[HIGH COURT OF AUSTRALIA.]

BROWN . . . . . APPELLANT;
PLAINTIFF,

AND

LIZARS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *August* 4, 8, 15.

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

County Court Act 1890 (*Victoria*), (*No.* 1078), *secs.* 31, 82, 88, 89, 93, 96, 133—*Action in County Court tried by jury—Verdict of jury—Judgment—Misdirection—Application for new trial—Appeal—False imprisonment—Arrest by constable without warrant on suspicion of felony in foreign Country.*

Where, on a trial in the County Court of Victoria by a jury, the jury answer certain specific questions put to them by the Judge, but give no general verdict, and the Judge enters judgment for one of the parties as though on those answers that party were entitled to a verdict and judgment, whereas in law the other party is entitled to judgment notwithstanding those answers, that other party is, under sec. 96 of the *County Court Act* 1890 (Victoria), entitled to apply to the County Court Judge for a new trial, although he may also be entitled, under sec. 133 of that Act, to appeal direct to the Supreme Court from the judgment.

Judgment of Full Court, *Brown* v. *Lizars*, (1905) V.L.R., 165; 26 A.L.T., 159, reversed.

A reasonable suspicion that a person has, in a foreign country or in another part of the British Dominions, committed an offence which, if committed in Victoria, would be a felony, does not justify a constable in arresting such person in Victoria without a warrant, and is therefore not a defence to an action by such person against the constable for false imprisonment.

The only existing powers to arrest, or detain, or surrender to a foreign country or to another part of the British Dominions, a person suspected of having there committed a criminal offence, are such as are conferred by Statute.

APPEAL by special leave from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by John Thomas Brown against Daniel Lizars, a constable of police, to recover £99 damages for malicious arrest and false imprisonment. The cause of action for malicious arrest was abandoned at the trial. The action was tried by Judge Gaunt and a jury.

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The defences stated were :—The defendant denies the assault and denies the false imprisonment. The defendant was at all material times a police constable. The defendant arrested the plaintiff in the execution of his duty as he had reasonable grounds to suspect that he (the plaintiff) had committed a felony. The defendant denies malice and alleges no want of reasonable and probable cause.

Evidence was given that the plaintiff had told one Foote that he (the plaintiff) "did a moonlight flit" from South Africa, where he had "nicked" £400; that Foote told this to the defendant, who, having searched in the *Victorian Police Gazette*, found there a report of an embezzlement of £400 19s. 9d. at Durban, Natal, and a photograph of the supposed criminal; and that the defendant thereupon arrested the plaintiff on the charge of that embezzlement and brought him before a magistrate, who discharged him. The Judge in his summing up told the jury that the question was not one of the guilt or innocence of Brown, but of the suspicion on which Brown was arrested being a reasonable suspicion. The Judge then asked the jury to answer the following questions, and they gave the answers set opposite to them respectively :—

"1. Are you satisfied as given in evidence, that Foote did tell Lizars of the statement alleged to be made by Brown to Foote of his 'doing a moonlight flit' from South Africa where he had 'nicked' £400 ?—Answer. Yes.

"2. And further, that Lizars did, on receipt of such information, look up and find in the *Victorian Police Gazette* of 14th April, 1904, the report of the embezzlement of £400 19s. 9d., at Durban, Natal ?—Answer. Yes.

"3. And that Lizars did thereupon arrest plaintiff on suspicion of having committed such felony ?—Answer. Yes.

"4. And had Lizars an honest belief, such as would operate on the mind of a reasonable man, in the truth of the statement he had received ?—Answer. Yes.

"If verdict for plaintiff assess damages for amount to which you think plaintiff is entitled.—Answer. £20."

Upon the Judge's notes appeared the following entry of what then happened :—

"Reasonable and probable cause.

"Verdict for defendant with costs."

According to affidavits before the Court, what happened when the jury answered the questions was this:—Counsel for the defendant having moved for judgment, counsel for the plaintiff opposed the motion, and asked for an adjournment in order to enable him to argue the question whether a police constable had any authority without a warrant to arrest a person suspected of having committed an offence outside Victoria, and he also moved for judgment for the plaintiff on the findings. The Judge refused an adjournment and entered judgment for the defendant.

The plaintiff on a subsequent day by summons asked the Judge that the judgment should be set aside and a new trial had, or, alternatively, that judgment should be entered for the plaintiff for £20 with costs, on the following grounds:—

1. That on the findings of the jury and as a matter of law, the learned Judge was wrong in directing judgment to be entered for the defendant with costs.

2. That on the findings of the jury the learned Judge should have directed judgment to be entered for the plaintiff with costs.

3. That the learned Judge was wrong in refusing to hear learned counsel for the plaintiff on the question of law raised by him.

The Judge having refused the application, the plaintiff appealed to the Full Court, which dismissed the appeal: *Brown* v. *Lizars* (1).

The plaintiff, having obtained special leave, now appealed to the High Court.

McArthur (with him *Ah Ket*), for the plaintiff appellant. There has been a mis-trial, the Judge either having misdirected the jury, or not having directed them at all. The plaintiff then had alternative remedies, either to appeal to the Supreme Court under sec. 133 of the *County Court Act* 1890, or to apply to the Judge of the County Court for a new trial. On an application for a new trial the Judge has a discretion, which must be exercised on legal principles, and whether he grants or refuses a new trial, an appeal lies to the Supreme Court: *Caffyn* v. *W. Howard Smith & Sons Ltd.* (2). There may be an appeal direct to the Full Court from a judg-

(1) (1905) V.L.R., 165; 26 A.L.T., 159.
(2) 18 V.L.R., 245; 13 A.L.T., 276.

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ment of the County Court founded on a verdict which is against the evidence and the weight of the evidence: *Sheehan* v. *Park* (1). If there has been a miscarriage of justice there should be a new trial, for, if an appeal is the remedy taken, the assessment of the damages stands, and that assessment might be entirely different if it was arrived at on the assumption that the act was unlawful. Under the *County Court Act* 1890 where there is a trial with a jury there should be a general verdict given. It is doubtful if special questions can be asked, and even if they are asked, the jury should also give a general verdict. [See sec. 93 of the *County Court Act* 1890.] The objection taken by the plaintiff that a reasonable suspicion of a felony committed outside the jurisdiction was no protection to the defendant, was not taken too late. What the Judge did amounted to this, that, the jury having answered certain questions, he directed them on those findings to give a verdict for the defendant, and that upon that verdict he entered judgment for the defendant. Otherwise he did not direct the jury at all on this particular matter as to which objection was taken. The questions put were altogether irrelevant. If there was either a misdirection or a non-direction, there should have been a new trial. It may be that the plaintiff might have appealed direct to the Full Court, but the course he did take was open to him. One of the reasons it was taken was that the conditions under which he could get the case before the Full Court would be less onerous: *Willoughby* v. *Eastern Plateau Proprietary Gold Mining Co. No Liability* (2). Under sec. 93 of the *County Court Act* 1890, the parties had a right to insist on a general verdict. The judgment is one which, under the old common law practice, would have been open to a bill of exceptions with a consequent *venire de novo*. If there was not a verdict for the defendant by direction of the Judge, there was no verdict at all, and in that case a new trial should have been allowed. One of the grounds upon which the Judge was asked for a new trial was that he should not have entered the judgment which he did. That is the same thing as asking for a new trial on the ground of misdirection. It is not necessary to take an objection as to misdirection, or as to non-direction on a question of law, at the time. There is,

(1) 8 V.L.R. (L.), 25; 3 A.L.T., 98. (2) 17 V.L.R., 196; 12 A.L.T., 182.

however, an obligation to take an objection as to non-direction on a question of fact at the time. The right to appeal and the right to apply for a new trial are alternative: *Curry v. President &c. of the Shire of Benalla* (1); *Dalton* v. *Dalton* (2).

The defendant had no right to arrest the plaintiff. A constable has a right to arrest without a warrant merely for the purpose of bringing an offender before a magistrate to be dealt with. If a felony is charged, which is alleged to have been committed outside the State, the magistrate has no jurisdiction to deal with it except under the provisions of the *Fugitive Offenders Act* 1881 (44 & 45 Vict. c. 69) under which proceedings are commenced by a warrant, and a constable has no authority to arrest without a warrant on suspicion of such a felony. The doubt of *Brett* L.J., in *R.* v. *Weil* (3) whether a constable has such authority, is not warranted by the cases.

Robinson, for the defendant respondent. In the County Court the whole question was as to whether the defendant had reasonable grounds for suspecting that the plaintiff was the person who was alleged to have committed a felony, and no defence was raised that, if the defendant had such grounds, he had no authority to arrest without warrant on suspicion of a foreign felony. Under the old practice at common law, upon a special verdict of a jury, the findings were drawn up and lodged in the superior Courts of Westminster. Arguments were then heard on the findings and the Court entered judgment. The proper remedy was by error: III. *Chitty's Blackstone*, p. 349; *Smith's Action at Law*, 8th ed., p. 143. Here the position is similar, and the only remedy is by appeal from the judgment. The action was for false imprisonment, and it was the function of the Judge to determine as a matter of law upon the findings of the jury whether the defendant had reasonable and probable cause. The power of the County Court Judge to grant a new trial is not absolute, but is a discretionary power to be exercised subject to proper grounds being shown: *Murtagh* v. *Barry* (4). The words "new trial" in the *County Court Act* 1890 are used in their technical

(1) 21 V.L.R., 159.
(2) 12 V.L.R., 202; 7 A.L.T., 144.
(3) 9 Q.B.D. 701, at p. 706.
(4) 24 Q.B.D., 632.

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sense, and not in the sense of a *venire de novo*. The wide words in sec. 96 of the *County Court Act* 1890 "in every case" and "as often as he shall think fit" are intended to remove the restrictions upon the power to grant a new trial existing at common law, *e.g.*, where the amount involved was small, or there had been two previous trials with the same result. The real application here was not for a new trial, because the findings were not attacked. In such a case there can be no new trial, but the proper course is to appeal: *Davies* v. *Felix* (1). There was a waiver of the objection that the defendant had no authority to arrest the plaintiff: *Graham & Sons* v. *Mayor &c. of Huddersfield* (2). The ground relied upon on the motion for a new trial, *i.e.*, that the learned Judge was wrong in directing judgment to be entered for the defendant, was no ground for a new trial. For, assuming as contended by the appellant that the true interpretation of the proceedings in the County Court was that the jury had found a verdict for the defendant, it was the duty of the Judge, under sec. 93, to enter judgment in accordance with the verdict.

A constable has authority to arrest a person on suspicion that he has committed a felony in a British possession. The statement to that effect by *Brett* L.J. in *R.* v. *Weil* (3) is borne out by other authorities. In *Oke's Magisterial Synopsis*, 13th ed., vol. II., p. 912, it is stated that at common law there is authority to arrest a person who has committed a felony anywhere. See also *Chitty's Criminal Law*, 2nd ed., vol. I., pp. 13, 16, citing *R.* v. *Kimberley* (4); *Mure* v. *Kaye* (5); and *Biron and Chalmers on Extradition*, p. 37.

[GRIFFITH C.J.—Although the act if done here would be a felony, it might be perfectly lawful in the country where it is done.]

The Court will assume that what is a felony here is a felony in other parts of the British Empire. There is a right to arrest in assistance of the proper legal process to be afterwards pursued: *Commonwealth* v. *Deacon* (6); *Eanes* v. *The State* (7); *Clarke on Extradition*, 4th ed., p. 28. The laws of South Africa are the

(1) 4 Ex. D., 32.
(2) 12 T.L.R., 36.
(3) 9 Q.B.D., 701, at p. 706.
(4) 2 Stra., 848.
(5) 4 Taunt., 35.
(6) 10 Sergeant & Rawle (Pen.), 125, at p. 134.
(7) 44 American Decisions, 289, at p. 292.

King's laws, and all his subjects, wherever they may be, owe him a duty with regard to the observance of those laws. Whether a man is a constable or not he owes that duty. A constable is an officer who should be active in seeing that the King's laws are observed, and the principle giving him extra protection as to arrest protects him here.

[O'CONNOR J.—In that view a magistrate would, apart from the *Fugitive Offenders Act*, be justified in issuing a warrant for the arrest of a person suspected of having committed a felony in South Africa.]

There appears to have been a power in England before that Act to send persons charged with felony from one part of the Empire to another. See *Sedley* v. *Arbouin* (1); *R.* v. *Kimberley* (2). That is recognized by sec. 16 of the *Habeas Corpus Act* (31 Chas. II., c. 2.) Sec. 12 of that Act cannot apply to Australia, for it is limited to inhabitants of England, Wales, and the Town of Berwick.

[GRIFFITH C.J.—Suppose the plaintiff had been committed for trial and had applied for a *habeas corpus*, what would have been the return?]

That he was in custody awaiting a warrant of a Secretary of State. The *Fugitive Offenders Act* was merely intended to enable proper local authorities to exercise the power which might before have been exercised by the King's officers. It also dealt with other offences than felony, and so extended the old law.

McArthur in reply. No case has ever decided that there is power at common law for a magistrate to issue a warrant for the arrest of a person alleged to have committed a felony in a foreign country, or for a constable to arrest without warrant on suspicion of having committed such a felony. Natal and Australia are for this purpose as between themselves foreign countries. The history of extradition shows that there is no right on the part of one country to demand, nor a duty on the part of another country to deliver up, a person who has committed an offence in that other country. Even those jurists who support the view that the right

(1) 3 Esp., 174.
(2) 2 Stra., 848; 1 Barn. C., 225; Fitzg., 111.

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and duty exist, admit that the duty is one of very imperfect obligation. Where such a right and duty exist, the duty is upon the Sovereign who acts by his warrant. There is no instance in England where the Sovereign has delivered up an offender except under treaty, and legislative enactment to carry the treaty into operation. In *Stephen's History of the Criminal Law* (ed. 1883), vol. II., p. 66, *R.* v. *Kimberley* (1); and *Mure* v. *Kaye* (2), are referred to, and it is said that the common law power there suggested to surrender felons has been done away with by the *Extradition Acts* and the *Fugitive Offenders Acts*. [See also *Clarke on Extradition*, 4th ed., pp. 3, 14, 23, 126.] Treaties between England and foreign countries as to the surrender of criminals have always been carried into effect by Acts of Parliament. Thus 6 & 7 Vict. c. 76, carried into effect a treaty with America, and 6 & 7 Vict. c. 75, a treaty with France. [See also *Encyclopædia of the Laws of England*, vol. V., p. 267; 20 *St. Tr.*, 1316; *Law Quarterly Review*, vol. IX., p. 146.] There have been many cases in England where arrests and imprisonments under the *Extradition Acts* and *Fugitive Offenders Acts* have been challenged, and in them the question has always been as to the validity of the warrant. This general power to arrest has never been relied upon in any of those cases: See *Ex parte Besset* (3). Sec. 12 of the *Habeas Corpus Act* is an answer to this alleged right of arrest. That section is in force in Victoria, and has often been acted on. If there has been no verdict in this case that is a ground for a new trial. If there has been a verdict then the jury were wrongly directed to find for the plaintiff, and that is a ground for a new trial.

[GRIFFITH C.J.—Or if there was a verdict which did not dispose of the case there should be a new trial.]

[He also referred to *Handley* v. *London, Edinburgh, and Glasgow Assurance Co.* (4); *Chitty's Archbold*, 20th ed., p. 1323; *Martin* v. *Great Northern Railway Co.* (5).]

Cur. adv. vult.

(1) 2 Stra., 848.
(2) 4 Taunt., 35.
(3) 6 Q.B., 481.
(4) (1902) 1 K.B., 350.
(5) 16 C.B., 179, at p. 191.

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15th August.

GRIFFITH C.J. This was an action brought in a County Court by the plaintiff against the defendant, a constable of police, for trespass to the person by false imprisonment. The defence set up was that the defendant had arrested the plaintiff upon reasonable suspicion that the plaintiff had committed a felony in the British Colony of Natal, or rather, an offence under such circumstances that, if it had been committed in Victoria, it would have been a felony. At the trial it seems to have been assumed that that would have been a good defence if proved. The case was tried "by a jury," to use the words of the *County Court Act* 1890 (Vict.), and the Judge asked the jury four questions which they answered in the affirmative, to the effect that the defendant had reasonable cause for suspicion that the plaintiff had committed an offence in Natal, which, if committed in Victoria, would have been a felony. The Judge also asked the jury to assess the damages in the event of their finding the facts the other way, and they assessed the damages at £20. Thereupon the learned Judge entered judgment for the defendant, counsel for the defendant and for the plaintiff having each asked for judgment for his client. Within the time allowed for moving for a new trial, the plaintiff, assuming that he had a right to do so, asked that the judgment entered for the defendant might be set aside and a new trial be had. He also asked in the alternative that judgment might be entered for him, but that part of the motion was misconceived. The Judge dismissed the application for a new trial, and the plaintiff then appealed to the Full Court (1). That Court dismissed the appeal, holding, as I understand it, that the plaintiff should have appealed direct to the Supreme Court, and that he was not entitled to ask the Judge of the County Court for a new trial. If the plaintiff was entitled to ask for a new trial, and if upon the merits he ought to have had it, of course the Supreme Court ought to have ordered it. But, as I follow the reasons of the Judges of the Supreme Court, they thought the plaintiff was not, under the circumstances, entitled to have a new trial. It is necessary therefore to refer to the *County Court Act* 1890 in order to see what are the rights given to a party under such circumstances. Sec. 89 of that Act provides that:—"In all

(1) (1905) V.L.R., 165; 26 A.L.T., 159.

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actions where the amount claimed shall exceed twenty pounds it shall be lawful for the plaintiff or defendant . . . to require a jury to try the said action." Sec. 93 provides that when a jury shall have been required to try any action, a prescribed number of jurors shall be impanelled, and it also provides for the manner of taking the verdict. The section then goes on:—"When a verdict is given judgment shall be entered in accordance with the verdict, subject to the provisions of reservation of judgment new trials and non-suit herein contained." The proviso as to reservation of judgment is contained in sec. 88, which provides that:—"In any action suit matter or other proceeding brought in any County Court the Judge of such Court may if he think fit reserve his decision on any question of fact or of law." That section then goes on to provide that when a Judge reserves his decision he may give it at any adjournment of the Court, or at any subsequent holding thereof, or, under some circumstances, he may have it read by the registrar, and that the decision so given is to be of the same force and effect as if it was given in open Court at the trial or hearing. But in any case the verdict is the verdict of the jury, and the judgment is the judgment of the Court pronounced in accordance with the verdict of the jury. Now in establishing this practice of the County Court the legislature followed the old practice of the superior Courts of common law. Under that practice the verdict was the verdict of the jury upon the direction of the Judge, and there was no way, except by getting leave reserved to move to enter judgment, of escaping that consequence. The jury had to give a verdict for the plaintiff or for the defendant, and to apply the law as directed by the Judge. If the Judge misdirected the jury upon a material point, the party against whom judgment was given was entitled to a new trial. There were other methods in England of getting a point of law settled besides a motion for a new trial. One way at common law was by a bill of exceptions to the direction of the Judge. That was entered upon the record, and an appeal lay direct to the Court of Exchequer Chamber. Another way was by means of a special verdict. Then the questions of law appeared upon the record. In those cases the Court could give such judgment as was proper to be given upon the findings of facts

entered upon the record. But, if upon those facts it was uncertain what judgment ought to be given, the only remedy was to try the action over again, and if the objection appeared upon the record the technical name for the proceeding was a *venire de novo*. The County Court practice introduced by the Statute does not comprise any of these refinements, but it provides that, where there is a trial by a jury, the jury is to give a verdict, and that judgment is to be entered in accordance with the verdict. Applying these principles to the present case, one of two views must be correct; either the learned Judge must be taken to have directed the jury that, if they answered the questions asked in the affirmative, they must find a verdict for the defendant; or else, when the jury answered those questions, the judge must be taken to have entered a verdict for the defendant. If he did neither, and no verdict has been given, there has been no complete trial, and the only remedy is to get the trial concluded. No doubt the parties regarded the course taken as a direction to the jury that, if they answered the questions in the affirmative, they should find a verdict for the defendant. At common law that was in form the course taken. Under the *Judicature Acts* the position is to some extent expressly provided for by rules of Court. When the course is adopted of taking special findings, the jury are asked to answer certain questions of fact, and upon those answers the Court is asked to enter judgment. That was also done sometimes under the old system by entering judgment for one party and reserving leave to the other party to move for judgment. But, as I have said, none of these refinements were introduced by the *County Court Act* 1890. The verdict must be given by the jury on the direction of the Judge, and if there is a misdirection the party aggrieved is entitled to a new trial.

I make these observations before referring to the reasons of the learned Judges of the Supreme Court for dismissing the appeal.

The learned Chief Justice in the reasons for the decision transmitted to this Court said:—"The position open to the plaintiff was either to appeal from the determination of the Judge, or else apply to the Judge to reserve the question of the plaintiff's right to have judgment entered for him upon the findings, that is to reserve leave to move to enter judgment for the plaintiff." I take it that

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that means that the Judge could have adjourned the case to have it further argued. The learned Chief Justice proceeds:—"If that had been done, then, on a proper motion at the proper time, the plaintiff might have had that done which ought to have been done before. But he applied for a new trial, and it was refused. He did not have leave reserved, and the result was that the opportunity of appealing (which was his only remedy) was lost, and his right to come on motion day never occurred to him. What he did was to take his point on a motion for a new trial—to set aside a verdict which was perfectly right and unobjectionable and which had nothing wrong with it." With all respect, it appears to me the verdict in the sense spoken of was not a verdict of the jury. The finding by the jury of certain facts is not a verdict, either at common law or, especially, under the terms of this Statute. What the plaintiff objected to was that, instead of judgment being given in favour of him, it was given in favour of the defendant. The learned Chief Justice says that an appeal was the plaintiff's only remedy. It is necessary as to that to look at the provisions of the *County Court Act* 1890 under which the plaintiff claimed the right to ask for a new trial. Sec. 96 of that Act provides that the Judge shall:—"In every case whatever have the power, and as often as he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable." The words could not be larger. The section does not prescribe — and apparently intentionally—that objection must have been taken at the trial. The words are "in every case whatever." It is very hard to limit those words. Assuming that the plaintiff could have done either of the two things the learned Chief Justice refers to, viz. that he could have appealed direct to the Supreme Court—and probably he could under sec. 133—or that he could have asked for leave to be reserved to him to apply for judgment on the findings, how could the existence of both these rights deprive him of the right given to him under sec. 96? In the case cited to us by Mr. McArthur of *Handley* v. *London, Edinburgh, and Glasgow Assurance Co.* (1), after a trial before the Commissioner of the City of London Court and a jury, an application was made for a new trial on a point which was not taken at the trial at all. It was assumed

(1) (1902) 1 K.B., 350.

at the trial that, if the jury found the facts in favour of the plaintiff, judgment should be entered for him, and as a matter of fact judgment was entered for the plaintiff. As a matter of law judgment should have been entered for the defendant on a point which was not taken at the trial. The application for a new trial having been refused, on appeal to the King's Bench Division a new trial was ordered. Lord *Alverstone* C.J. said (1): "If the parties desire to come straight to this Court by way of appeal from the judgment of the County Court Judge they must take the point of law at the trial." (That is apparently not the case under this Statute; at any rate it is not so clear). "If they desire to apply to the County Court Judge for a new trial on the ground of misdirection they are entitled to do so, even though they have not interposed in the course of the summing up; and upon his refusal to grant a new trial they are entitled to appeal to this Court. Speaking for myself, I think the latter is the better course to adopt." It appears to me upon the proceedings in this case that the plaintiff was manifestly entitled to ask the Judge of the County Court to entertain his application for a new trial.

Then the next question is whether the County Court Judge ought to have granted the application. That raises a question of great interest, but of not much difficulty. The contention on behalf of the defendant, the respondent to this appeal, is that a constable of police has the same right to arrest on suspicion of a felony committed in a foreign country, or at any rate in another part of the British Dominions, as he has on suspicion of a felony committed in Victoria or another State of the Commonwealth. In support of that contention some ancient authorities—very respectable authorities—were cited, which would deserve great attention if there were no more to be said about the matter. In particular, reference was made to *Chitty's Criminal Law* and *Oke's Magisterial Synopsis*, which contain passages which warrant that contention. We had a very interesting argument before us with respect to the foundation of the law of extradition. There can be no doubt that it was assumed for many centuries that a sovereign State could extradite

(1) (1902) 1 K.B., 350, at p. 351.

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to another country a foreigner found within its territories for an offence committed within the other sovereign State. That power was frequently exercised. A very interesting history of the laws of extradition is given in the *Encyclopædia of the Laws of England*, vol. v., p. 264, to which we have been referred. The earliest case mentioned was in the time of the Roman Republic, and an instance is given as early as 266 B.C. Again, nations of Europe at various times have made treaties with one another on the assumption of such a power, but there is no instance except one referred to by *Heath* J. in *Mure* v. *Kaye* (1) as having occurred in the time of Lord *Loughborough*, in which such power was exercised. The earliest treaty of extradition in later times made by Great Britain was that with the United States of America in 1794, which contained express provisions for the extradition of criminals, but it was thought necessary to validate that treaty by an Act of Parliament, viz., 37 Geo. III., c. 97, passed specially for the purpose. The case of *Mure* v. *Kaye* (1) in 1811 was after that treaty, but in it neither the treaty nor the Statute was referred to. In the course of that case observations were made—particularly by *Heath* J.—to the effect that a magistrate may probably issue a warrant for the arrest of a person charged with an offence committed in a foreign country. But in that case the question arose as to an offence committed in England by a person who had gone to Scotland and been arrested there. Those statements are, after all, mere dicta, and the case did not proceed upon that ground at all. Later it seems to have become recognized that the power, if it existed, could not be used to the detriment of an individual. The Attorneys-General expressed that opinion in the eighteenth century, in the cases referred to in the *Encyclopædia of the Laws of England*, vol. v., p. 267, and in the nineteenth century Attorneys-General expressed views in 1836 to the effect that the laws of England did not warrant the extradition of foreign convicts wrecked on the Bahamas, and in 1854 *Sir A. Cockburn* and *Sir R. Bethel* gave an opinion to a similar effect as to deserters from a foreign public vessel. Those were the opinions of the law officers. There was a later treaty for extradition with the United States of America, viz., in

(1) 4 Taunt., 35.

1843, and in the following year one with France, but both those treaties were expressly validated by Statute, the former by 6 & 7 Vict. c. 76, and the latter by 6 & 7 Vict. c. 75.

In the face of the current of these authorities and of the course of legislation followed by the *Extradition Acts* and the *Fugitive Offenders Acts*, the former applying between Great Britain and foreign countries, and the latter between different parts of the British Empire, it is impossible to hold that the liberty of individuals can now be interfered with without the sanction of municipal law. In a case before the Privy Council, *Walker* v. *Baird* (1) it was contended that the Crown, having the power of making treaties, could, for the purpose of carrying out a treaty, sanction an interference with certain private rights without legislative enactment. The case was argued by the present Lord *Alverstone*, then Sir R. Webster, Attorney-General, and Lord *Herschell*, in delivering the judgment of the Court, said (2):— "The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law." In the face of those authorities there is nothing except the statement of a Judge of the Court of Pennsylvania in *Commonwealth* v. *Deacon* (3) that it was the practice in the English Colonies before there was any Statute in the nature of the *Fugitive Offenders Act* for one

(1) (1892) A.C., 491.
(2) (1892) A.C., 491, at p. 497.
(3) 10 Sergeant & Rawle (Pen.), 125.

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colony to surrender fugitive offenders from another colony. It is unnecessary to examine the origin of such a practice, or to inquire whether the practice was ever objected to, or whether anything in the nature of extradition between British colonies ever existed apart from Statute, in the face of the authorities to which we have been referred. In the modern authorities it is suggested even that the powers of extradition either to a foreign country or to a British possession cannot be exercised except in accordance with the laws which prescribe in detail the precautions to be taken to prevent unwarrantable interference with individual liberty. In my opinion extradition cannot be had in the one case or in the other without complying with the forms prescribed by those Statutes.

But, even if that proposition were true, it would by no means follow that any constable could set the law in motion—that this great prerogative power, supposed to be an incident of sovereignty, could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished.

There is therefore no authority in support of the defence set up in answer to the plaintiff's claim. The result is that the learned Judge of the County Court ought to have granted a new trial, and that the Supreme Court should have allowed the appeal from his refusal to do so. The appeal must therefore be allowed.

We granted special leave to appeal in this case for two reasons,—and no objection has been taken to our doing so. The first reason was that the denial of a suitor's right under the *County Court Act* 1890 to obtain a new trial under the circumstances I have set out, seemed to be a matter of considerable general importance. The Statute confers that right on every suitor who has not received justice in the most general terms. The other ground was that the right of a constable to arrest without warrant on suspicion of a felony committed outside the State or the Commonwealth was also a matter of importance.

BARTON J. This is an appeal from the judgment of the Full Court, delivered the 9th February last, dismissing an appeal from

an order of the County Court made by Judge Gaunt on the 14th September, 1904. By this order, the learned Judge had refused to grant a new trial of an action brought by the appellant against the respondent, which had come before him with a jury, and had arisen out of the following circumstances.

Brown, the appellant, was present in a Court of Petty Sessions during the hearing of cross summonses for assault, between himself and one Foote. After the hearing of the case Foote appears to have said something to Constable Lizars, the defendant and respondent, which excited his suspicion. Foote told Lizars that Brown had said that he did a "moon-light flit" from South Africa where he had "nicked" (which I suppose means stolen or embezzled) £400. This incited Lizars to look up the *Victorian Police Gazette*, where he found a description of a man resembling Brown, as he thought. There was apparently a photograph also which, Lizars thought, showed a resemblance to Brown. No doubt the *Police Gazette* also contained a statement that the subject of the description and photograph was wanted on a charge of having embezzled money in Natal. These circumstances seemed to Lizars to justify him in arresting Brown on suspicion of having committed a felony in Natal, and he did arrest Brown, and brought him before a magistrate, who discharged him. Brown thereupon brought a County Court action against Lizars based first on malicious prosecution, and secondly on false imprisonment. At the trial the first cause of action was abandoned, and the case rested upon the complaint of false imprisonment alone. The defence was that the defendant had arrested the plaintiff on reasonable suspicion of having committed a felony. The matter in evidence to sustain that defence consisted of the facts I have mentioned, and therefore the defence amounted to this, that facts which would justify a constable in arresting without a warrant a citizen of Victoria on suspicion of having committed a felony in Victoria, would be sufficient to justify the arrest without a warrant of a person coming here from another country on suspicion of his having committed a like offence in that country. The arrest being *primâ facie* a trespass would entitle the plaintiff to a verdict unless legally justified, so that it was incumbent upon the defendant to establish his

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defence. Whether he has discharged that onus is a question to be determined after several technical questions have been dealt with.

The questions are really four in number, viz.: (I.) Was the matter a proper subject of a new trial motion in the County Court, *i.e.*, had the County Court Judge *power* to grant a new trial? (II.) If the power existed, was the County Court Judge wrong in refusing a new trial? (III.) If he was wrong, did an appeal lie to the Full Court? (IV.) If an appeal lay to the Full Court, were they wrong in dismissing it? A negative answer to any one of these questions would be fatal to this appeal.

I will refer now to some provisions of the *County Court Act* 1890 which will be seen to be of importance in answering these questions. The first is sec. 82, the material part of which is as follows:—"On answer being made in Court by the defendant the Judge, or the Judge and jury, as the case may be, shall proceed to try the cause and give their verdict without any formal joinder of issue." Then sec. 93 provides that, in case of trial by a jury, "when a verdict is given judgment shall be entered in accordance with the verdict." Sec. 31 provides that the registrar or deputy registrar "shall make entries in the register of all verdicts orders decrees and judgments" of the Court. Sec. 96 provides that "every judgment . . . shall be entered in the said register . . . and no other record thereof shall be necessary; and every such judgment except as herein provided shall be final and conclusive between the parties. But the Judge shall . . . in every case whatever have the power, and as often as he shall think fit, to order a new trial." Finally as to appeals, sec. 133, as amended by Act No. 1348, provides that:—"Any party to any action suit matter or proceeding in any County Court who shall be dissatisfied with any judgment decree or order of the said Court . . . may appeal from the same to the Supreme Court . . . and the Supreme Court shall decide the matter of such appeal and make such order therein as shall be just, and may either dismiss such appeal or reverse or vary the judgment decree or order appealed from, and may direct the cause to be re-heard before any Judge of the Supreme Court, but shall not in any case remit the cause for re-hearing before the Judge of the Court from which such appeal

shall have been brought . . . and every such appeal shall be in the form of a case," &c.

I think the first question—Had the County Court Judge power to grant a new trial?—may be disposed of in a few words. As in sec. 96 it is enacted that the Judge shall "in every case whatever have the power, and as often as he shall think fit, to order a new trial," is there anything else in the Act to limit the power so granted? I can find nothing. We have found no limit assigned either in the Act or in the arguments which have been addressed to us, nor have we been referred to any case in which a limit of any kind has been imposed on the exercise of that power as a result of judicial construction. It seems to me to result from those words that we must hold that the power existed in the present case, especially having regard to the strong and wide character of the words used.

As to the second question—Having the power to grant a new trial, was the County Court Judge wrong in refusing to grant one? What appears to have taken place at the trial was this:—The facts as I have described them having been given in evidence, the defence stated in answer to the Court was: "The defendant denies the assault and denies the false imprisonment. The defendant was at all material times a police constable. The defendant arrested the plaintiff in the execution of his duty as he had reasonable grounds to suspect that he (the plaintiff) had committed a felony."—It will be noticed that that defence is stated in the widest terms and without apparent limitation to the question involved.—"The defendant denies malice and alleges no want of reasonable and probable cause." The denial of malice need not trouble us now. The evidence having been gone into and having occupied several days, we come to the 24th August, 1904, and find those notes of the County Court Judge which are embodied in the special case stated for the Full Court. "I sum up. I tell the jury that the question is not one of the guilt or innocence of Brown but of the suspicion on which Brown was arrested being a reasonable suspicion." The learned Judge himself seems to have treated the case as if it were one depending upon the ordinary domestic law of justification for an arrest under the laws of the country in which the arrest takes place. The learned Judge then

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asked the jury four questions. [His Honor read the questions and continued.] The jury answered each of these questions in the affirmative, and, contingently upon a verdict being ultimately entered for the plaintiff, they assessed the damages at £20. The note of the learned County Court Judge then goes on:—"Reasonable and probable cause. Verdict for defendant with costs." In the first place was the defence set up good in law? I think it was not. The defence was the ordinary one of an arrest on reasonable suspicion that the person arrested had committed a felony, which, on its face, does not seem applicable to the facts of reasonable suspicion of a crime committed abroad under the circumstances now to be considered. Now, how do we know that embezzlement is a felony in Natal? Dealing with the matter apart from statutory provision, we have no proof given by the defendant of what the law of that colony is. Even if it were shown that the law there is British in its complexion, that is not enough. There are various distinctions between felonies and misdemeanours in the several British communities. In Victoria it is enacted that certain specified offences shall be felonies, and others misdemeanours. In New South Wales the distinction depends on whether the offence is punishable with penal servitude. While on the one hand we know of such variations between this and the neighbouring State of New South Wales, on the other hand we do not know that embezzlement is a felony in Natal. It may be mentioned that the plaintiff might have had a writ of *habeas corpus* under sec. 12 of the *Habeas Corpus Act* (31 Chas. II. c. 2), unless it could have been shown that he came within sec. 16 of that Act. It appears to be reasonably clear, and all the more because it never has been doubted, that Sec. 12 of that Act applies to all the Australian States, that is to say, that it applies to the arrest and taking away of a person in the Australian States, and I see no reason whatever to doubt that it is part of the law of England brought here at the time of the settlement of this colony, or, if not, that it is law here under 9 Geo. IV. c. 83, under which the laws and Statutes of England were made law here so far as applicable. There is a qualification to sec. 12 of the *Habeas Corpus Act*, viz., sec. 16, which provides that:—"If any person or persons at any time resiant in this realm shall have committed any capital offence in Scotland

or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this Act, anything herein contained to the contrary notwithstanding." This is the section to which reference was made in connection with some cases decided in England, but the words " capital offence " are no doubt used as a designation of felony, as all felonies at one time were capital offences, and it may be that they are used in that section in that sense. Even supposing that to be the sense of it, embezzlement would still have to be established to be a felony within the meaning of that section, and that is a felony according to the law of the place in which it is alleged to have been committed. But several English cases have been cited to us, viz., *R.* v. *Lundy* (1): *R.* v. *Kimberley* (2); *Mure* v. *Kaye* (3); and *East India Company* v. *Campbell* (4). Stephen, in his *History of the Criminal Law* (ed. of 1883), vol. II., p. 66, refers to the two cases last mentioned, and points out that the power assumed by the dicta in them, if it ever existed at common law, has been entirely superseded by subsequent legislation. He says:—"The law of England upon extradition is extremely modern, and lies in a very short compass:—There are only two English cases in which it was asserted, though even in those cases it was not decided, that a power of delivering up a person suspected of crime to a foreign nation demanding his surrender exists at common law. These are *East India Company* v. *Campbell* (4), and *Mure* v. *Kaye* (3). In *Mure* v. *Kaye*, the question arose upon the pleadings in an action for false imprisonment, part of which had been in Scotland, and Mr. Justice *Heath* observed, rather by way of illustration than because it was in any way necessary to the case, 'By the comity of nations the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to punishment,' and he mentioned a case in 'Lord *Loughborough's* time' in which

(1) 2 Vent., 314.
(2) 2 Stra., 848.
(3) 4 Taunt., 35.
(4) 1 Ves., 246.

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'it was held'—he does not say where or by whom—that the crew of a Dutch ship who had mastered the vessel and brought her into Deal might be sent to Holland. This faint trace of evidence of any such power existing by the common law has been entirely superseded by subsequent legislation"—no doubt by the *Extradition Act* and the *Fugitive Offenders Act.*

Sir Edward Clarke in his work on *Extradition* (4th ed.), has something to say about those cases at pp. 23, 24:—"As to the common law of England upon the duty of according extradition, five cases have been cited: *Rex* v. *Hutchinson*; *Rex.* v. *Lundy*; *Rex* v. *Kimberley*; *East India Company* v. *Campbell*; and *Mure* v. *Kaye.* Of these cases the first three do not touch the subject of extradition at all. . . . In the cases of *Lundy* and *Kimberley*, the only point decided was that Ireland came within the proviso of the *Habeas Corpus Act*, that persons accused of crime in any part of the King's dominions might be sent thither for trial. In neither of the other cases was a decision as to the legality of extradition necessary, but in each a very clear opinion was expressed. The case of the *East India Company* v. *Campbell* was tried in 1749, on the equity side of the Court of Exchequer, Lord Chancellor Hardwicke and Chief Baron Parker taking part in the decision. It was there laid down in the judgment of the whole Court, that the Government may send a prisoner to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals. Mr. Justice *Heath*, whose opinion on this point was given in *Mure* v *Kaye* (1811), was a Judge of very high reputation, and his dictum was not dissented from by the other members of the Court. He said:—'As to the first point, it has generally been understood that wheresoever a crime has been committed the criminal is punishable according to the *lex loci* of the country against the laws of which the crime was committed, and by the comity of nations the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to punishment. In Lord *Loughborough's* time the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal, and it was a question whether we could seize them and send them to Holland,

and it was held we might, and the same has always been the law of all civilised countries.'"

It is to be observed that this passage, while it speaks of the existence prior to Statute of the right of extradition, shows that in *R.* v. *Lundy* (1) and *R.* v. *Kimberley* (2), the only point really decided was that Ireland came within the proviso of the *Habeas Corpus Act*, and that persons accused of crime in any part of the King's Dominions might be sent thither for trial. The author places the origin of the assertion of the right "to send a prisoner to answer for a crime wherever committed" upon prerogative or governmental right. He makes this even clearer at p. 14 where he says:—"The surrender of fugitive criminals is an international duty. It may not be so plainly a matter of right that the refusal to grant it should subject a nation to the penalty of war, but such refusal is so clearly injurious to the country which refuses, and to the whole world, that it is a serious violation of the moral obligations which exist between civilised communities. In former times, the surrender was granted by a sovereign in virtue of his own prerogative; but the recent course of European legislation has been to restrain this prerogative, and to cast upon the legislature of a country the task of providing for the performance of this duty."

It will be seen that he adverts to the recent change in the course of European legislation, which restrains this prerogative and regulates its exercise on lines of strict law. We were referred to a passage, which is worth reading and is very applicable, in the *Encyclopædia of the Laws of England*, vol. v., at pp. 267, 268. "The English lawyers by the eighteenth century had come to the conclusion that the laws of England did not permit the arrest or surrender of fugitive offenders from foreign States. This is distinctly expressed by opinions of Attorneys-general in 1763, and in 1769; and from the case of *Count St. Germains* (3), this view seems to have been accepted by the executive. Similar views have been expressed during this century by Attorneys-general, *e.g.*, in 1836, when the Government was advised that it would be illegal to surrender to Spain even the worst of a shipload of con-

(1) 2 Vent., 314.

(2) 2 Stra., 848.

(3) 20 St. Tr., 1316.

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victs wrecked on the Bahamas; and a similar opinion was given in 1854 as to the seizure of deserters from a Russian public vessel. The dicta in *Mure* v. *Kaye* (1) have never been accepted as a safe guide, either to the Crown or the magistrate: *Clarke on Extradition*, 3rd ed., p. 26. There are dicta of *Blackstone*, 1 Com., 366, and *Chitty* (*Pleas of Crown*, ed. 1820, p. 49) to the effect that the Crown, by its prerogative, can expel even alien friends; but there does not seem to have been any attempt since the Revolution to exercise such prerogative, and the extrusion of alien friends has since then always been effected by statutory authority; and while in other States treaties and Acts have been regarded as merely regulating, internationally and municipally, the cases in which, and the conditions on which, offenders will be surrendered, the constitutional law of England admits indeed the treaty-making power of the Crown, but denies the treaty any extra-territorial validity without parliamentary sanction: *Walker* v. *Baird* (2), and does not permit the Crown, under any prerogative claim, to surrender fugitives in any case not warranted by Statute.

"So far as any matter can be established without direct judicial decision, this was settled in the *Creole Case* in 1841, when slaves on an American ship seized the ship and carried her into the Bahamas. Surrender of the slaves was demanded, on the ground that they had committed murder and piracy. Every lawyer in Parliament agreed that their surrender would be illegal; and when the Ashburton Treaty was passed in 1843, it was judged necessary to give it municipal validity by Statute (6 & 7 Vict. c. 76); and see Schedule 3 to the *Extradition Act* 1870, and *U.S.* v. *Rauscher* (3)."

As to the rights and duties of parts of the Empire *inter se*, in this regard, the present legislative power is in the Imperial Statute 44 & 45 Vict., c. 69, known as the *Fugitive Offenders Act* 1881. Before passing from that I should mention another passage in *Clarke on Extradition*, at p. 26, where he speaks of the cases cited by Mr. Robinson in his able argument. He says:— "Upon the authority of *East India Company* v. *Campbell* and *Mure* v. *Kaye*, it is laid down in *Chitty on the Criminal Law*,

(1) 4 Taunt., 35.
(2) (1892) A.C., 451.
(3) 119 U.S.R., 407.

(1826), that 'an English magistrate may also cause to be arrested, and committed for trial, any offender against the Irish law, or accused of having perpetrated a crime in a foreign country' (p. 14); and 'if a prisoner, having committed a felony in a foreign country, come into England, he may be arrested here and given up to the magistrates of the country against the laws of which the offence was committed' (p. 16). These opinions may have been correct, but they have ceased to be law now. If any magistrate were now to arrest a person on this ground, the validity of the commitment would certainly be tested, and, in the absence of special legislative provisions, the prisoner as certainly discharged upon application to one of the superior Courts."

It is not even asserted, much less proved, that the plaintiff's arrest took place in any such way as to entitle the defendant constable to the protection of the *Fugitive Offenders Act* 1881. There has not been any warrant, and the claim to be justified in arresting without one is in itself an abandonment of the protection of the Act. It is unnecessary therefore to discuss the question whether the charge before the magistrate of an embezzlement committed in Natal, without any proof that it is punishable as prescribed in sec. 9, would enable the arresting constable to rely on that provision of the Act. It seems to me that the law in this respect qualifies the exercise of the prerogative to this extent, that apart from the exercise of the treaty making powers and legislation hereupon, which is matter between the Empire and a foreign State, the statutory provisions which regulate municipally the arrest of foreign offenders, are the only provisions under which the defendant could have sought for justification, and he has not brought himself within them. It appears, then, that there has been, according to the Judge's notes, which are part of the special case, a verdict for the defendant quite indefensible in law. As sec. 96 of the *County Court Act* 1890 gives the Judge power to order a new trial "in every case whatever," why should he not have exercised that power in the present case? I do not find anything to show that the learned Judge ever considered the merits of the new trial motion. He appears to have dismissed it with the view of letting the question be determined by the Supreme Court on appeal. As to whether the findings of the jury in answer

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to the Judge's questions amounted to a verdict, I am on the whole of opinion that they did. There are two or three affidavits as to what happened at the trial, but I think we ought to be guided by the learned Judge's notes, and no doubt, according to them, a verdict for the defendant appears to have been given. The effect of the findings is this, that the defendant constable acted (I.) on information given him by a person who informed him that the plaintiff had admitted a "moonlight flit" from South Africa, where he had "nicked" or stolen £400; (II.) on a report in the *Victorian Police Gazette* of the embezzlement at Durban in Natal of £400; that the constable had on the information before him arrested the plaintiff "on suspicion of having committed such felony;" and in so doing he had entertained an honest belief, such as would operate on the mind of a reasonable man, in the truth of the statement he had received. If this was not a verdict at all there was of course a complete mistrial, such as under sec. 96 of the *County Court Act* 1890 would unquestionably be ground for a new trial—the only means provided by this Act for bringing about a proper result in such event. But taking it as a verdict, then it appears to me that it was evidently arrived at on a misdirection by the Judge, for it is scarcely possible that any jury could hear the questions put without coming to the conclusion that the Judge intended them to take from him as the law that embezzlement in Natal was a felony, in the sense that any officer of the Victorian police force, reasonably suspecting a person in Victoria of having committed embezzlement in Natal, was protected by the law in arresting that person. It being necessary that judgment should be entered in accordance with the verdict (sec. 93), and the making of such entry being the duty of the registrar (sec. 31), the Judge ordered such entry of judgment to be made. I am of opinion that as a matter of law he was wrong in directing judgment to be entered for the defendant on that verdict, because it was not in law a verdict for the defendant at all. Moreover in *Sheehan* v. *Park* (1) *Higinbotham* J. said:—"The direction of the Judge in this case may have tended to embarrass the jury," and he based his decision on the ground that a verdict against

(1) 8 V.L.R. (L.), 25, at p. 29.

the evidence had resulted from this cause. I should say, having reference to what appears to us to be the law, that the jury could not have been more embarrassed than they were by the way the Judge left the case to them, unless the learned Judge clearly intended to convey to them the view of the law, as to justification for arrest, which seems to us to be untenable. Where, as in the present case, the proceedings in the court of first instance have been either abortive or directed to the wrong question, it would be a denial of justice if we held that this appellant could not have redress.

So I come to the third question:—A new trial having been erroneously refused by the County Court Judge, did an appeal lie to the Supreme Court? Sec. 133 of the *County Court Act* 1890 is very strongly expressed. It says (leaving out the words which Act No. 1348 has eliminated):—"Any party to any action suit matter or proceeding in any County Court who shall be dissatisfied with any judgment decree or order of the said Court . . . may appeal from the same to the Supreme Court . . . and the Supreme Court shall decide the matter of such appeal and make such order therein as shall be just, and may either dismiss such appeal or reverse or vary the judgment decree or order appealed from, and may direct the cause to be reheard," &c. It is true there was a right in the plaintiff to appeal direct to the Supreme Court without going to the County Court Judge for a new trial. But, with great respect, I am unable to see that a prior resort to the Judge on new trial motion takes away the right to appeal against the refusal of a new trial. In *Sheehan* v. *Park* (1) the appeal was really based on the direction of the Judge of the County Court. That is what *Stawell* C.J. says. Although the appellant could here have gone direct to the Full Court by way of appeal, is he to be precluded from appealing against an erroneous order of the County Court Judge to whom he has gone for redress in the first instance? *Stawell* C.J. says (2): "It is a very unusual course to appeal directly from the verdict of a jury, without asking the Judge of the County Court to express his opinion as to whether there ought to be a new trial. But if the Act allows this to be done, this Court must entertain

(1) 8 V.L.R. (L.), 25.

(2) 8 V.L.R. (L.), 25, at p. 28.

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the appeal. The present *County Court Act* is an amendment of a previous Statute, and it, in effect, renders the verdict of the jury the judgment of the Court, where it has not been set aside by the Judge. The appeal is given in general terms from the judgment of the Court. It is, therefore, necessary for this Court to give its decision on that judgment, although it is deprived of the advantage of having the reasons which the Judge might have given, if he had been applied to, and deemed it right to refuse an application for a new trial. The appeal is really based on the direction of the Judge." Now, in the case of *Caffyn* v. *W. Howard Smith & Sons Ltd.* (1), it was decided that an appeal lies to the Supreme Court from orders of the County Court interlocutory or final, and therefore that an order of the County Court Judge granting a new trial is the subject of an appeal. Many years before it had been held in *Cooper* v. *Higgins* (2), that such an order was not the subject of an appeal, because the granting of a new trial is not conclusive; but the later opinion of the Court, which I see no reason for questioning, goes to the conclusion that all judgments or orders, whether final or interlocutory, may be the subject of appeal. If that be so, I do not see how the conclusion can be escaped that the order of the Judge refusing a new trial is a fit subject for appeal to the Full Court, and therefore I am of opinion that an appeal did lie to the Full Court. But it is objected on the part of the respondent that the appellant's objection to the view of the law put forward by the learned Judge was taken too late. It was taken at the time of the trial, but after the findings of the jury. On this question a conclusive authority exists in the case of *Handley* v. *The London, Edinburgh and Glasgow Assurance Co.* (3). There the objection to the direction of the Commissioner of the City of London Court had not been taken during the course of the trial nor during the summing up, but was made for the first time upon the application for a new trial. The main ground was that the Judge had misdirected the jury. The new trial was refused by the County Court Judge, and an appeal was taken to the High Court. Lord *Alverstone* C.J. said (4): "In this case I think it is impossible to come to any other conclusion than that

(1) 18 V.L.R., 245; 13 A.L.T., 276.
(2) 6 V.L.R. (L.), 186.
(3) (1902) 1 K.B., 350.
(4) (1902) 1 K.B., 350, at p. 351.

there has been a serious misdirection by the Judge at the trial. He seems to have led the jury to think that circumstances which would clearly justify the dismissal of the plaintiff from his employment might be treated as not justifying it because of certain other matters which had no connection with them at all." (I may add that that case so far is parallel to the case we are now considering.) "The case must therefore go back for a new trial. I wish to add a few words with respect to what I understand to be the law and practice relating to applications in this Court for new trials in the County Court. If the parties desire to come straight to this Court by way of appeal from the judgment of the County Court Judge they must take the point of law at the trial. If they desire to apply to the County Court Judge for a new trial on the ground of misdirection, they are entitled to do so, even though they have not interposed in the course of the summing up; and upon his refusal to grant a new trial they are entitled to appeal to this Court. Speaking for myself, I think the latter is the better course to adopt, for I do not think it is a prudent thing, and certainly not in the interests of the orderly conduct of the trial, that there should be constant interruptions of the Judge whose duty it is to direct the jury. Mr. Giveen has contended that it is a condition precedent to an application to the County Court Judge for a new trial on the ground of misdirection, and *à fortiori* to an appeal to this Court from a refusal by the County Court Judge to grant a new trial on the ground of misdirection, that the objection to the direction should have been taken at the trial. I do not understand that to be the law. The case of *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1), upon which he relied, I understand to have been a case in which the parties objecting to the direction, instead of applying to the County Court Judge in the first instance for a new trial, came direct to this Court by way of appeal from the Judge at the trial, which is not the case here." From this case and *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1), there cited, it appears that, if the plaintiff here had appealed direct to the Supreme Court of Victoria instead of going first to the County Court Judge to ask for a new trial, the point that he had taken

(1) (1898) 1 Q.B., 314.

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his objection too late would probably have been arguable. In that view he has been prudent in going first to the County Court Judge.

The fourth question is this:—It being clear that an appeal lay to the Supreme Court from the refusal of a new trial, were their Honors in error in dismissing it? To my mind this question is involved in the prior one already discussed, namely, whether a new trial should have been granted by the County Court Judge. As I think it should, I must come to the conclusion that the Supreme Court should have allowed the plaintiff's appeal to them. This appeal should, therefore, in my opinion, be sustained, and a new trial ordered.

O'CONNOR J. It is quite clear that a constable of this State cannot justify an arrest without warrant on the ground that he had a reasonable suspicion that the person arrested had committed a felony in South Africa. Mr. Robinson relied on several authorities, amongst them a passage in *Oke's Magisterial Synopsis*, which appeared to support his contention, but the modern authorities do not support that view, and it can no longer be taken as a correct statement of the law. The duty of arrest and surrender of fugitive offenders from other countries is, as pointed out in *Clarke on Extradition*, a matter of international duty, that is, a duty to be carried out by the Executive. Its origin is in the power of the Executive—the prerogative power, as it is called, in accordance with the comity of nations to surrender fugitives from justice to their own State. In modern times, no doubt, the executive government has always had conferred on it powers from Parliament to *regulate* the performance of that international duty. But it has never been decided that the power has been absolutely taken away from the executive government to exercise that prerogative right on fitting occasions. No doubt the tendency of modern times has been to regulate the right of arrest by Statute as almost every other like power is regulated.

But it is not necessary, it appears to me, for us to express an opinion on the large question raised as to the right of a constable to arrest a fugitive offender from the justice of another State, where the Statute law has given no express authority in that

behalf, and there has been no express direction of the Executive. The defence here rests within much narrower limits. The constable admits that he had no warrant, but justifies the arrest on the ground that he had the same right to arrest the plaintiff on suspicion of having committed a felony in South Africa, as he would have had to arrest a person on suspicion that he had committed a felony in Victoria. All arrests without warrant are a derogation from the policy of the common law, and from the provisions of *Magna Charta*. There are some derogations from *Magna Charta* and from the principles of the common law which are rendered necessary by the circumstances of the occasion, as is pointed out in *Chitty's Criminal Law*, 2nd ed., vol. I., p. 12, where he says:—"It having been enacted by *Magna Charta*, that no one should be taken or imprisoned but by the lawful judgment of his peers or by the law of the land; it was, for some time, insisted that no one could be deprived of his liberty for any offence, until after the finding of a bill against him by a grand jury, which afforded probable evidence that he was guilty. All the deviations from this rule have been considered as encroachments on the common law. An exception was very early allowed to prevail, when a thief was taken in the *mainour*, that is, apprehended with the stolen goods actually in his possession. And it is now fully established, that in every case of treason, felony, or actual breach of the peace, the party may be arrested on suspicion, before any indictment is preferred against him." That is an exception of necessity to the principles of *Magna Charta*. Now, I think it must be evident that a person arresting a supposed criminal for a supposed offence in South Africa cannot have larger powers than if he was arresting a supposed criminal who is suspected of having offended against the laws of this State. Therefore we must see whether the rule under which the defendant acted can possibly apply to the circumstances of an arrest on suspicion of a felony committed outside Victoria. There must first of all be suspicion of a felony. The division under our law of offences into felonies and misdemeanours is purely arbitrary, and always has been so. The definition of "felony" given by *Coke* in *I. Inst.*, 39 (*a*), is as follows:—"Every crime the perpetrator of which is, by any Statute ordained to have judgment of life or member is a felony."

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The list of capital crimes has entirely altered since that definition, but the classification of offences into felonies and misdemeanours in British possessions is on analogous lines, and still depends to a large extent upon the punishment imposed upon the particular offence. How can it be possible to apply a law of that kind to an offence committed in a foreign country when, in the first place, the law of that country is a fact that has not been ascertained by the person making the arrest, and is not known in the State in which he is making the arrest, and when, in the second place, it is impossible that the arbitrary limit which is placed upon the term "felony" in that State can have any application to the criminal law of the foreign country? From the very nature of the limitation it appears that this authority to arrest without warrant on suspicion of a felony which would justify an arrest in this State, can have no application where the offence is committed outside this State, whether in a foreign country or in some other British possession. There are many cases in which an arrest can be made for an offence committed in another country, but then the ordinary course under the *Fugitive Offenders Acts* or the *Extradition Acts* must be followed. There is ample provision for carrying out these international agreements made between different British possessions or between the British Empire and foreign countries, in those Acts which provide a special procedure which must be followed. But these Acts, if they are applicable, have not been applied in this case, and on the principles of the common law I can see no justification whatever for this arrest.

The verdict for the defendant, therefore, was also without any justification. But the defendant says it is to be allowed to prevail, on the ground that the proper proceedings were not taken by the plaintiff to obtain a reversal of the decision in the County Court. I am not able to follow that reasoning, and I think that an examination of the sections of the *County Court Act* 1890 makes it plain that there is a remedy against the existence of this verdict which on the face of it is altogether opposed to law. I do not think it was disputed by Mr. Robinson that the Supreme Court of Victoria had, under sec. 133 of the *County Court Act* 1890, power to reverse the decision of

the County Court Judge refusing to grant a new trial. That appears quite apparent on the face of the section. Then we turn to sec. 96 of that Act, which gives the Judge of the County Court power to grant a new trial, and on its face that section seems to embrace every possible ground upon which a new trial could be ordered. It is quite true, as pointed out by Mr. Robinson, that the Judge cannot give effect to some merely whimsical idea of his own in granting a new trial. He must exercise a legal discretion. But, exercising a legal discretion, it would appear that every possible ground, upon which either upon appeal or new trial a verdict can be upset, is open to the consideration of the County Court Judge in ordering a new trial under sec. 96. He is given that power "in every case whatever." I cannot imagine a wider scope for the exercise of the power of granting a new trial.

The next question is, ought the County Court Judge under the circumstances to have exercised that power of granting a new trial? It is quite clear that, if the verdict was not in accordance with law, the Judge ought to have exercised the power. The Judge's duty, where there is a trial by a jury, is set out in sec. 93 of the *County Court Act* 1890. The verdict is to be given by the jury, and can be given by the jury only. Sec. 93 provides that:— "When a verdict is given judgment shall be entered in accordance with the verdict, subject to the provisions of reservation of judgment new trials and non-suit herein contained." It is not necessary in every case that the jury shall find in so many words for the plaintiff or the defendant. I presume that in the County Court, as in other Courts, the jury may find specially in such a way as amounts in law to a verdict for the plaintiff, or for the defendant, leaving it open for the parties or the Judge to arrange for judgment being entered upon the findings of fact by the jury. But it is quite clear that the verdict must be the verdict of the jury, and that there must be in the findings of the jury the materials of fact which will enable the Judge to legally enter judgment in accordance with the verdict either for the plaintiff or for the defendant. The Judge in this case entered judgment for the defendant. Let us now consider whether, upon the verdict of the jury, that was allowable in law. The findings of the jury

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amount to this, viz., to findings of facts which would be a justification for the arrest, if the arrest had taken place on suspicion of a felony committed in Victoria. But upon their face the findings show that the offence was not committed in Victoria, but in Durban, in South Africa. The jury also assessed the damages at £20. On those findings the defendant apparently moved to have judgment entered for him. It is said that the plaintiff was too late in taking the point that the verdict could not be entered for the defendant on those findings. I can see no foundation for that argument. Considering that the verdict was such that the defendant found it necessary to move that judgment should be entered for him, and made that motion, the plaintiff was entitled at that time to take the point that at law the findings amounted to a verdict for the plaintiff. Whether judgment should be entered for the plaintiff or for the defendant depended upon one question of law, and upon nothing else. That question of law was whether a constable was justified in arresting a person without warrant upon suspicion of having committed an offence in South Africa which, if committed in Victoria, would be a felony. If a constable was so justified, then on those findings the judge would have been entitled to enter judgment for the defendant. On the other hand, if the findings on their face amounted to no justification for the arrest, and it appearing on those findings that the constable had made the arrest, there was no other course open for the Judge than to enter a judgment for the plaintiff. Therefore the entry of judgment for the plaintiff or defendant depended entirely upon that question of law. The view the Judge took was that the constable was so justified, and he entered judgment for the defendant. We have held that that view of the law is wrong, that there was no justification for the judgment on those findings of the jury, and therefore the Judge ought to have entered judgment for the plaintiff. Having entered judgment for the defendant, and not having set the matter right on the application for a new trial, it was open to the party aggrieved to go to the Supreme Court to have it set right there. The Supreme Court having dismissed the plaintiff's appeal, it seems to me we have no other course open to us than to hold that the Supreme Court was wrong

in refusing to interfere with the order of the County Court Judge refusing a new trial, and therefore that a new trial should be granted.

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Appeal allowed. Orders appealed from discharged and new trial granted. Respondent to pay costs of motion for new trial, of appeal to Supreme Court, and of this appeal. No costs of former trial.

Solicitors for appellant, *Maddock & Jamieson*, Melbourne.
Solicitor for respondent, *Brent Robinson*, Melbourne.

B. L.

END OF VOL. II.