[HIGH COURT OF AUSTRALIA.]

McKELVEY . . . . . APPELLANT;

AND

MEAGHER . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 19, 20, 21, 24.

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

Fugitive Offenders Act 1881 (44 & 45 *Vict. c.* 69), *secs.* 3, 5, 6—*Application of Act to States of Commonwealth—Power of Commonwealth Parliament to deal with fugitive offenders—The Constitution, secs.* 51 (xxix.), 108—*Offence committed partly outside Colony—Jurisdiction of Parliament of Colony—Statement of offence in indorsed warrant—Evidence.*

Unless the Commonwealth Parliament has under the Constitution power to make laws such as are referred to in sec. 32 of the *Fugitive Offenders Act* 1881, or to legislate generally as to the surrender of fugitive offenders between the Commonwealth and other parts of the British Dominions, the establishment of the Commonwealth has had no effect whatever upon the position and authority of the States with regard to that Act.

Semble, the Commonwealth Parliament has under sec. 51 (xxix.) of the Constitution power to legislate generally as to the surrender of fugitive offenders from other parts of the British Dominions.

Whether the Commonwealth Parliament has such power or not, the *Fugitive Offenders Act* 1881 was at the date of federation a law in force in each of the Colonies of Australia, and, by virtue of sec. 108 of the Constitution, remains in force until the Commonwealth Parliament makes provision in that behalf, and should therefore be interpreted as though there had been no federation.

Held, therefore, that the Governor, the Judges, and the magistrates of Victoria can exercise in Victoria jurisdiction under the *Fugitive Offenders Act* 1881 notwithstanding federation.

Sec. 76 of Law No. 47 of 1887 of the Colony of Natal provides that :—"If any person who is adjudged insolvent or has his affairs liquidated by arrangement after the presentation of an insolvency petition by or against him or the commencement of the liquidation or within four months before such presentation or commencement quits Natal and takes with him or attempts or makes

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preparations for quitting Natal and for taking with him any part of his property to the amount of £20 or upwards which ought by law to be divided amongst his creditors he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of an offence punishable with imprisonment for a time not exceeding two years with or without hard labour."

Held, that such law was not *ultrâ vires* the Colony of Natal.

An indorsed warrant sufficiently mentions, within the meaning of sec. 5 of the *Fugitive Offenders Act* 1881, the offence with which an alleged fugitive offender is charged, if the charge is substantially sufficient according to the law of the State where the warrant was issued.

The Attorney-General of Natal having certified that "the crime of contravention of sec. 76 of the *Insolvency Law* No. 47 of 1887 . . . is punishable in the Colony of Natal," &c.:

Held, that an indorsed warrant which alleged that the defendant had committed "the crime of contravening sec. 76 of Law 47, 1887, (Natal)," was sufficient to give a magistrate in Victoria jurisdiction to commit the defendant to prison to await his return to Natal.

The persons whose duty it is to administer the *Fugitive Offenders Act* 1881 in the part of the British Dominions where an alleged fugitive offender is arrested, must ascertain as best they can the law of the State from which such fugitive has come.

Depositions made in Natal in proceedings instituted in that Colony, which are the basis of a criminal charge there against a person who has come to Victoria, may be received in evidence before a magistrate on proceedings under the *Fugitive Offenders Act* 1881 to have that person sent back to Natal, there to be tried on that charge.

Decision of Supreme Court (*In re McKelvey*, (1906) V.L.R., 304; 27 A.L.T., 198), affirmed.

APPEAL from the Supreme Court of Victoria.

William Alexander McKelvey was apprehended on a provisional warrant on 5th November 1905, in Melbourne, brought before a justice of the peace, and remanded from time to time to appear at the City Court up to the 2nd February 1906, when he was charged, before J. A. Panton, Esq., a police magistrate of the State of Victoria, on a warrant purporting to bear at foot the signature of Percy Binns, who described himself as "Chief Magistrate, Durban, Natal." This warrant was in the following terms:—"To all constables and officers of the law proper for the execution of criminal warrants. Whereas, from information

taken on oath on the 19th day of October 1905 and succeeding dates, there is reason to believe that William A. McKelvey did commit the crime of contravening sec. 76 of Law 47, 1887 (Natal). These are therefore to command you in His Majesty's name to apprehend the person of the said William A. McKelvey, and bring him before me to be dealt with according to law. Given under my hand, at Durban, this 7th day of December 1905." The warrant was also sealed with a seal bearing the inscription "Resident Magistrate's Department, Durban." There were three indorsements on the warrant. The first described the alleged criminal. The second purported to bear the signature and to have affixed thereto the seal of the Colonial Secretary of Natal, Charles J. Smythe, and was as follows:—"I, Charles John Smythe, Colonial Secretary of Natal, do hereby certify that the signature, 'Percy Binns,' appended to this warrant is in the proper handwriting of Percy Binns, who is Chief Magistrate for the Division of Durban, in the Colony of Natal, and as such is authorized to issue warrants of arrest in terms of the provisions of the *Fugitive Offenders Act* 1881. Given under my hand and seal of office at Pietermaritzburg, Natal, this 8th day of December 1905." The third indorsement was dated 18th January 1906, and signed by Sir John Madden, the Chief Justice of the State of Victoria. It was addressed to all members of the police force of Victoria, and to all persons to whom the warrant for the apprehension of McKelvey was originally directed, and proceeded:—"Being satisfied that the said warrant was issued by some person having lawful authority to issue the same, I, John Madden, Chief Justice of the Supreme Court of the State of Victoria, do hereby indorse such warrant, and do hereby authorize and command all or any of the persons named herein in His Majesty's name forthwith to apprehend the above-named William Alexander McKelvey, and bring him before one of His Majesty's justices of the peace in and for the Central Bailiwick of the said State, there to be dealt with according to law."

On the 2nd February 1906 evidence was adduced before Mr. Panton that he had a jurisdiction in the State of Victoria similar to that exercised by a magistrate of the Bow Street Police Court in London, and the further hearing was adjourned until

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9th February, when Mr. Panton, after overruling a number of objections raised by McKelvey's counsel to the legality of the proceedings, and to the admissibility of certain evidence tendered for the prosecution, which objections are hereafter sufficiently referred to, issued a warrant of commitment, under which McKelvey was delivered and received into the custody of the keeper of the Melbourne Gaol, there to await his return to Durban. This warrant was given under Mr. Panton's hand and seal, and therein he described himself as a police magistrate in and for the State of Victoria and a justice of the peace of and for every bailiwick in the said State, and as having the like jurisdiction as one of the magistrates of the Metropolitan Police Court in Bow Street. It recited that William A. McKelvey (hereinafter called the accused) was brought before him on a warrant duly issued by Percy Binns, Esquire, Chief Magistrate for the Division of Durban in the Colony of Natal, and indorsed by Sir John Madden, one of the Judges of the Supreme Court of the said State of Victoria, pursuant to the *Fugitive Offenders Act* 1881, charged with having committed an offence to which Part I. of the said Act was applicable, viz., that the said William A. McKelvey did commit the crime of contravening sec. 76 of Law 47, 1887 (Natal). It further recited that the warrant so indorsed was duly authenticated, and such evidence of the criminality of the accused was produced before him, as, subject to the provisions of the said Act, according to the law ordinarily administered by him, raised a strong and probable presumption that the accused did commit the offence mentioned in the warrant, and the said offence was one to which Part I. of the *Fugitive Offenders Act* 1881, applied.

McKelvey having been committed to prison under this warrant, a *habeas corpus* was obtained directed to the keeper of the Melbourne Gaol, requiring him to bring up the body of McKelvey. On the return of the *habeas* before the Full Court of the Supreme Court of Victoria, McKelvey was remanded to prison to await his return to Natal (*In re McKelvey*) (1).

The other material facts are fully set out in the judgments hereunder.

(1) (1906) V.L.R., 304; 27 A.L.T., 198.

McKelvey now appealed to the High Court on the grounds :—

1. That the Full Court was wrong in holding and adjudging that J. A. Panton, Esq., a police magistrate of the State of Victoria, had jurisdiction under the *Fugitive Offenders Act* 1881, or at all, to commit the said appellant to prison, the said J. A. Panton not being a magistrate of a British possession within the meaning of the said Act.

2. That the said Court was wrong in holding and adjudging that the warrant, issued in Natal, to apprehend the appellant in Victoria, was duly indorsed as required by sec. 3 of the *Fugitive Offenders Act* 1881, and that the said warrant, being indorsed by Sir John Madden, Chief Justice of the Supreme Court of Victoria, was indorsed by a Judge of a superior Court of a British possession within the meaning of the said Act.

3. That the Acting Chief Justice and Mr. Justice *à Beckett* were wrong in holding and adjudging that the warrant, which stated that the said appellant did commit the crime of contravening sec. 76 of Law 47, 1887 (Natal), did mention an offence within the meaning of the said Act.

4. That the said Full Court was wrong in holding and adjudging that the offence with which the said appellant was charged in the said warrant fell within sec. 9 of the said Act, and that the creation of such offence was not *ultrâ vires* the legislature of Natal.

5. That the said Court was wrong in holding and adjudging that the said warrant was duly authenticated as required by the said Act.

6. That the said Court was wrong in holding and adjudging that the depositions read herein were duly authenticated as required by the said Act.

7. That the said Court was wrong in holding and adjudging that what purported to be a certificate of the Attorney-General of Natal, certifying to the law of Natal, was evidence in Victoria of such law, and was duly authenicated as required by the said Act.

8. That the said Court was wrong in holding and adjudging that what purported to be a statement of one David Calder appearing in the depositions was evidence in Victoria of the law of Natal.

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9. That the said Court was wrong in holding and adjudging that the case for the prosecution raised a strong and probable presumption that the appellant committed the offence mentioned in the warrrant.

Arthur, for the appellant. The police magistrate had no jurisdiction to deal with this matter, nor had the Chief Justice of Victoria jurisdiction to indorse the warrant, because, on the passing of the *Commonwealth of Australia Constitution Act*, Victoria ceased to be a "British possession" or "a part of His Majesty's dominions" within the meaning of the *Fugitive Offenders Act* 1881. The effect of the definitions in sec. 39 of the latter Act is that the Commonwealth is now a "British possession," being under one "central legislature." The meaning of the words "central legislature" is to be determined at the time the *Fugitive Offenders Act* was passed. At that time the Dominion of Canada had been established, and if the Dominion then satisfied the definition of a "British possession," and its legislature satisfied the definition of a "central legislature," so do the Commonwealth and its legislature satisfy these definitions.

[GRIFFITH C.J.—Suppose the central legislature has nothing to do with police, as is the case with the Commonwealth?]

The *Fugitive Offenders Act* is not merely a police Act, it deals with external relations, and power as to external relations is expressly given to the Commonwealth by the Constitution.

[GRIFFITH C.J.—In Canada the Dominion Parliament has jurisdiction as to criminal matters, and the power not specifically granted to the Provinces is vested in the Dominion. In those respects Canada differs from Australia.]

But the constitution of criminal Courts and procedure in criminal matters was vested in the Provinces: See *British North America Act* 1867, secs. 91, 92 (14). Further, in New Zealand there was a case of the residuum of powers not being vested in the central legislature: See *New Zealand Constitution Act* 1852 (15 & 16 Vict. c. 72), sec. 19. Power to deal with matters relating to fugitive offenders is conferred on the Commonwealth by the *Fugitive Offenders Act* 1881. The intention of the *Fugitive Offenders Act* was that the persons who were to exercise authority in a British possession should be under the control

of the Government of that possession. If there is not an officer of the Commonwealth who comes within the category of those officers who have jurisdiction under the Act, there is power under secs. 30 and 32 to appoint an officer to exercise the jurisdiction. The Commonwealth Parliament has by the *Extradition Act* 1903 in so many words exercised the power given by sec. 18 of the *Extradition Act* 1870, assuming that it is a British possession within the meaning of that Act, and the meaning of "British possession" is the same in the *Extradition Act* 1870 and in the *Fugitive Offenders Act* 1881. See also the Proclamation of 7th March 1904, proclaiming the *Extradition Act* 1903; *Medical Act* (1886) *Amendment Act* 1905 (5 Edw. VII. c. 14), sec. 27; *Interpretation Act* 1889 (52 & 53 Vict. c. 63), sec. 18.

[GRIFFITH C.J.—There appears to be a dilemma. If the Commonwealth Parliament has no power to deal with fugitive offenders, then it is not a "central legislature" within the meaning of the *Fugitive Offenders Act* 1881. If the Commonwealth Parliament has power to deal with the matter, the law previously existing in each of the States is preserved by sec. 108 of the Constitution until the Commonwealth Parliament deals with the matter and it has not yet done so. In either case each State remains a "British possession."]

Sec. 108 does not have that result. The *Commonwealth of Australia Constitution Act* does not expressly repeal the *Fugitive Offenders Act* 1881, and the two Acts, both of which are Imperial Acts, are not inconsistent with one another, and therefore the latter Act would continue in force notwithstanding the passing of the former. But the circumstances arising out of the passing of the former Act render the term "British possession," which had theretofore been applicable to each of the States, applicable only to the Commonwealth.

[On this point counsel also referred to *Commonwealth of Australia Constitution Act*, sec. viii.; *In re Willis* (decided in Western Australia) and *In re Small* (decided in Queensland), referred to in *Commonwealth Law Review*, vol. III., Part I., pp. 14, 17; *In re Gerhard* (1); *Ilbert's Legislative Methods and Forms*, pp. 276, 349*n*; *British North America Act* 1867, sec. 132;

(1) 27 V.L.R., 244, 655; 23 A.L.T., 127, 181.

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Quick and Garran's Constitution of the Australian Commonwealth, p. 378; *Colonial Solicitors Act* 1900 (63 & 64 Vict. c. 14); *Colonial Probates Act* 1892 (55 & 56 Vict. c. 6), sec. 4 (3); *Ex parte Worms* (1), referred to in *Lefroy's Legislative Power in Canada*, p. 218; *Moore on Extradition*, p. 627; *Commonwealth Law Review*, vol. II., p. 278; *Biron and Chalmers on Extradition*, p. 130; *Clark's Australian Constitutional Law*, 1st ed., pp. 19, 20; *Dartmouth College* v. *Woodward* (2); *Harrison Moore's Commonwealth of Australia*, p. 67; *Documentary Evidence Act* 1868 (31 & 32 Vict. c. 37), sec. 5; *Colonial Prisoners Removal Act* 1884 (47 & 48 Vict. c. 31), sec. 18.]

If Victoria has ceased to be a "British possession" and the Commonwealth has become a "British possession," then a Victorian police magistrate does not satisfy the words of secs. 4 and 5 of the *Fugitive Offenders Act* 1881. The magistrate, under those sections, must exercise his powers by virtue of Commonwealth laws. See also secs. 26 and 32.

The offence indicated by the law of Natal is one which the language of the *Fugitive Offenders Act* 1881 excludes from its operation. Under secs. 2 and 9 of the latter Act the offence must be completed before the fugitive left the place where it is said to have been committed, and whether the offence is the quitting Natal or the subsequently becoming insolvent it was not completed until after the appellant had left Natal. When the appellant left Natal no warrant could have been issued against him on this charge because he had not then been made insolvent. See *Ex parte Reggel* (3); *In re Mohr* (4); *State* v. *Hull* (5); *In re Sultan* (6); *Moore on Extradition*, p. 937; *Quick and Garran's Constitution of the Australian Commonwealth*, p. 619.

It is *ultrâ vires* the legislature of Natal to render criminal this particular act. A Colonial legislature cannot render criminal an act which is not completed within its territorial limits: *Macleod* v. *Attorney-General for New South Wales* (7). When the appellant was made insolvent, which is the essence of the offence, he

(1) 2 Cartwright, 315.
(2) 4 Wheat., 528.
(3) 114 U.S., 642, at p. 651.
(4) 49 Amer. Rep., 63.
(5) 44 Amer. State Rep., 501.
(6) 44 Amer. State Rep., 433.
(7) (1891) A.C., 455, at p. 457.

was not amenable to the criminal law of Natal. The warrant does not mention the offence which it is alleged that the appellant committed as is required by sec. 5 of the *Fugitive Offenders Act* 1881. A warrant in this form would be bad according to Victorian law and, in the absence of evidence, the presumption is that, according to the procedure in Natal, it would also be bad. The best that can be said of this warrant is that it mentions several offences, one or more of which the appellant is said to have committed. There should be, at any rate, substantial indications of the nature of the crime: *Ex parte Terraz* (1); *Ex parte Krans* (2); *R.* v. *Despard* (3); *Ex parte Reggel* (4); *In re Fishenden* (5); *In re Ryan* (6); *Castro* v. *De Uriarte* (7); *Moore on Extradition*, p. 877.

There was no proper proof of the law of Natal. That law is in Victoria a matter of fact to be proved by experts. *Taylor on Evidence*, 9th ed., vol. II., pp. 936, 1064. The depositions are not evidence of that law, for they were taken in Natal in a proceeding instituted in Natal, where that law was not a question of fact, and therefore not a subject of evidence.

Irvine (with him *Wanliss*), for the respondent. In order to determine whether Victoria still is a "British possession" within the meaning of the *Fugitives Offenders Act* 1881, it is necessary to consider the general character of the jurisdiction conferred by that Act. It is an ex-territorial jurisdiction given in aid of the ordinary criminal jurisdiction of the Courts. It is ex-territorial so far as the different parts of the British dominions are mutually concerned. The magistrates in one part of the dominion are given a jurisdiction which is part of their judicial jurisdiction to determine whether there is a *primâ facie* case of an offence having been committed in another part of the dominion. In that respect the exercise of jurisdiction under that Act is necessarily connected with the administration of the ordinary criminal jurisdiction. Therefore, where there is a union of several parts of the dominion under one legislature, in order to determine whether that

(1) 4 Ex. D., 63.
(2) 1 B. & C., 258.
(3) 7 T.R., 736.
(4) 114 U.S., 642.
(5) 4 V.L.R. (L.), 143.
(6) 8 V.L.R. (L.), 327.
(7) 16 Fed. Rep., 93.

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merges the several parts into one for the purpose of that Act, the Court has to consider whether under the Constitution which brought about that union the criminal jurisdiction has passed to the central legislature. Sec. 9 of the *Fugitive Offenders Act* 1881 assumes that in any particular "British possession" in question there is uniform criminal law. In construing the Constitution in connection with that, we have the fact that there is no general criminal law for the Commonwealth, although the Commonwealth may create offences and legislate as to their punishment. The "central legislature" referred to in the *Fugitives Offenders Act* 1881 is a central legislature which has power to deal with ordinary criminal matters.

[GRIFFITH C.J.—Sec. 32 assumes that a central legislature has power to legislate as to certain matters. Does that section confer upon that legislature a new power to legislate?]

No. It assumes that the central legislature to which it refers is one which already has those powers, that is to say that it is a legislature which has a general power to regulate criminal law and procedure. It is doubtful whether the power conferred on the Commonwealth to deal with external affairs authorizes legislation dealing with extradition or fugitive offenders. Such a power could not authorize laws compelling magistrates in the Commonwealth to deliver up persons accused of crimes against the laws of other countries.

[GRIFFITH C.J.—The conveyance of such persons to those countries would need Imperial legislation.]

Sec. 108 of the Constitution does not affect the matter.

[GRIFFITH C.J.—The law of each State was that the Governor of the State and the magistrates of the State had a certain power. By virtue of sec. 108 that law remains in force until the Commonwealth Parliament exercises its power of legislation.

O'CONNOR J.—The practical result would be that the Constitution has to a certain extent altered the interpretation of the *Fugitive Offenders Act*.]

If the Commonwealth is a unit with respect to the *Fugitive Offenders Act*, Mr. Panton is a magistrate in the Commonwealth. Just as a by-law of a municipality is part of the law of Victoria so is a magistrate of Victoria a magistrate of the Commonwealth.

As to whether the offence was committed in Natal, that depends on the language of the Statute. The substantial crime created by sec. 76, Law 47, 1887 (Natal), is the doing an act with intent to defraud creditors. Everything else in the section relates to conditions or evidence. The substance of the offence is a thing done by the accused himself at the time or before he leaves Natal.

The warrant sufficiently states the nature of the offence. There is nothing inherently wrong in charging a man with more than one offence or with one or more of several offences. Although it may be a rule of procedure adopted here that a warrant must only charge one offence, there is no reason for applying that rule strictly to these proceedings. The real substantial question is—had the appellant an opportunity of knowing with what he was charged? *R.* v. *Despard* (1) is an authority for saying that this warrant is sufficient. See also *Ex parte Piot* (2); *Clarke on Extradition*, 4th ed., p. 90; *Grin* v. *Shine* (3).

As to the proof of the law of Natal, the statement that foreign law is to be proved as a question of fact is not universally true. In the hearing of ordinary matters which come before the Courts where one of the facts in issue involves foreign law, that foreign law must be proved as an ordinary fact is proved. But there are exceptions to that rule. For instance, where it is necessary to determine whether a will is a will within the meaning of the law of a foreign country, it is not necessary to prove the foreign law: *In re Klingemann* (4). The Court must inform itself in the best way it can what the foreign law is: *Powell on Evidence*, 7th ed., p. 284. In this case there is the official certificate by an officer who in the ordinary performance of his duty would be acquainted with what the law of Natal is.

Arthur, in reply, referred to *Sussex Peerage Case* (5); *In re Orton* (6); 23 & 24 Vict. c. 122; 12 & 13 Vict. c. 96, sec. 3; *Lefroy's Legislative Power in Canada*, p. 334; *R.* v. *Brierly* (7); *R.* v. *Plowman* (8).

Cur. adv. vult.

(1) 7 T.R., 736.
(2) 48 L.T. N.S., 120.
(3) 187 U.S., 181.
(4) 3 Sw. & Tr., 18.
(5) 11 Cl. & F., 85.
(6) (1896) 1 Q.B., 509, at p. 511 (*n*).
(7) 4 Cart., 665.
(8) 25 Ont. Rep., 656.

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GRIFFITH C.J. In this case the appellant was held under a warrant issued under the *Fugitive Offenders Act* 1881, ordering him to be returned to the British Colony of Natal to be tried for an offence against the criminial law of that Colony, which falls within the terms of the *Fugitive Offenders Act*. Objection has been taken to the warrant for his removal on various gounds, some of which go to the validity of the original arrest in Victoria, and others to the particular facts of the case. Some of the objections taken were important, and others were not. I will deal with the objections *seriatim*.

The first objection taken is, in substance, that, since the establishment of the Commonwealth, the State of Victoria is no longer a "British possession" or a "part of His Majesty's dominions" within the meaning of the *Fugitive Offenders Act*. That Act, which was passed in 1881, when the Commonwealth was not established or even thought of, provides by sec. 2 that:—"Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive." The Act then proceeds to prescribe the conditions under which a fugitive may be arrested, how the charge against him is to be investigated, and how he may be sent back to the part of the British dominions where he is accused of having committed the offence. When the warrant is brought from that part it may by sec. 3 be indorsed by a Judge of a superior Court, by a Secretary of State or a Bow Street magistrate in the United Kingdom, or by the governor of a British possession in that possession. Sec. 5 provides that:—"A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail) as if the fugitive were charged with an offence committed within his jurisdiction." By sec. 39 "magistrate" is defined as meaning in a British possession "any person having authority to issue a warrant for the apprehension of

persons accused of offences and to commit such persons for trial." That is qualified, perhaps, by sec. 30 which provides that:—"The jurisdiction under Part I. of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,— . . . . (4) In a British possession, by any Judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the Metropolitan Police Court in Bow Street, or by such other Court, Judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the Legislature of that possession." Certainly, to some extent, the definition of "magistrate" is qualified by that sub-section.

By sec. 39 it is also provided that:—"In this Act unless the context otherwise requires,—The expression 'British possession' means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and Isle of Man; all territories and places within Her Majesty's dominions which are under one legislature shall be deemed to be one British possession and one part of Her Majesty's dominions. The expression 'legislature,' where there are local legislatures as well as a central legislature, means the central legislature only." On that the argument is founded by Mr. Arthur that Victoria has ceased to be a "British possession" or "a part of His Majesty's dominions" within the meaning of that Act. Before dealing with that argument I will refer to sec. 32 which provides that:—"If the legislature of a British possession pass any Act or ordinance—(1) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or (2) For determining the Court, Judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or (3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise in the execution of this Act; or (4) In any manner for the carrying of this Act or any part thereof into effect in that possession—it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof shall, with or without

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modification or alteration be recognized and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act." Now, it will be observed that all those four matters are matters entirely within the jurisdiction of any legislature having anything in the nature of plenary powers of legislation. The first provision says, in effect, that the legislature of that part may renounce for that part the benefits of the Act as to any offence which it chooses to specify. The other three are also matters of internal administration. Sec. 32 therefore assumes that the legislature spoken of has power to deal with such matters, and I am of opinion that the expressions "British possession" and "legislature," as defined in sec. 32, must be considered from that point of view. I think a "central legislature," as distinguished from a "local legislature," means a central legislature which has power to deal with the subject matter of the Act—such matters as are involved in the administration of the Act, including the administration of justice within the possession. So that, if a new form of constitution is granted under which a new legislature—central, in one sense, it is true—is established, but with authority not extending to the criminal law or the extradition or rendition of fugitive offenders, then such legislature is not a central legislature within the meaning of the Act. Sec. 39 begins with the words " . . . unless the context otherwise requires." I think that the powers which such a legislature is assumed to be able to exercise show that the intention is as I have indicated. I cannot accede to the argument that sec. 32 was intended to create any new power in any particular legislature, because all the matters there referred to are within the ordinary powers of a legislature. I am, therefore, of opinion that unless the Commonwealth Parliament has power under the Constitution to make laws under sec. 32 of the *Fugitive Offenders Act* 1881, or to deal with the surrender of fugitive offenders between the Commonwealth and other parts of the British dominions, the establishment of the Commonwealth has had no effect whatever upon the position and authority of the State of Victoria with regard to this Act. I am disposed to think—although it is not necessary to express any definite opinion upon the subject—that the power conferred upon the Commonwealth Parliament

to make laws with respect to external affairs probably includes the power to pass the necessary laws to give effect to this Act. If it does not, then the establishment of the Commonwealth in no way affected the operation or administration of this Act in Victoria. If, on the other hand,—which I think is more probable —the Constitution does empower the Commonwealth Parliament to deal with the subject of the rendition of fugitive offenders, all difficulty is removed by the express words of sec. 108 of the Constitution, which declares that:—"Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State." Further, sec. 109 provides that:—"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." So that the appellant is in this dilemma: Either the Parliament of the Commonwealth has no power to deal with this matter, and therefore cannot be a "central legislature" within the meaning of the Act; or, if the Parliament of the Commonwealth can deal with this matter and may be a "central legislature," the existing law is preserved by sec. 108 of the Constitution, since the Commonwealth Parliament has not dealt with the matter so far as the surrender of fugitive offenders to other parts of the British dominions outside the Commonwealth is concerned.

It was contended that the administration of the *Fugitive Offenders Act* 1881 was not a law in force in Victoria at the time of the establishment of the Commonwealth within the meaning of sec. 108 of the Constitution. I can see no force in that contention. Amongst the powers possessed by the Governor, the Judges, and the magistrates of Victoria were powers under the *Fugitives Offenders Act* 1881, and the law which enabled them to exercise those powers was a law in force in Victoria, and, in my opinion, still continues a law there. I think, therefore,

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the decisions of the Supreme Court in Western Australia in *Ex parte Willis*, and of *Real* J., in Queensland in *In re Small* were erroneous, and that the decision of the Full Court now under appeal is right. I notice that one of the members of the last mentioned Court was of opinion that this decision only extends so far as the subordinate officers are concerned, and that the Governor-General, and not the Governor of Victoria, must sign the warrant for a fugitive's return. If the view I have stated is correct, the law of Victoria remains exactly the same as it was, and the power of the Governor of Victoria is exactly as it was before the establishment of the Commonwealth.

Another part of the contention for the appellant, depending on the same arguments, was that, assuming the Commonwealth to be one "British possession," the police magistrate in Melbourne was not a magistrate of that part of His Majesty's dominions—that is, of the Commonwealth. In sec. 3 the expression "Judge of a superior Court in such part" is used, and in sec. 4 "a magistrate of any part of Her Majesty's dominions." In my opinion, whenever either of these expressions is used it means a person who, in the place where the fugitive is found, has authority to exercise the function of a Judge or magistrate as the case may be. It is well known that the jurisdiction of a magistrate is generally limited as to locality, and I think a person who is *de facto* a Judge of any portion of the Commonwealth, or a magistrate having jurisdiction in any portion of the Commonwealth, is then a Judge or magistrate respectively of the Commonwealth within the meaning of the Act. That objection therefore fails.

The next objection turns upon the nature of the offence which is charged. The substance of the offence is that the appellant quitted Natal within four months before being adjudged insolvent, and took with him property of the value of more than £20 which should have been divided amongst his creditors. It is objected that it is not within the power of a subordinate legislature, such as that of Natal, to constitute that offence, for this reason, that the offence is not and cannot be committed within the Colony of Natal. It is said that a man cannot quit a Colony while he is within it, and therefore any Act creating such an offence is *ultra*

vires. For that *Macleod* v. *Attorney-General for New South Wales* (1) is relied on. But, to look at the matter from another point of view, it would be absurd to say that a man can quit a place while he is outside it. These are rather fine distinctions. The common sense view of the matter is that the act of quitting a place is done partly inside and partly outside the place. At any rate it is partly done within the place quitted, and so far as the acts done within the territory of a Colony are concerned, it is clearly within the jurisdiction of the legislature of that Colony to deal with the matter and to declare it to be an offence. In construing an Act to create such an offence that, I think, is the meaning to be given to the words. If a man does within the borders of the Colony such an act as results in his quitting that Colony, he is guilty of the offence against the Act. That objection therefore also fails.

The next objection is that when the appellant left Natal he had committed no offence because he had not then been adjudged insolvent, and was not adjudged insolvent until some time afterwards. That at first sight seems plausible. But it is necessary to have regard to the substance of the law rather than its form. The real nature of the offence is this, that a person who is in such a financial position, and has within the Colony done or suffered such an act that he is liable by law to be adjudged insolvent, leaves the Colony and takes with him property which should be divided amongst his creditors. The fact that he has not been actually adjudged insolvent is not material. The acts which the Colony has made an offence are completed so far as they rest with him. An illustration, which I think is perfectly analagous, is afforded by the case put in argument of manslaughter. A man does some act which results in the death of another, but which is not likely to produce that result. Shortly after the doing of the act the man leaves the State in which he did it. If the other dies within twelve months of the doing of the act, the man who did it is guilty of manslaughter, and if death does not result within twelve months he is not guilty. But it cannot be disputed that he who did the act would be liable to be taken back to the State where the act was committed though it might be uncertain for twelve

(1) (1891) A.C., 455.

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months, long after he had left the State, whether he had committed an offence at all. The illustration is entirely applicable. Therefore the alleged offence can be committed and is an offence within the section.

The next objection turns upon the form of the warrant. It is a singular form, and one which is not familiar to us in Australia. But I should think it is one which is possibly authorized in some part of His Majesty's dominions. We, however, do not know whether it is or not. The charge in the warrant brought from Natal is that the appellant committed "the crime of contravening sec. 76 of Law 47, 1887 (Natal)." That section is in the same familiar form as sec. 12 of the *Debtors Act* 1869 (32 & 33 Vict. c. 62) which appears in the Insolvency Acts of the different Australian States. It provides that:—"If any person who is adjudged insolvent or has his affairs liquidated by arrangement after the presentation of an insolvency petition by or against him or the commencement of the liquidation or within four months before such presentation or commencement quits Natal and takes with him or attempts or makes preparations for quitting Natal and for taking with him any part of his property to the amount of £20 or upwards which ought by law to be divided amongst his creditors he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of an offence punishable with imprisonment for a time not exceeding two years with or without hard labor." It is said that the charge of committing a crime against that section is open to the objection of duplicity, because the section covers more than one offence. In one sense, no doubt, the section does provide for more than one case; it provides for insolvency and for liquidation by arrangement, it also provides for quitting after or within four months before insolvency, and it not only deals with quitting but also with attempting to quit and with making preparations to quit. In substance, however, it is one offence, and that offence is that a man, having by some act put himself in such circumstances that he is liable to be made insolvent, leaves the Colony and takes with him property which ought by law to be divided amongst his creditors. But the most that can be said of the charge is that it is open to the objection of duplicity. That objection is one which, according to

our law, must be taken at an early stage of the proceedings, and it is doubtful whether it can ever be taken except by special demurrer. It would be a very singular thing if, in a case dealing with the surrender of fugitive offenders, the warrant issued by the State from which a fugitive came, and which is *primâ facie* good by the law of that State, could be verbally criticised by the Court called upon to give effect to it, by saying "Here we do our work much better than that, we do not allow proceedings to be taken in this slovenly way, and therefore we refuse to act upon the warrant." That would seem to be a singular want of comity in dealing with a request by another State. I think the *primâ facie* presumption to be drawn—if it is necessary to draw any—is that that is the ordinary way of stating that offence in Natal. That I think is supported by the certificate of the Attorney-General of Natal, which is in these words:—"I certify that the crime of contravention of Section 76 of the Insolvency Law No. 47 of 1887 with which William A. McKelvey is charged is punishable in the Colony of Natal by imprisonment with or without hard labour for a term of twelve months or more"—assuming that to be in Natal the usual way of stating the crime. It is, at any rate, the form which the Attorney-General of that Colony uses to describe the offence. But even if it were not the usual way, and even if neither the Attorney-General nor the Chief Magistrate of Durban understands how to describe the offence properly, nevertheless I think the objection fails, for this "is not a commitment for safe custody, in order that the party may afterwards be brought to trial, nor is it a commitment in execution; but it is a commitment for safe custody in order to secure the party and prevent mischief to His Majesty's subjects." Those are the words of Lord *Tenterden* in *Rex* v. *Gourlay* (1) cited by *Huddleston* B. in *Ex parte Terraz* (2). The distinction between the different classes of warrants is pointed out by the learned Baron, and by the other authorities cited in that case. I think it is sufficient that the charge should be substantially sufficient according to the law of the State where the warrant is issued. I see no reason for supposing that this is not substantially

(1) 7 B. & C., 669.

(2) 4 Ex. D., 63, at p. 70.

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sufficient according to the law of Natal, or according to the law of Victoria for the purpose for which it is issued. I am of opinion, therefore, that that objection fails.

There were some other minor objections, the only material one being that there was no valid proof of the law of Natal. The evidence given as to that law was, first, a certificate of the Attorney-General which was said to be admissible under the provisions of sec. 92 of The *Fugitives Offenders Act* 1881 which provides that:—"Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act." The Attorney-General certified under his hand and seal this law sufficiently for the purpose of this proceeding so far as authentication was concerned. It is said, however, that is not a fact to which the Attorney-General can certify. In my opinion, if the law of Natal is to be regarded as a fact, that is eminently a fact to which the principal law officer of that Colony can certify. The other evidence was the deposition of a practising lawyer of Durban in Natal, who produced a copy of the Statute and swore that it was the law of Natal. In my opinion, if the law of Natal is a fact, that was sufficient evidence of it. It is said, however, that as this deposition was not receivable in Natal as evidence of the law of Natal because that law is not in Natal a question of fact, it follows that before the committing magistrate in Victoria, where the law of Natal is a question of fact, although evidence as to what that law is may be given by deposition, it can only be so given by a deposition taken in a Victorian proceeding. I take leave to doubt whether the law of Natal is a question of fact with regard to the administration of this Act. To give an illustration, which is very analogous, under the *Extradition Act*. Apart from any local Act the Governor had to administer that Act. Now the Governor had in some way to make himself acquainted with the law he was administering. Is it to be supposed that he was to require foreign experts to be called before him to give evidence on oath as to what that law was? Or is it not to be supposed rather that the Governor, in order to enable him to discharge his duty, was to ascertain in the best way he could what the law was which he

had to administer? In the case of extradition I think that is quite clear. If that is so, how can there be any difference if, instead of that power being limited to the Governor, it is delegated to some executive officer? It is not necessary to express any definite opinion on the matter, but it seems to me that this law, which the authorities of each British possession are called upon to administer, may reasonably be said to imply that such officers shall make themselves acquainted with the laws of the other British communities in order to discharge their duties.

The other objections rested upon the facts, but on the facts there was no foundation for them, so that it is not necessary for me to say anything further about them. I am therefore of opinion that the appeal should be dismissed.

BARTON J. I also am of opinion that the appeal fails. The objections taken resolve themselves into four, taking into consideration that those with reference to the authentication of the documents do not seem to have been persisted in. The first is that Victoria is not a "British possession" within the meaning of the *Fugitive Offenders Act* 1881 and has not been such a possession since federation took place. That is a ground which covers more than one objection, for in negativing the one the other falls with it. The second objection is that the indorsed warrant did not mention an offence within the meaning of sec. 5 of the Act. The third objection is that the offence, if any, mentioned in the warrant is not an offence within the meaning of sec. 9, because the creation of such offence is *ultra vires* of the legislature of Natal. The last objection is that the evidence taken in Natal before the local tribunal is not evidence in Victorian Courts, so that there is no evidence in Victoria to prove the law of Natal.

Taking the points *seriatim*, the objection that Victoria is not a "British possession" depends upon secs. 30 and 39 of the *Fugitive Offenders Act* 1881. [His Honor read the material parts of the sections and continued.] It is contended that by force of those words the only "British possession" cognizable with reference to the execution of this Act is the Commonwealth in respect of alleged offenders who have escaped from other

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parts of the Empire. As the learned Chief Justice has pointed out, it is not necessary to decide now whether the External Affairs power of the Commonwealth Parliament under sec. 51 of the Constitution would cover legislation applying to such circumstances as these. It is probable that that power includes power to legislate as to the observance of treaties between Great Britain and foreign nations. If it does that, it is still more probable that it includes power to legislate as to offences which come within the *Fugitive Offenders Act* as distinguished from the *Extradition Act*. If the External Affairs power extends to such cases, still the appellant is brought face to face with sec. 108 of the Constitution. [His Honor read the section and continued.] If then the Commonwealth has the power contended for, nevertheless sec. 108 of the Constitution applies, and I fail to see how clearer terms to include the matter could be applied than those placed in sec. 108. If that is so, then this law is a law which was in force in Victoria and remains in force there. It did not cease to exist with reference to the position of Victoria as a British possession so soon as federation was brought about. Therefore the objection fails.

But, if the External Affairs power does not apply, then it seems to me the objection fails because Victoria would remain a "British possession." It is to my mind inconceivable that, while the Imperial legislature was dealing with matters of this kind in 1881, it could ever have intended to make the general legislature of a federation the sole authority under the *Fugitive Offenders Act*, and at the same time not to confide to that authority a power competent for the purpose. In my view that consideration alone is sufficient to dispose of the matter. The Imperial Parliament found in existence at that time the federation of Canada. Under the operation of secs. 91 and 92 of the *British North America Act* 1867, the competence to deal with criminal law generally as relating to conduct was already in the Dominion Parliament, while matters of procedure and the constitution of Courts were confided to the Provincial legislatures. I think the British Parliament, in dealing with what it defines as a "British possession" with a central legislature had in its mind the relations of central and subordinate authorities such as existed in

Canada, and had no intention to apply a rule of this kind to any future central legislature unless it should be constituted with powers to meet the case. In the case of Australia, if the Imperial Parliament did not endow the central legislature with power to make laws to meet the case, it seems to me the power to deal with the *Fugitive Offenders Act* remains where it was before federation, and the law previously in force in Victoria must stand. Therefore, whichever position is taken up, this objection must fail. I may say that I adopt the opinion expressed in the judgment of the Supreme Court in this case so far as it is applicable to this point, and I also adopt what was said by *à Beckett* J. in *Ex parte Gerhard* (1).

Another question was raised under secs. 3, 30, and 39 of the *Fugitive Offenders Act*. It was contended that throughout this enactment and the definitions, the word "in" must be read as "of," so that, when the words "British possession" are given the larger force and meaning contended for, a Judge or magistrate or other officer in a "British possession" must be regarded as a Judge or magistrate or other officer of the "British possession" in that larger sense. It was said, therefore, that, in the case of the Commonwealth, where the matter is not dealt with by any authority of the Commonwealth, a case for the rendition of this person would fail. I am not of that opinion, for the reason that I think the plain meaning of the words in the various parts of the Act is that a magistrate in a "British possession" means a magistrate performing his functions in the possession. That of course applies to the particular part of the possession where he performs his functions. So that, even if Mr. Arthur had succeeded in his able argument in showing that the Commonwealth was a "British possession" for the purposes of this Act, still, in my opinion, he would have got no further in his attempt to destroy the authority under which the proceedings were taken by reason of which the appellant remains in custody.

The next objection was that the indorsed warrant, by stating that the appellant committed "the crime of contravening sec. 76 of Law 47, 1887 (Natal)," did not mention an offence within the meaning of sec. 5 of the *Fugitive Offenders Act*. [His Honor

(1) 27 V.L.R., 244, at p. 251; 23 A.L.T., 127.

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read the section and continued]. The objection is that the words "the offence mentioned in the warrant" are not satisfied by the words "the crime of contravening section 76 of Law 47, 1887 (Natal)." Now, I am strongly of opinion that, if the certificate of the Attorney-General and the evidence of Mr. Calder can be accepted as evidence for the present purpose, then there is *primâ facie* evidence that there is a crime known in Natal as "contravening sec. 76 of Law 47, 1887 (Natal)." That evidence is unrebutted. The Attorney-General of Natal has certified that:—"The crime of contravention of sec. 76 of the Insolvency Law No. 47 of 1887 with which William A. McKelvey is charged is punishable in the Colony of Natal," &c. Mr. Calder, a solicitor practising at Durban, in Natal, where the crime is alleged to have been committed, was called before the Chief Magistrate of Durban, where the depositions were taken which were transmitted here, and he deposed that the law of Natal was as contained in the transcript put in evidence there and attached to his deposition. I shall deal presently with the question whether the certificate of the Attorney-General and the deposition of Mr. Calder can be taken as evidence for this purpose. That the description of the offence appears to have been thought sufficient in Natal is borne out by the depositions which are headed by that charge. The case with reference to fugitive offenders is not the same as under the *Extradition Act*, because the second paragraph of sec. 9 of the *Fugitive Offenders Act* 1881 provides that:—"This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies." That gets rid of the necessity of showing that the offence chargeable in the jurisdiction from which a fugitive has escaped is an offence known and recognized in the jurisdiction to which his escape has been made. It therefore renders the

case of *Ex parte Piot* (1), a doubly strong authority in favour of holding that there has been a sufficient description of the offence for the purpose of this Act in this warrant. In *Ex parte Terraz* (2), *Huddleston* B. said:—"Warrants in execution are in the nature of convictions, and it has always been held that warrants of that class require considerable strictness, for the reason that when the party is brought up on *habeas corpus*, and is held under a warrant in execution, the Court can only judge by what appears in the warrant whether a crime has been committed, and whether the alleged criminal is properly held in custody. But warrants for apprehension are merely instruments not directed to the prisoner, but directed to the officer for his protection, and to enable him to take the person into custody either for the purpose of inquiry, or of holding him in custody while the inquiry is going on, or of keeping him in safe custody for some of the reasons I have mentioned. Now, doubtless the latter class of warrants, namely where the party is to be held in safe custody during a particular time, would seem to require more particularity than a warrant for apprehension; but there are clear authorities to show that warrants for safe custody, even for public purposes, or for the protection of the public or individuals, may be in general terms." The learned Baron cited the case of *Rex* v. *Despard* (3) and authorities to the same effect. I am of opinion, therefore, first, that on the assumption of the admissibility already mentioned, there is *primâ facie* evidence that the offence is one known to the law of Natal, and that that is the offence mentioned in the warrant, and, secondly, apart from that, I am of opinion that it was not necessary to describe the offence with any greater particularity than has been observed in the warrant.

Then there is an objection that the offence mentioned in the warrant is not within sec. 9 of the *Fugitive Offenders Act* 1881, as the creation of that offence was *ultra vires* of the legislature of Natal, and that, inasmuch as the accused person would have to be out of the territory before he could be said to have quitted Natal, there was no jurisdiction in the local legislature to pass a

(1) 48 L.T., 120.

(2) 4 Ex. D., 63, at p. 68.

(3) 7 T.R., 736.

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law to punish him for that quitting. That objection sounds very well on its face, but there are two sides to it. It is urged that a man cannot be said to have quitted a country while he is in it, and that the legislature of that country cannot pass a law to punish him for having quitted it when he is outside, and the argument amounts to this, that whether the man is inside or outside the country, he cannot be punished for quitting it. Although the argument is ingenious, I think it is too finely drawn to commend itself. Here is an act which can only be criminal in so far as it relates to the territory which a man has left, and which is not in itself criminal in respect of that man's entrance into another territory. It is said that the country from which he has escaped as the perpetrator of a fraud cannot punish him for the fraudulent escape upon his return. Is it true that a British self-governing community is thus at the mercy of the perpetrator? I think the offence of quitting Natal under the circumstances described in this enactment is an offence capable of being made subject to punishment by the legislature of Natal, certainly by no other legislature, so far as I know, of any self-governing part of the British Dominions. The attempt by a man to quit and take with him property which should be divided amongst his creditors, and also the making preparations for quitting, are admittedly punishable in Natal. It is argued that, while in the inception of that offence it is punishable, still when those preparations have been brought to a successful issue and the attempt is perfected, the person who otherwise would be an offender, ceases to be an offender amenable to the criminal jurisdiction of the country which is quitted. I cannot accept that argument. The element of fraud, no doubt, must upon the trial be seen to be in the transaction, but, in the circumstances described in the Statute, fraud will, from the terms of it, be assumed *primâ facie*, because the Statute says that the offender is to be held to be guilty of the offence unless the jury is satisfied that there was no intent to defraud. It is therefore the antecedent intention, formed at the time of making preparations to quit and of attempting to quit, and before either of them amounts to the act of quitting, which is to be considered, and it is only then that the criminal intent is or can be formed. The intention

of this Act is to make that criminal intent punishable when it is coupled with a successful escape. It would be going altogether beyond reason to hold that the legislature of Natal could not validly pass an Act for punishing an offence of that kind.

The remaining objection was that the certificate of the Attorney-General of Natal and the evidence of Mr. Calder taken before the local tribunal of Natal are not evidence of the law of Natal in a Victorian Court in a proceeding under the *Fugitive Offenders Act*. I do not think that objection is supported by any authority. I could understand there being proceedings in which the technical objection would prevail, but I do not think that would be the case in proceedings of this kind, where the primary object of the whole thing is to satisfy the mind of the authority in the country to which the escape has been made that there is strong and probable ground to suppose that a person has committed a crime against the laws of the country from which he has fled. I certainly should refuse to hold that the authority described in the Act, in considering evidence brought before it from another possession of the Crown as to the commission of an offence against the laws of that other possession, is not entitled to satisfy its mind by reading evidence given by experts in the laws of that other possession as to what those laws are, notwithstanding that that evidence has been taken in that other possession, and not in the possession in which the authority is sitting. I am glad to be able to come to such a conclusion when I consider the reciprocal usefulness of this Act to all parts of the British dominions, the evil consequences of a too technical construction of it, and the difficulties which beset its administration. For these reasons I concur with the learned Chief Justice that the appeal must be dismissed.

O'CONNOR J. I also am of opinion that the Supreme Court of Victoria came to a right conclusion in this case. It is not necessary for me to follow my learned brethren in considering the various ingenious points submitted by Mr. Arthur. There are, however, two extremely important questions which he raised upon which I think it right to add something. Those are, first, that the Chief Justice of Victoria had no jurisdiction to indorse

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the warrant, and, secondly, that the magistrate who heard the case had no jurisdiction to entertain it. The judgment delivered by the Supreme Court was sufficient to decide the case as it now stands, the only matter now in controversy being whether the warrant was properly indorsed by the Chief Justice and whether the magistrate properly heard the case. It appears to me that both had jurisdiction to do what they did. I am of opinion that the Supreme Court of Victoria was right in holding that a "Judge of a superior Court" is a Judge exercising jurisdiction in the part where the fugitive was apprehended. I think they were also right in holding that a magistrate, who is a magistrate in that part of His Majesty's dominions having jurisdiction where the fugitive was arrested, had jurisdiction to hear the matter. But the next step which must be taken is the issuing of the warrant, which will necessarily bring up for decision the question whether Victoria is a "British possession" within the meaning of the Act. Before the necessary authority for the surrender of the fugitive can be issued it will be necessary to decide whether the officer to sign should be the Governor of Victoria or the Governor-General. As that point is submitted to us we must decide the whole question of jurisdiction. It will be useful, in considering the scope and intention of the *Fugitive Offenders Act*, to remember the basis upon which it rests. It rests upon the principle of extradition. It is an application to the various possessions of the British Crown *inter se* of the principle of extradition which obtains between different countries. In the case of foreign countries the extradition relations of Great Britain are settled by treaties, and in the case of such treaties it has always been the law that, whilst the scope of extradition is fixed by treaty, the procedure for arrest, identification, and proof is determined by the law of the State or country in which the alleged criminal is found. It has therefore been settled for many years, as pointed out in *Brown v. Lizars* (1), at all events in Great Britain, that the procedure by which extradition treaties are carried out is regulated by Statute and must be controlled by Statute. In the case of the *Fugitive Offenders Act*, applying as it does between different parts of the British Dominions, the Imperial legislature

(1) 2 C.L.R., 837.

has in its own hands power both to settle the terms upon which fugutive offenders are to be surrendered, and also to regulate the procedure to be adopted in surrendering them. But it must be remembered—and it is important in regard to the statement of the offence in the warrant—that all these proceedings are merely to inform the executive whether persons should be surrendered or not. The act of surrender is the act of the executive just as in the case of extradition. Such being the general principle upon which the surrender of fugitive offenders is founded, we find that the Act itself specifies the class of offences to which it is to apply and has given power to limit those offences in certain cases to the local or central legislature—that is the central legislature of a "British possession"—as the case may be, and has the criminal law procedure of the possession in which a fugitive is found for the purpose of identifying him, proving the offence, and informing the executive officer of the circumstances which made it necessary or expedient to order the surrender. It may be gathered also from the Act that it necessarily presupposes two things: first, that the criminal procedure in the possession in which the fugitive is found is uniform, and, secondly, as the provisions are to be worked mutually between the different possessions, that there is a uniform criminal law in every part of the possession in which the offence is committed. I entirely assent to Mr. Irvine's argument on that point. The position may be put in another way. Assuming that there was in some form a union of all the provinces of South Africa, it is clear that in this case the magistrate would have to ascertain what was the law of the union, not what was the law of Natal. And, unless there were a uniform criminal law of the union, how would it be possible for him to ascertain what was the law of the union?

Such being the Act as it has existed from 1881 up to the inauguration of the Commonwealth, it is contended that the passing of the *Commonwealth of Australia Constitution Act* has entirely altered its administration and application. The effect of Mr. Arthur's argument may be stated in a very few words:—It is that all the machinery for the purpose of surrendering fugitive offenders between the States of Australia and other portions of the British Empire suddenly came to an end on the inauguration

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of the Commonwealth, and that all the States of Australia have since been without the necessary machinery for carrying out the *Fugitive Offenders Act*, and unable to perform their statutory duties towards other parts of the British dominions in the administration of justice. This result has been reached, according to Mr. Arthur, not by any implied repeal of the Act by the Constitution, nor by the substitution of any provision in lieu of it, but in this way. Immediately on the inauguration of the Commonwealth the Parliament of the Commonwealth became a "central legislature" within the meaning of the *Fugitive Offenders Act*, and the Parliaments of the States became "local legislatures;" the local legislature, having dropped out of operation so far as this Act is concerned, all the powers conferred on it by the Act have come to an end. Whether the Act is to be so interpreted depends altogether upon the meaning of the words "central legislature" and "local legislature." One very useful rule in construing an Act is to take all the circumstances and conditions the legislature must have had in mind when the Act was passed. In 1881 there was only one federal form of government in the British dominions which could be said to have a central as contrasted with a "local legislature," and that was the federation of Canada. In that federation, the control of the criminal law was in the hands of the Dominion Parliament, and that Parliament having it in its power to enact criminal laws, was in a position at once to carry out the provisions of this Act. There was another form of union of provinces in which there was a "central legislature" and "local legislatures" and that was New Zealand. There it is quite plain that the power of exercising criminal jurisdiction, and of passing laws regulating criminal procedure was in the hands of the "central legislature." In various other portions of the British dominions there were Crown Colonies under the control of local legislatures with certain limited functions, but they were all controlled by a general legislature which had jurisdiction to impose uniform criminal laws and uniform criminal procedure. Now, throughout these different forms of union there is one common feature, viz., the "local legislature" is subordinate and the "central legislature" is supreme. The form of our Constitution places any analogy to such consti-

tutions out of the question. The legislature of the Commonwealth is supreme only as to certain matters. As to some of them it has exclusive power, as to others its power is exclusive when the Parliament has once acted. In respect to those matters in which power is not given to the Commonwealth Parliament, the Constitution leaves the States in the enjoyment of the power which they had before the inauguration of the Commonwealth. Amongst the matters left in the hands of the States is the control of criminal procedure and the enactment of criminal laws. As to matters of legislation under the control of the Commonwealth the Commonwealth Parliament would have power incidentally to enact criminal laws and to provide the procedure for carrying them into effect. But there is no power except in that respect to enact uniform criminal law and procedure throughout the Commonwealth. So that the Commonwealth legislature has no power to establish that uniformity of criminal law and procedure which is necessary for the working of the Act; and if the Commonwealth Parliament is the "central legislature" within the meaning of the Act it becomes unworkable. Having regard to these considerations I have come to the conclusion that the Commonwealth legislature fulfils none of the conditions which are required in a "central legislature," within the meaning of the *Fugitive Offenders Act*, and that this Act must be construed as not applying to the Commonwealth legislature. That being so, no change has been made by the passing of the *Commonwealth of Australia Constitution Act* in the powers of the States under the *Fugitive Offenders Act*.

Assuming, however, that the legislature of the Commonwealth has power by legislation to carry the Act into effect,—that the exercise of one of the concurrent powers would enable all the provisions of the *Fugitive Offenders Act* to be complied with—then sec. 108 of the Constitution seems to afford a complete answer to the contention of Mr. Arthur. It is impossible that sec. 108 can be complied with if his argument is to have any effect. The object of that section was to prevent any gap in the administration of State laws. The express provision of sec. 108 is that:—"Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers

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of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State." The position is therefore this—if the Parliament of the Commonwealth has not power to make criminal law and procedure uniform, then that Parliament is not a "central legislature"; if it has the power then, until it exercises it, the powers of the States remain.

The other objection is that the offence is not sufficiently described in the warrant. In considering that we must remember what is the object of these proceedings. It is to enable the chief executive officer of the State to carry out the obligation of aiding another portion of His Majesty's dominions in the administration of justice by surrendering a fugitive offender. That obligation is imposed by sec. 6 upon the Governor of a British possession, and he may, after all proceedings have been taken, and after the decision of any question raised on *habeas corpus*, "if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive." This procedure is to enable the Governor to form an opinion whether it is just that the fugitive should be returned. I think that the distinction pointed out by *Huddlestone* B., in *Ex parte Terraz* (1), between warrants of apprehension for safe custody pending investigation before the proper tribunal, and warrants in execution of a sentence or punishment is a clear one. Both warrants in this case come within that class in which the warrant is not an authority for the carrying out of punishment, but simply a warrant for safe custody of a person who has been charged with having committed an offence until that offence can be inquired into by the tribunal which has cognizance of it. That being so, the principles which should guide us in examining the warrant are those which should guide the Court in examining a warrant for safe custody. I have no doubt this offence is quite sufficiently stated. In the first place, we find that the certificate of the Attorney-General of Natal states the offence in the same way as it is stated in the warrant. He says:—"I certify that the crime of contravention of section 76 of the Insolvency Law No. 47 of 1887 with which William A. McKelvey is charged is punishable in the Colony of Natal," &c. We find also that the

(1) 4 Ex. D., 63.

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Chief Magistrate of Durban in Natal issues the warrant in that form, charging that "William A. McKelvey did commit the crime of contravening section 76 of Law 47, 1887 (Natal)."

The statement of the offence which is considered by the Attorney-General of Natal and the Chief Magistrate of Durban to be sufficient, ought to be sufficient for a Court intrusted with the duty, not of finally deciding the case, but of determining whether there is evidence of an offence coming within that Act sufficient to satisfy the magistrate that the person charged was properly apprehended.

For these reasons I am of opinion that the statement of the offence in the warrant is sufficient. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor, for appellant, *A. C. Secomb*, Melbourne.

Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

[HIGH COURT OF AUSTRALIA.]

HOLMES . . . . . APPELLANT;

AND

ANGWIN . . . . . RESPONDENT.

APPEAL FROM A COURT OF DISPUTED RETURNS IN THE STATE OF WESTERN AUSTRALIA.

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PERTH, *October* 23-24.

Griffith C.J., Barton and Higgins, JJ.

Court of Disputed Returns—Electoral Act (W.A.), (No. 20 of 1904), secs. 159-170—Final and Conclusive Jurisdiction—"Supreme Court of a State"—The Constitution, (63 & 64 Vict.), sec. 73—Special Tribunal.

Disputed elections in Western Australia are, under the *Electoral Act* 1904, heard and determined by the "Supreme Court," this tribunal being constituted by a single Judge in the special manner prescribed by the Act. By sec. 167 the decisions of the tribunal are declared final and conclusive. This