as such in the manner herein directed." The penalty of £50 was, by sec. 62, to be recoverable by proceedings in the Courts of Exchequer in England, Ireland, and Scotland at the suit of the Attorney-General or Advocate General, and not otherwise. The Act contained two other enactments of a permanent nature (secs. 60, 61) to which it is not necessary to refer more particularly. The provisions of the Act for punishing rogues and vagabonds were contained in sec. 67, which provided that if any person should be convicted of an offence against the Act and adjudged a rogue and vagabond the Justices should order him to be sent to the House of Correction for a term not exceeding six months and not less than one month, and on a second conviction might further order him to be privately whipped. No appeal was given from the conviction. Sec. 41 contained a proviso that the punishment of being deemed a rogue and vagabond and punished as such should not extend to proprietors printers and publishers of newspapers charged with publishing proposals for the sale of tickets in foreign or unauthorized lotteries if they proved that they had complied with the provisions of the English Acts relating to registration of newspapers. It was contended for the appellant that these State Lottery Acts, including the Act now in question, must be taken to have expired as soon as they had served their purpose, except so far as they were expressly made perpetual, and that the provision in sec. 41 as to selling lottery tickets is not included in sec. 19. The "clauses" which by sec. 19 are to remain in force are those "relative to the suppression of illegal lotteries and insurance therein and the sale of foreign lottery tickets." Sec. 41 does not use the expression "illegal lotteries" but speaks of "the sale of tickets in any lottery or lotteries except such as are or shall be authorized by this or some other Act of Parliament to be sold." There can, I think, be no doubt that lotteries falling within this description are those intended by the words "illegal lotteries" in sec. 19, and that the prohibitions of the sale of tickets in such lotteries and of the publishing of proposals with respect to them were clauses relative to the suppression of illegal lotteries within the meaning of that section. Comparatively recently, indeed, a prosecution under sec. 41 for

publishing a proposal for the sale of tickets in an unauthorized lottery has been sustained: *Hall* v. *McWilliam* (1). I cannot distinguish between a prohibition of the sale of tickets and a prohibition of proposals for their sale as being equally provisions relative to the suppression of lotteries. The suggestion that the express reference, in the preamble to sec. 19, to the sale of foreign lottery tickets excludes the inference that this prohibition is a clause relating to "suppression" was well answered by pointing out that the term "suppression" was not applicable to a foreign lottery, which could not be dealt with by the English law, except by provisions for preventing the sale of tickets, while any steps taken to prevent the successful carrying out of an English lottery might properly be included under that term. In my opinion, therefore, the enactment in question was permanent.

Were then the provisions of sec. 41 suitable to the conditions of New South Wales in 1828? It has never been doubted that the general provisions of the criminal law were introduced by the Act 9 Geo. IV. c. 83. And it has been expressly held in New South Wales that the English *Lottery Act*, 42 Geo. III. c. 119, by which the keeping of a lottery was made a misdemeanour, was so introduced: *Attorney-General* v. *Edgley* (2). If there was no more in the case, it might be held that the provisions of sec. 41, regarded as ancillary, though minor, provisions, were equally introduced. It was, however, contended that this inference is excluded by the provision in sec. 41 as to the penalty of £50 to be recovered at the suit of the Attorney-General in the Court of Exchequer only, and by the provisions as to the punishment of rogues and vagabonds, both of which, it is said, were inapplicable to New South Wales in 1828. As to the first objection the case of *Attorney-General* v. *Edgley* (2) is in point. That was a suit by the Attorney-General of New South Wales to recover a penalty of £500 imposed by the Act 42 Geo. III. c. 119, sec. 2, upon the keepers of lotteries. That section contained also a provision, analogous to that of sec. 41 now in question, that a keeper of a lottery should be deemed a rogue and vagabond. The objection that

(1) 20 Cox C.C., 33.

(2) 9 N.S.W. L.R., 157.

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the suit could only be brought in the Court of Exchequer was not, indeed, taken, but I see no reason to doubt the correctness of the decision.

The second objection raises difficulties of a different character. It is pointed out that the provisions exempting printers and publishers of newspapers from liability to be punished as rogues and vagabonds on compliance with an English law could not have effect in New South Wales, and that consequently printers and publishers in the Colony would either be exempt altogether or liable unconditionally. Such a law, it is said, could not be deemed to extend to New South Wales. It appears to me that there is much force in this argument. It is not, however, necessary to decide the point, inasmuch as the provisions of the Act 4 Geo. IV. c. 60 as to the punishment of rogues and vagabonds were repealed by the Act 5 Geo. IV. c. 83, other provisions being substituted by sec. 21 of that Act. The Statutes relating to the subject now under consideration which were in force at the passing of the Act of 9 Geo. IV. were, therefore, 4 Geo. IV. c. 60, sec. 41, except so far as it deals with the mode of punishment of rogues and vagabonds, and the Act 5 Geo. IV. c. 83, sec. 21. And the actual question for decision is whether this latter Act, or, if not all of it, sec. 21, extended to New South Wales. For, if it did, the two Acts together contain a definition of an offence, and provisions for its punishment.

The Act 5 Geo. IV. c. 83, after reciting that it was expedient to make further provision for the suppression of vagrancy and for the punishment of idle and disorderly persons, rogues and vagabonds in England, repealed all provisions theretofore made relative to idle and disorderly persons, rogues and vagabonds, incorrigible rogues, or other vagrants in England, save as hereinafter excepted. Sec. 3 enumerates six classes of persons who are to be deemed idle and disorderly persons: (1) Persons who are able wholly or partly to support themselves or their families, and who refuse to do so, by reason whereof they or their families become chargeable to a parish under the Poor Laws; (2) persons improperly returning to and becoming chargeable under the Poor Laws in a parish from which they have been legally removed; (3) unlicensed and unauthorized pedlars; (4) common prostitutes

wandering in public and behaving riotously or indecently; (5) beggars in public; (6) beggars with unauthorized certificates. Sec. 4 enumerates thirteen classes of persons who are to be deemed rogues and vagabonds and are to be liable to imprisonment for a term not exceeding three months in the House of Correction: (1) Idle and disorderly persons previously convicted of being such; (2) fortune tellers; (3) persons wandering abroad and lodging in a barn or outhouse or deserted or unoccupied building or in the open air or under a tent or in a cart or wagon, not having any visible means of subsistence, and not giving a good account of themselves; (4) persons publicly exposing indecent prints, &c.; (5) persons indecently exposing themselves in public with intent to insult a female; (6) persons wandering abroad endeavouring to obtain alms by the exhibition of wounds or deformities; (7) collectors of alms under false pretences; (8) persons deserting their wives or children who might be chargeable to a parish; (9) persons gaming or betting in public places; (10) persons having in their possession housebreaking implements with intent to commit a felonious act; (11) persons found in buildings or enclosed premises for an unlawful purpose; (12) suspected persons or reputed thieves frequenting public places with intent to commit felony; (13) persons apprehended as idle and disorderly persons violently resisting apprehension and subsequently convicted. Sec. 5 provides that persons (1) in custody after conviction under the Act, or (2) committing an offence under sec. 4 after a previous conviction under that section, or (3) violently resisting apprehension as rogues and vagabonds and subsequently convicted shall be deemed incorrigible rogues, and shall be liable to be committed to the House of Correction till the next Quarter Sessions, at which the Justices may sentence them to imprisonment with hard labour for twelve months with whipping. Sec. 6 provides for the apprehension by any person whatever of offenders against the Act, and requires constables and peace officers to apprehend them under penal consequences to themselves. Sec. 7 authorizes the issue of warrants for the apprehension of offenders, and sec. 8 the seizure by any person apprehending another for an offence against the Act of his vehicles or goods and for their search in the presence of a justice.

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Sec. 9 provides for the due prosecution at Quarter Sessions of persons committed as incorrigible rogues. Sec. 13 authorizes the search of lodging houses for suspected offenders. Sec. 14 gives an appeal to Quarter Sessions to any person convicted under the Act, and authorizes his discharge from custody on giving security to prosecute the appeal. Sec. 20 declares that every person convicted under the Act as an idle and disorderly person, or as a rogue and vagabond, shall be deemed to be chargeable under the Poor Laws to the parish in which he resides. Sec. 21 provides that "whenever by any Act or Acts of Parliament now in force it is directed that any person shall be punished as an idle and disorderly person or as a rogue and vagabond or as an incorrigible rogue for any offence specified in such Act or Acts and not hereinbefore provided for by this Act . . . every such person shall be punished under the provisions powers and directions of this Act."

It is obvious that many of the provisions of this Act were quite inapplicable to New South Wales in the year 1828. Of such provisions those as to persons improperly causing burdens to be thrown upon parishes afford a good example. It is contended, however, that even if the provisions which create offences are inapplicable, sec. 21 should be read as incorporated with the Act 4 Geo. IV. c. 60, sec. 41, and that these two enactments together were applicable and not unsuitable to the circumstances of the Colony. Sec. 21, however, does not stand alone. If it applied, it brought with it all the provisions as to punishment, including the right of a convicted offender to appeal to Quarter Sessions, and the declaration that he should be chargeable to the parish in which he resides. Now, in 1828 there were no Courts of Quarter Sessions in New South Wales, although the establishment of such Courts was authorized by the same Act 9 Geo. IV. c. 83.

The appellant contends that the Act of 5 Geo. IV. did not extend to New South Wales, and further that, if any doubt could have arisen on that point, it was set at rest by the Act or Ordinance 6 Wm. IV. No. 6. The preamble of that Act, which is entitled "An Act for the prevention of vagrancy and for the punishment of idle and disorderly persons rogues and vagabonds and incorrigible rogues in the colony of New South Wales,"

recites that "it is expedient to make provision for the prevention of vagrancy and for the punishment of idle and disorderly persons and rogues and vagabonds in this Colony"—not that it is expedient to make "better" provision for that purpose. This language suggests that the legislature thought that there was no existing law on the subject—a point, however, on which they may have been mistaken. The Act then proceeds to deal with the matter on the lines of the Act 5 Geo. IV. c 83, but with very important differences. It begins with provisions requiring transported convicts to report themselves periodically at Petty Sessions. Sec. 2, corresponding to sec. 3 of the English Act, defines idle and disorderly persons, amongst whom are included transported convicts failing to report themselves or failing to appear before a Justice when summoned to give an account of their means of support, persons lodging or wandering with the black natives of the Colony, and failing to give a good account of their conduct to the satisfaction of the Justices, persons thrice convicted of drunkenness within twelve months and behaving riotously or indecently in public, while it omits the provisions as to persons whose conduct casts a charge upon the parish and modifies some other definitions. Secs. 3 and 4 follow the lines of secs. 4 and 5 of the English Act with other differences. Sec. 12 gives an appeal to Courts of Quarter Sessions, which had then been established in the Colony under an Act passed in 1829 (10 Geo. IV. No. 7). The Act 6 Wm. IV. does not contain any formal provisions analogous to sec. 21 of the English Act, which, indeed, were unnecessary if the legislature thought that the English laws as to rogues and vagabonds did not extend to the Colony. I think that the laws as to rogues and vagabonds and idle and disorderly persons, which are laws intimately connected with the social conditions of a country, are laws of police within the meaning of the passage cited from *Blackstone*, and are *primâ facie* inapplicable to a new country. If, therefore, it were necessary to decide the point, I should have no difficulty in holding that the general provisions of the Act 5 Geo. IV. c. 83 did not extend to New South Wales. But, treating that point as doubtful, I am disposed to accept the argument that the Act of 6 Wm. IV. ought to be read either as a legislative declaration that those provisions were not in force, or as a codification of the law

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on the subject in exercise of the power conferred by sec. 24 of the Act 9 Geo. IV. c. 83 to declare whether that Statute was "to be deemed to extend to New South Wales," "or to make and establish such limitations and modifications of its provisions as might be deemed expedient," and as a consequent repeal by implication of the English Act. In either view, the general provisions of the Act are not now in force in this State.

The only remaining question for consideration is whether sec. 21 of the Act 5 Geo. IV. ought to be held to be in force. For, if not, the provisions of sec. 41 of the Act of 4 Geo. IV. relating to rogues and vagabonds are merely declaratory, and entail no penal consequences. The case of *Attorney-General of New South Wales* v. *Love* (1) referred to by the Supreme Court in *Anderson* v. *Ah Nam* (2), which affirmed the view on which *Pring* J. founded the judgment now under appeal, establishes that if the general provisions of a Statute were not unsuitable to the conditions of the Colony the mere fact that some minor or severable provisions could not come into operation owing to local circumstances is not a sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute, which if it stood alone might be applicable, and to say that it is therefore applicable, I should have great difficulty in coming to this conclusion.

But, apart from this difficulty, I am confronted by the further one that a person convicted under the Act of 5 Geo. IV. was entitled in England to appeal to Quarter Sessions, and to release from custody pending the appeal on giving the prescribed security. In 1828 no such privilege was available to a person in New South Wales. It is true that Quarter Sessions were established in the Colony in 1830 under the Act 10 Geo. IV. No. 7, but the provisions of sec. 21, if they came into force at all, came into force at the passing of the Act 9 Geo. IV. c. 83, in 1828. The Act 10 Geo. IV. No. 7 directed that Courts of Quarter Sessions should be held at about thirty specified places in New South Wales, and (sec. 2) that such Courts should have power and authority to take cognizance of all matters and things cognizable in Courts of

(1) (1898) A.C., 679. (2) (1904) 4 S.R. (N.S.W.), 492.

Quarter Sessions in England so far as the circumstances and conditions of the Colony should require and admit. In the interval before the passing of this Act, which was in fact short but might have been of indefinite duration, offenders convicted under secs. 21 and 4 of the Act of 5 Geo. IV. would have been deprived of any right of appeal. This is, in my judgment, of itself sufficient to show that the provisions of sec. 21 applying the penal provisions of the Act to offences created under other Statutes were not suitable to the circumstances of the Colony. This opinion in no way conflicts with the case of *Attorney-General* v. *Edgley* (1), in which the question whether the provisions of 42 Geo. III. c. 119 sec. 2 as to punishing keepers of lotteries as rogues and vagabonds was not raised. Neither this point, which, in my judgment, is fatal to the respondent's contention, nor the local Act of 6 Wm. IV. was brought to the notice of the Court in *Mitchell* v. *Ah King* (2). If they had been, I cannot help thinking that the Court would have come to a different conclusion in that case. I think, therefore, that the appeal should be allowed.

BARTON J. This case is one of large importance, and it will be no waste of time to deal at some length with the considerations involved in the matter at issue. [His Honor then stated the facts as already set out and continued.] As will be seen, the Act 4 Geo. IV. c. 60 is not the only one to be considered in solving the question. By the 24th section of 9 Geo. IV. c. 83, often called the New South Wales Act, the laws and Statutes in force in England at the passing of the Act (25th July, 1828) are to be "applied in the administration of justice in the Courts of New South Wales and Van Diemen's land respectively so far as the same can be applied," and in each Colony, "as often as any doubt shall arise as to the application of any such laws or Statutes . . . it shall be lawful for the Governor . . . by and with the advice of the Legislative Council . . . by ordinances to be by them for that purpose made to declare whether such laws or Statutes shall be deemed to extend to . . . and to be in force within the same or to make and establish such limitations and modifications of any such laws and Statutes . . . as may be deemed expedient

(1) 9 N.S.W. L.R., 157. (2) 21 N.S.W. L.R., 64.

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in that behalf: Provided always that in the meantime and before any such ordinances shall be actually made it shall be the duty of the said Supreme Court as often as any such doubts shall arise upon the trial of any information or action or upon any other proceeding before them to adjudge and decide as to the application of any such laws or Statutes . . . " In the first place, I take it, that the expressions "can be applied," "extends to," and "is in force" are of the same value in this connection, for I cannot discover any difference in their effect by reference to any authority or on any ground of reason. They are used interchangeably by Judges, and whether we hold that an English Statute "can be applied" in a Colony, or that it "extends" thereto, or that it "is in force" therein, the result is precisely the same. Also, I think it is idle to say of a Statute that it "can be applied" unless it is immediately enforceable on the happening of facts within its meaning. In the next place the application, extension or enforcement must be reasonable, or as it is put in *Forsyth's Cases and Opinions*, at p. 20, "all Acts which by reasonable construction must be supposed to apply to the Colonies, whether passed before or after the acquisition" [that is, passed until a Legislative Assembly is constituted within them] "will be considered obligatory upon them." In *Jex* v. *McKinney* (1), it was held that the Statute of Mortmain did not extend to British Honduras, and that its provisions did not satisfy the condition prescribed by the local Acts and Ordinances, of applicability to the Colony, although the Statute is included in the description of laws introduced thereby. In giving the judgment of the Judicial Committee of the Privy Council, which included with him Lords *Watson* and *Fitzgerald* and Sir Wm. *Grove*, Lord *Hobhouse* discussed the meaning of the words "in so far as they are applicable or can be applied," used in the Act of the local Assembly under which it was contended that the Statute of Mortmain prevailed in the Colony. He said (2): "Their Lordships read the words 'can be' as meaning 'can reasonably be,' agreeing herein with Lord Justice *Knight-Bruce*, who in *Whicker* v. *Hume* (3) placed that construction upon similar words in the New South Wales Act." He added: (4) "In

(1) 14 App. Cas., 77.
(2) 14 App. Cas., 77, at p. 81.
(3) 7 H.L.C., 124; 1 D.M. & G., 506.
(4) 14 App. Cas., 77, at p. 82.

Attorney-General v. *Stewart* (1), with reference to Granada, *Sir William Grant*, in *Whicker* v. *Hume* (2), with reference to New South Wales, Lord *Romilly* at the Rolls, Lord Justices *Knight-Bruce* and *Cranworth* in the Court of Appeal, Lord *Chelmsford*, Lord *Cranworth*, and Lord *Wensleydale* in the House of Lords; all decided that the Statute was framed for reasons affecting the laws and society of England, and not for reasons applying to a new Colony." In other words, they all held that the Act did not extend to the Colony unless it could "reasonably be applied," and this the conditions of the Colony forbade, because it was founded on reasons which were peculiar to England in their application, and which had no reference to the conditions of an infant settlement. In the third place, unless a statutory provision extended to New South Wales immediately on the passing of the New South Wales Act, as I shall now call the 9 Geo. IV. c. 83, I am of opinion that it never came into force here at all. In 1839, in the case of *Ex parte Lyons, In re Wilson* (3), the Supreme Court held unanimously that the Bankrupt Law, 6 Geo. IV. c. 16, is not in force under the operation of the New South Wales Act, sec. 24. It was argued at the Bar that the Bankrupt Law in question, though perhaps it could not have been applied when that Act was passed, might yet be in force in 1839 when the case was decided. In his judgment, at pp. 152-3, *Stephen* J., afterwards *Sir Alfred Stephen* C.J., said that he must at once express his dissent from that position. "The question," he said, "whether a particular Statute is in force, may be determined, as I apprehend, with reference to the date of the New South Wales Act alone. I cannot conceive that we are to determine the question by nice inquiries from time to time, as to the progress made by the Colony, in wealth or otherwise. . . . . Whatever exceptions the rule may or may not admit of, there seems no ground for holding that the question of applicability was to have reference to the future. On the contrary, the meaning seems to me plain; that those laws only should compulsorily be applied which then, at the passing of that Act, could be applied. For the future, as I conceive, a local legislature was created; by which, Statutes not

(1) 2 Mer., 143.

(2) 7 H.L.C., 124.

(3) 1 Legge, 140.

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then capable of application were to be introduced, either wholly or in part, as that body might determine. So that if the Bankrupt Law could not have been applied in 1828, it cannot, according to my opinion, be in force now."

I adopt completely this opinion of *Sir Alfred Stephen.*

The question, then, is whether on the passage of the New South Wales Act the 41st section of 4 Geo. IV. c. 60 could reasonably be applied here—*i.e.*, whether by reasonable construction it must be supposed so to apply, in the sense of being then presently enforceable to punish the sale of lottery tickets. The Act 4 Geo. IV. c. 60, passed in England in 1823, is intituled "An Act for granting to His Majesty a sum of money to be raised by Lotteries." Most of its provisions relate only to the purpose so declared: and for that purpose and for carrying out the Government lotteries authorized, elaborate machinery is provided. But there are three or four sections, including sec. 41, which demand attention on the question now under appeal. Before considering them it is well to remember that private, as distinct from Government lotteries, had long been the subject of prohibition in England. The Act 10 & 11 Will. III. c. 17, declares lotteries to be a public nuisance, and forbids the keeping open of any lottery after 29th December, 1699. Anyone transgressing this prohibition was to forfeit for each offence £500, to be recovered by information, bill, plaint or action at law in any of His Majesty's Courts at Westminster: while those who played at such lotteries were to forfeit £20, recoverable in like manner. Several Acts were passed from time to time for the repression of the evil. On the other hand, the raising of money by lottery in aid of the public revenue commended itself to the Exchequer, and several acts were passed sanctioning this expedient on occasion. Not only were private lotteries found immoral, but their competition was inconvenient, as also was that of foreign lotteries, and there are Statutes which at one stroke authorize Government lotteries and provide for the simultaneous repression of private lotteries and "little-goes," and of the sale of tickets in foreign lotteries, and for the repression of the publication of either. The first Act relating closely to foreign lotteries was the 9 Geo. I. c. 19, passed in 1722.

The Statute 1 & 2 Geo. IV. c. 120, intituled "an Act for grant-

ing to His Majesty a sum of money to be raised by Lotteries," and another Act of 3 Geo. IV. c. 101, with an identical title, are of some interest as showing the origin of the section under which Quan Yick was prosecuted. Sec. 38 of the former Act is identical with sec. 41 of 4 Geo. IV. c. 60, with the exception that it says nothing about foreign lotteries: while sec. 39 of 3 Geo. IV. c. 101, is in terms identical with sec. 41 of the Act of 1823. Neither of these two Statutes makes any provision for the permanency of the enactments contained in sec. 38 of the one and sec. 39 of the other, and it is in sec. 19 of the Act now in question that we find such provision. So far as is material to this appeal, it reads thus: "And whereas it may be expedient to discontinue raising money for the public service by way of lottery after the sale of the tickets authorized by this Act and in that case it will be necessary to continue in force such parts of this Act as will be necessary to repress unlawful insurance in little-goes, and private lotteries . . . be it therefore enacted that from and after the drawing of the lottery authorized by this Act and the matters relating thereto the clauses herein contained relative to the suppression of illegal lotteries and insurance therein . . . shall remain in full force and virtue notwithstanding other powers given by this Act may have ceased and determined."

It is argued for the appellant, notwithstanding the strong words used to give permanency to the clauses relative to "the suppression of illegal lotteries and insurance therein" that the provisions of sec. 41, which I am about to cite, were not made permanent by sec. 19, but that "the clauses relative to the suppression of illegal lotteries and insurance therein" are clauses extraneous to sec. 41. Now that section, so far as it is material, enacts as follows: "If any person or persons shall sell any ticket, chance, or share of any ticket chance or share . . . in any lottery except such lottery as shall be authorized" by this or some other Act of Parliament . . . "such person shall for every such offence forfeit and pay the sum of £50, and shall also be deemed a rogue and vagabond, and shall be punished as such in the manner hereinafter directed."

The contention is that "the clauses relative to the suppression of illegal lotteries," as the term is used in sec. 19 for the purpose

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of making such provisions permanent, do not include the provision in sec. 41 for making illegal the selling of "any ticket, chance &c. in any lottery except such lottery as shall be authorized by this or some other Act of Parliament." I take it that the term "illegal lottery" as used in the one section completely covers and includes the lotteries mentioned in the other, not authorized by the 4 Geo. IV. c. 60 or some other Act of Parliament, and therefore that the enactment under which the appellant was prosecuted was clearly made permanent in England by sec. 19. As to the legal consequences prescribed by the Act for the selling of tickets in illegal lotteries, they are contained in secs. 62 and 67. The former makes pecuniary penalties for any offence against the Act, except where otherwise directed, go to the use of the King; and they can be recovered on behalf of the Crown only in the manner therein directed, namely "in the name of His Majesty's Attorney-General in the Court of Exchequer at Westminster if such offence shall be committed in England; in the name of His Majesty's Attorney-General in the Court of Exchequer at Dublin if such offence shall be committed in Ireland; or in the name of His Majesty's Advocate-General in the Court of Exchequer in Scotland if such offence shall be committed in Scotland." It is argued that this provision is inapplicable because (1) it excludes all locality of the offence except England, Ireland and Scotland, (2) there was no Court of Exchequer in New South Wales in which to sue. But I take it that the provision operates merely to prevent penalties being sued for outside that part of the realm where the offence was committed. We are only concerned with "laws and Statutes in force within the realm of England" as this was, and it is applicable if not unsuitable to the local conditions of the time. There was here an Attorney-General, and the Supreme Court of New South Wales was invested in New South Wales with all the jurisdiction which the Courts of Queen's Bench, Common Pleas and Exchequer possessed in England. I therefore think that the objection of the appellant in this respect fails. A similar provision existed in another Lottery Suppression Act, 42 Geo. III. c. 119, and that Act was in my judgment rightly held to be in force in New South Wales in the case of the *Attorney-General* v. *Edgley* (1),

(1) 9 N.S.W. L.R., 157.

and the Attorney-General of New South Wales was held entitled to sue in the Supreme Court here for a pecuniary penalty which under that Act was recoverable in the Court of Exchequer at suit of the Attorney-General.

Still dealing with the Act 4 Geo. IV. c. 60, sec. 67 prescribes the punishment for offences where the offender is convicted before justices and adjudged a rogue and vagabond. In such cases the justices are to order the offender to be sent to the House of Correction for not more than six months and not less than one month, with a discretion to the justices to order whipping where the offender has been convicted of a like offence under this or any former Act.

Now I know of nothing which could make the enactment of sec. 41 against selling lottery tickets unsuitable to the conditions of the Colony at the time the New South Wales Act was passed. But the difficulty arises in considering whether the enactment was then enforceable It was not and is not enforceable unless a breach of it could be punished under some law in force in New South Wales. The Act 5 Geo. IV. c. 83, "An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England," was passed in 1824. The Chief Justice has given an exhaustive analysis of its provisions, and I need not attempt to follow him over that ground. In the case of *Mitchell* v. *Ah King* (1), the question was whether this Act is in force in New South Wales, and the Supreme Court held it to be so, and that on a conviction for keeping a lottery under 42 Geo. III. c. 119 (previously, as we have seen, held to be in force, at least for certain purposes, in the *Attorney-General* v. *Edgley* (2)), a magistrate had acted rightly in awarding to the defendant a sentence under the 5 Geo. IV. c. 83. This Act the Court held to be also in force. *Sir Frederick Darley* C.J., with whom *Owen* J. and *G. B. Simpson* J. concurred, said in giving judgment: "If we were to hold that 5 Geo. IV. was not in force, we should nullify our former decision that 42 Geo. III. c. 119 is in force in the Colony, because 5 Geo. IV. c. 83 provides for the punishment of persons who keep lotteries in defiance of 42 Geo. III. c. 119." It may be observed that in the case of *Attorney-General*

(1) 21 N.S.W. L.R., 64. (2) 9 N.S.W. L.R., 157.

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v. *Edgley* (1), it was only necessary to decide that a pecuniary penalty for keeping a lottery was recoverable in the Supreme Court at the suit of the Attorney-General of New South Wales, and the terms of the second section of the last mentioned Act seem to make this quite clear, for that portion of the section is not affected by anything in the Act 5 Geo. IV. c. 83. But the offender, declared in another part of the same section to be a rogue and vagabond, was from 1824 punishable as such in England under 5 Geo. IV. c. 83 only, and even if that Act or the punishment sections of it are not in force here, it is that part only of the section which makes him punishable as a rogue and vagabond that could not be made effective in New South Wales. So that the correctness of *Attorney-General* v. *Edgley* would not, I suggest with respect, have been affected if the decision in *Mitchell* v. *Ah King* (2) had been in the defendant's favour.

Is then a person declared by 4 Geo. IV. c. 60 to be a rogue and vagabond punishable? It is necessary in order to answer this question to examine some of the provisions of the Act 5 Geo. IV. c. 83. As to whether that Act is enforceable in New South Wales at all, I share the doubts expressed by the Chief Justice, and for similar reasons. But in my view of this case it is not necessary to go so far as to hold the Act of 5 Geo. IV. inapplicable. Assuming that it came into force by virtue of the New South Wales Act on 25th July, 1828, its first section repealed all provisions then in existence "relative to idle and disorderly persons, rogues and vagabonds, incorrigible rogues and other vagrants, in England." There are exceptions to the repeal which do not require notice here. Sec. 3 provides that "wherever by any Act . . . now in force it is directed that any person shall be punished as . . . a rogue and vagabond . . . for any offence specified in such Act, and not hereinbefore provided for in this Act" (these words include the present case) "in every such case . . . every such person shall be punished under the provisions, powers and directions of this Act." Sec. 4 provides the punishment for all rogues and vagabonds, viz., committal to the house of correction for any time not exceeding three months, with hard labour. Sec. 14 enacts that "any person aggrieved by

(1) 9 N.S.W. L.R., 157. (2) 21 N.S.W. L.R., 64.

any act or determination of any justice or justices of the peace out of sessions, in or concerning the execution of this Act, may appeal to the next General or Quarter Sessions for the county, riding, division or place in and for which such justice or justices shall have so acted," and on giving the written notice and security prescribed, he is to be discharged out of custody, and such Court of General or Quarter Sessions is to hear and determine his appeal &c.

Now, if 5 Geo. IV. c. 83 did not come into force in New South Wales, it had nevertheless repealed the provisions for punishment as a rogue and vagabond of the offender under that part of 4 Geo. IV. c. 60, sec. 41 with which we are dealing, so that in July, 1828 that part of the Act, not being any longer in force in England, was not enforceable at all in New South Wales by way of punishment; and, even if 5 Geo. IV. c. 83 did come into force here, there was in July, 1828, no Court of General or Quarter Sessions in the Colony to which a person convicted of selling a lottery ticket under sec. 41, and by necessary consequence declared a rogue and vagabond, could have appealed. We cannot hold that the punishment provisions of the 5 Geo. IV. are enforceable without the correlative right of appeal to Quarter Sessions granted by that Act. They must stand or fall together, and to hold that an offender is liable to the whole force of punishment given by the Act without being able to clear himself by way of the appeal which the Act purported to give at the same time and as part of the same scheme, would be out of all reason. True, the New South Wales Act gave in its 17th section a power to the local legislature to institute Courts of General and Quarter Sessions with the powers and jurisdiction of the like Courts in England, so far as the circumstances of the Colony allowed. But when the New South Wales Act, and with it, *ex hypothesi*, the applicable part of the 41st section of 4 Geo. IV. c. 60, and the applicable parts of 5 Geo. IV. c. 83, came into force here, there were no Courts of General and Quarter Sessions. Such Courts were established in 1829 by the local Act 10 Geo. IV. No. 7, in exercise of the power granted, but a lapse of about a year took place, and for the purpose of the legal considerations at present involved, that lapse was tantamount to a much longer one, or to a complete omission on the

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part of the local legislature to create such Courts. For, as I have endeavoured to show above in citing the case of *Ex parte Lyons* (1), those laws only should be compulsorily applied which at the passing of the New South Wales Act were applicable, *i.e.*, enforceable. It was urged that the subsequent creation of Courts of Quarter Sessions cured the defect, but if I am right in agreeing with *Sir Alfred Stephen's* opinion in the last cited case, the defect was incurable. At the time, therefore, that the New South Wales Act came into force, the 5 Geo. IV. c. 83, could not apply to make this breach of the 4 Geo. IV. c. 60, punishable, for want of a vital part of the machinery appropriate to its enforcement. To use the words of *Sir Francis Forbes* C.J., in *Reg.* v. *Maloney* (2), in which case the English *Marriage Act*, 4 Geo. IV. c. 76, was held not to be in force in New South Wales: "It is apparent, then, that some of the most material requisites of the Act are entirely defective in this Colony—that it wants the machinery necessary to its operation—that, in fact, it cannot be enforced."

Accordingly, I am of opinion that the enactment, under which the appellant was prosecuted, is not in force in New South Wales, and that the appeal should be upheld.

O'CONNOR J. The question for determination is whether the provisions of 4 Geo. IV. c. 60 relative to selling tickets in an illegal lottery can be enforced by summary conviction in New South Wales. I propose to consider first to what extent 4 Geo. IV. c. 60 was in force in England in 1828 when the New South Wales Constitution Act (9 Geo. IV. c. 83) came into operation, secondly, the principle upon which the latter Act is to be construed, and thirdly, to what extent, having regard to those principles, the Act under which the offence is charged can be enforced in New South Wales. The 9 Geo. IV. c. 60 was the last of a series of Statutes, beginning in 1710 with 9 Anne c. 6, by which state lotteries for the purposes of revenue were established and regulated. Some years before, namely, in 1699, the Act of 10 William III. c. 23 declared lotteries to be a common and public nuisance which was punishable as a misdemeanour, and prohibited persons keeping or playing at lotteries, rendering offenders liable to heavy penal-

(1) 1 Legge, 140. (2) 1 Legge, 74.

ties recoverable in any of His Majesty's Courts at Westminister and also "to be prosecuted as common rogues according to the Statutes in that case made and provided." Except therefore as to the public lotteries authorized for revenue purposes under these Acts, the keeping of lotteries has at least since 1699 been an offence against the laws of England. In 1823 when the last of the Government Revenue Lotteries Acts, 9 Geo. IV. c. 60, was passed it was evidently felt that the time was approaching when this expedient for raising revenue could no longer be used, and it had become apparent that some of the provisions originally inserted for the protection of this method of raising revenue might be usefully made permanent as part of the general law against lotteries. The main purpose of the Act being the raising of revenue by the particular lottery thereby authorized, the greater portion of its sections were necessarily temporary in their operation. It became therefore necessary to declare what portions should be permanent, and the first important question in the controversy between the appellant and the respondent is whether the provision sought to be enforced in this prosecution is amongst those declared to be permanent. Sec. 41, under which the appellant is charged, enacts that "if any person . . . . shall sell any tickets . . . . in any lottery . . . . except such as are or shall be authorized by this or some other Act of Parliament to be sold . . . . such person . . . . shall for every such offence forfeit and pay the sum of £50 and shall also be deemed a rogue and vagabond and shall be punished as such in the manner hereafter directed." The prosecutor alleges, and the appellant denies, that the portions of the section above quoted have been made permanent. The words of sec. 19, which declares the parts of the Act which are to be permanent are, in so far as material, as follows:—"And whereas it may be expedient to discontinue raising money for the public service by way of lottery . . . and in that case it will be necessary to continue in force such parts of this Act as will be necessary to repress unlawful insurances in Little Goes and private lotteries and prevent the sale and publishing proposals for the sale of foreign lottery tickets within the United Kingdom &c. . . . be it therefore enacted that from and after the drawing of the lottery

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authorized by this Act, and the matters relating thereto, the clause herein contained relative to the suppression of illegal lotteries and insurance therein and to the preventing the sale and publishing proposals for the sale of foreign lottery tickets shall remain in full force and virtue, notwithstanding other powers given by this Act may have ceased and determined." Now, which are "the clauses relative to the suppression of illegal lotteries"? There are none directly enacting that unauthorized lotteries shall be suppressed, nor declaring such lotteries common and public nuisances, as was done by 42 Geo. III. c. 119, one of the Acts mentioned in sec. 50. But such a section as 41 is quite as effective in the suppression of an unauthorized lottery as if it had declared the lottery illegal, especially when taken in connection with sec. 61 which renders persons employing others in such transactions, and every person aiding or assisting them, liable to heavy penalties. Grammatically the word "suppression" would include all such means of suppression, and it is difficult to see how any effect can be given to the expression in sec. 19 unless it is to be read as referring to those sections which aim at the suppression of illegal lotteries by making the sale of tickets a punishable offence. This view is supported by the case of *Hall* v. *McWilliam* (1), in which, although the point was not taken, the section was treated as in force in regard to the offence of publishing a proposal for the sale of tickets in an illegal lottery. Sec. 41 therefore being a permanent enactment applying to all illegal lotteries and making the selling of tickets an offence, let us see how under the Act that offence was punishable. It was punishable in two ways. First by a penalty of £50, and secondly by subjecting the offender to be deemed a rogue and vagabond and punished as such on summary conviction. The penalty is to be sued for under the provisions of sec. 62 and not otherwise. By that section the proceeding for the penalty must be in the name of the Attorney-General, and must take place in the Court of Exchequer at Westminister. In so far as the punishment by penalty recoverable by action is concerned, I think it is abundantly clear that in 1828 sec. 41 could have been enforced in England by action in the Court of Exchequer in

(1) 20 Cox C.C.R., 33.

the name of the Attorney-General. The section was also then enforceable in England in a Court of Petty Session, but the aid of another Statute had by that time become necessary. By the provisions of 4 Geo. IV. c. 60, an offender under sec. 41 when proceeded against before justices was dealt with under sec. 67, which provided that he should be adjudged a rogue and vagabond, and be sent to the house of correction for a term not less than one nor more than six months. There was an additional punishment for a second offence, and it was expressly provided that the proceedings should not be subject to appeal. But in the following year, 1824, an Act was passed, 5 Geo. IV. c. 83, consolidating and amending the laws relating to the punishment of idle and disorderly persons and rogues and vagabonds. It repealed all sections dealing with rogues and vagabonds in the various Acts in which offenders were to be adjudged rogues and vagabonds for purposes of punishment, and provided by sec. 21 that, wherever under any Act an offender was to be deemed a rogue and vagabond and punished as such, he was in future to be dealt with under that Act. Sec. 3 fixes as punishment a maximum of three months' imprisonment in the house of correction and no minimum. Sec. 17 directs justices to transmit the conviction to the next Court of General or Quarter Sessions for the county to be there recorded. Sec. 14 gives to every person convicted under the Act a right of appeal to the next Court of General or Quarter Sessions of the county in which the conviction took place, and also a right on entering into recognizances with sufficient surety to apply for his discharge from custody pending the hearing of the appeal. To sum up the position in 1828 in England:—A person selling lottery tickets in contravention of sec. 41 of 4 Geo. IV. c. 60 might at the option of the prosecutor be proceeded against for a penalty of £50 by the Attorney-General in the Court of Exchequer—or he might be charged before justices with that offence and proceeded against under 5 Geo. IV. c. 83 for conviction as a rogue and vagabond. The offence was under 4 Geo. IV. c. 60, but the proceedings had to be initiated and carried on under 5 Geo. IV. c. 83, which gave the offender a right of appeal to Quarter Sessions, and a right to apply

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for discharge from custody pending his appeal if he gave proper and sufficient notices and recognizances under the Act.

Such being the law of England in 1828, to what extent, if at all, has that law become in force in New South Wales? The answer to that question depends largely on the proper interpretation to be placed upon sec. 24 of the New South Wales Constitution Act (9 Geo. IV. c. 83).

That section has been the subject of many decisions in this State, and in the Court of Appeal in England. I do not intend to refer to them in detail as I entirely concur in the views of my learned brother the Chief Justice in regard to their effect. Reading the section in the light of these authorities, it would appear now to be well established that out of the body of laws in force in England at the time of the commencement of the Act 9 Geo. IV. c. 83, only those came into force in New South Wales which could at that time be reasonably applied in the existing circumstances of the Colony. It would also appear to have been established that the question for the consideration of the Court always is, not whether the English law can be reasonably applied at the time when the question arises for decision, but whether the law came into force at the time of the commencement of 9 Geo. IV. c. 83 by reason of its being a law which could at that time be reasonably applied in this State.

It cannot, I think, be doubted that the English laws prohibiting lotteries came into force in New South Wales on the passing of 9 Geo. IV. c. 83. They were, like the laws against gambling and wagering, of general application, and intended to safeguard the moral well-being of the community, and there would appear to be no reason why they should not have been in force from the very beginning of the settlement. The *Lotteries Act*, 42 Geo. III. c. 119, has been expressly held to be in force in New South Wales in the case of the *Attorney-General* v. *Edgly* (1), and what *Sir James Martin* in delivering judgment says of that Statute may well be applied to the *Lotteries Act* now under consideration. "And looking at the object of the Act," he says, "which we have already seen to be the preservation of morality and the protection of the unwary, we can see nothing in the Act or the circumstances

(1) 9 N.S.W. L.R., p. 157.

of the Colony which would render it inapplicable, and we are accordingly of opinion that it is now in force in New South Wales." It seems to follow that the law enacted in sec. 41 of the 4 Geo. IV. c. 60, prohibiting the sale of tickets in illegal lotteries would be equally applicable here. But before the law authorizing the prosecution of the offence can be declared in force we must be satisfied that the procedure prescribed to be followed could have been reasonably applied here in 1828. Under sec. 41 the offence may be dealt with in the two ways which I have explained in the earlier part of this judgment. I can see no reason why the suit for penalties under sec. 41 should not have been maintained here at that period. It is true that sec. 62 provides that the action must be in the name of the King's Attorney-General, and, in the case of the offence being committed in England, must be brought in the Court of Exchequer at Westminster. But in 1823 the Supreme Court of New South Wales was constituted by the authority of 4 Geo. IV. c. 96, and by sec. 2 of that Act it was invested with the same jurisdiction which the Courts of King's Bench, Common Pleas, and Exchequer at Westminster exercised in England, and in sec. 4 of the Act the office of His Majesty's Attorney-General was recognized as existing. There was therefore existing and available in New South Wales in 1828 all the machinery necessary for proceeding by action for penalties against a person selling tickets in an illegal lottery in contravention of sec. 41. It would follow that the Act, in so far as it creates the offence and imposes the penalty recoverable by action, could have been reasonably applied in New South Wales in 1828 and is therefore now in force. But when we turn to the other procedure authorized by sec. 41 and followed in this case, the procedure for convicting the offender before justices as being a rogue and vagabond, grave difficulties arise in the application of that portion of the Act to New South Wales at the period named.

For the purposes of this procedure, as I have already pointed out, the English *Vagrant Act* (5 Geo. IV. c. 83), must be used. As the law stood in England in 1828 no prosecution for this offence before justices could take place without the aid of sec. 21 and of sec. 4 of that Statute. If those sections could not in 1828 have been reasonably applied in New South Wales, the law as to

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the punishment of the offence by proceedings before justices was not in force there at that time, and cannot be in force now. It was urged by Dr. Cullen that the English *Vagrant Act* could not be applied in New South Wales because the whole system of dealing with rogues and vagabonds was inseparably connected with the English Poor Law System, which from its local nature could not be applied out of England. No doubt the punishment of rogues and vagabonds goes back to the early period when each district and parish was responsible for the maintenance of its labourers, when stringent labour laws compelled every man to work, and treated persons wandering away from their own parishes without work as being guilty of the offence of being "rogues and vagabonds." But in the series of Statutes, from 14 Eliz. c. 5, one of the earliest, dealing with "Roges Vacaboundes and sturdy Beggers" down to that under consideration, the use of the phrase "rogues and vagabonds" had changed considerably, and persons had become liable to be adjudged "rogues and vagabonds" for a variety of offences having no connection whatever with mendicancy, poverty, or the poor laws. In other words the phrase as used at the time of 5 Geo. IV. c. 83 had come to mean nothing more than a measure of punishment to be attached to particular offences. We find in that Act a great variety of offences dealt with: Some undoubtedly involving mendicancy and the application of the English poor law system, but very many others in which the offenders were made liable to be declared rogues and vagabonds, and to be punished accordingly, for offences which are in no way connected with mendicancy or the poor laws. Those portions of the Act which arise out of and depend upon the English poor law system would not of course be capable of being reasonably applied here. On the other hand, although it is unnecessary to decide the matter, I can see no reason why sec. 21, which is quite general in its nature and unconnected with any English local conditions, should not have been applied here in 1828, nor why sec. 4, in so far as it authorizes punishment of offences under sec. 21, should not be equally applicable. It has also been urged that the New South Wales *Vagrant Act*, 6 Will. IV. No. 6, is either an "ordinance" within the meaning of sec. 24 of the 9 Geo. IV. c. 83, establishing the limitations and modifications under which the

English Vagrancy Law is to be applied, or that its existence is inconsistent with the English Act being in force. An examination however of the Act will show that it is in no sense a declaration as to the English law. Nor does it purport to be an exhaustive definition of all the cases in which an offender may be convicted of being a rogue and vagabond. Such being its scope and provisions, I do not see why it should shut out those portions of the English Act dealing with cases for which it does not provide. However the fatal nature of the next objection makes it unnecessary to decide that point.

Finally it is urged that the English *Vagrant Act* (5 Geo. IV. c. 83) could not be reasonably applied here in 1828 because at that period the machinery for giving effect to its provisions did not exist in New South Wales.

As I have already pointed out, the offence of selling a ticket in an illegal lottery was punishable in England on conviction under the *Vagrant Act* 5 Geo. IV. c. 83, by imprisonment, but that conviction was subject to appeal to Quarter Sessions, and the person convicted was entitled on giving the required notice to have his conviction reconsidered, and was also entitled, on giving the required recognizance, to apply for his release from custody pending the appeal. In 1828 there was in New South Wales no Court of Quarter Sessions, nor was there any Court of Appeal in which decisions of Justices in Petty Sessions in facts and law were examinable as they are in a Court of Quarter Sessions. The *Constitution Act* itself in 1828 first gave authority to establish such Courts, and they were first established in the following year by the New South Wales Act 10 Geo. IV. No. 7. Assuming both the 4 Geo. IV. c. 60, and the 5 Geo. IV. c. 83, to have been applied in New South Wales in 1828, a conviction under sec. 41 of the former Act would have been final. There was under the conditions then existing no possibility of exercising that right of appeal which was given by the same Act which imposed the punishment. It is urged by Dr. Cullen that under these circumstances the provisions of the English *Vagrant Act* cannot reasonably be applied. I can see no answer to that objection. There are no doubt cases in which English laws have been held to apply in New South Wales when the machinery for their administration

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did not exist in all its completeness. For instance, it has been decided that the law of distress and replevin as respects the power of seizing, detaining, and replevying of goods is in force in New South Wales: *Slapp* v. *Webb* (1), although there was not in 1828 any Sheriff's County Court, and the office, duty and jurisdiction of the Sheriff differed widely from that of the Sheriff in England. But there were Courts, procedure and officers available by which in its main features the principles of replevin could be carried out. In the case under consideration there was no Court, and no procedure, by which in New South Wales a conviction under sec. 41 could have been examined as in an appeal to Quarter Sessions. It seems to me that we cannot separate the conviction and punishment from the right of appeal, and as there was in New South Wales in 1828 no machinery under which the right of appeal could be exercised, I find it impossible to hold that the provisions as to conviction and punishment could be reasonably applied. As the 5 Geo. IV. c. 83 cannot be applied, the provisions of sec. 41 of 4 Geo. IV. c. 60, in so far as they relate to proceedings before justices, become inapplicable. Before coming to this conclusion I have given careful consideration to the case of *Mitchell* v. *Ah King* (2), which decides that the English *Vagrant Act* 5 Geo. IV. c. 83 is in force here. It is evident from the report of that case that the particular objection, which is in my opinion fatal, was not brought to the attention of the Supreme Court. Neither was it brought to the notice of the Court in *Anderson* v. *Ah Nam* (3), the case on which Mr. Justice *Pring* based his judgment in this case. On the whole matter, therefore, I have come to the conclusion that, although 4 Geo. IV. c. 60 is in force in New South Wales for the purposes of an action for penalties in the name of the Attorney-General, it is not in force for the purposes of a proceeding before magistrates to adjudge the offender a "rogue and vagabond." It follows in my opinion that the magistrate was right in dismissing the case on the ground stated by him, and that the judgment of Mr. Justice *Pring* to the contrary should be set aside, and the appeal allowed.

Appeal allowed with costs.

(1) 1 Legge, 649; 1 N.S.W. S.C.R., App., 54.

(2) 21 N.S.W. L.R., 64.

(3) (1904) 4 S.R. (N.S.W.), 492.

Solicitors for the appellant, *Crick & Carroll.*
Solicitors for the respondent, *The Crown Solicitor of New South Wales.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

DANIEL WILKIE . . . . . APPELLANT;
DEFENDANT,

AND

DAVID ELLIOT WILKIE . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 7.

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

Practice—Appeal book—What Documents to be inserted—Rules of High Court 1903, *Part II., sec. IV., rr.* 11, 15.

In preparing the appeal book for an appeal from the Supreme Court of a State, the appellant is not required by the Rules of the High Court 1903, Part II., sec. IV., rr. 11, 15, to include all the documentary evidence, but should include such documents as he thinks necessary. The respondent may apply to the Court to have inserted any documents which he thinks are necessary, and which have been omitted.

APPLICATION.

In an action brought by David Elliot Wilkie, against Daniel Wilkie, Alexander McCalla, and John Creuze Hingston Ogier, the nature of which it is not necessary to state as the action was subsequently settled, judgment was given by the Full Court in favour of the plaintiff. (See [1905] V.L.R., 278; 26 A.L.T., 133). The defendants Daniel Wilkie, and Ogier each appealed to the High Court.

Schutt for the appellant Daniel Wilkie asked the Court whether it was necessary under the Rules of the High Court 1903, Part II., sec. IV., rr. 11, 15 (as amended by Rules of Court Oct. 12th, 1903), for the appellant to set out in the appeal book the whole of the