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WILLIAMS v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Appeal allowed. Order appealed from discharged. Suit dismissed with costs. Respondent to pay the costs of the appeal.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondent, *Cope & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MAYBURY AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

PLOWMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 1, 2, 3, 5.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Assault and false imprisonment—Arrest—General power to apprehend person found committing offence—Special power to apprehend for offence in respect of inclosed land—Construction of consolidating Statute—Criminal Law Amendment Act 1883 (*N.S.W.*) (46 *Vict. No.* 17), *sec.* 429—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 352—*Inclosed Lands Protection Act* 1854 (*N.S.W.*) (18 *Vict. No.* 27), *secs.* 1, 3—*Inclosed Lands Protection Act* 1901 (*N.S.W.*) (*No.* 33 *of* 1901), *secs.* 4, 6.

Sec. 352 (1) of the *Crimes Act* 1900 (N.S.W.) provides that: "Any constable or other person may without warrant apprehend, (*a*) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act."

Held, that sec. 352 (1) (*a*) of the *Crimes Act* 1900 applies to offences created by, and punishable under, other Statutes as well as to offences created by, and punishable under, the *Crimes Act* itself.

Sec. 4 of the *Inclosed Lands Protection Act* 1901 (N.S.W.) provides that: "Any person who, without lawful excuse, enters into the inclosed lands of any other person, without the consent of the owner or occupier thereof, or the person in charge of the same, shall be liable to a penalty not exceeding £5," &c.

Sec. 6 (1) of the same Act provides that: "Any person found committing any offence against this Act, and who refuses, when required to do so, to give his name and place of abode, may be apprehended by the owner, occupier, or person in charge of the inclosed lands upon or in relation to which the offence was committed, and delivered to the custody of the nearest constable to be taken before a Justice to be dealt with according to law."

Held, that sec. 352 (1) (*a*) of the *Crimes Act* 1900 applies to offences created by, and punishable under, the *Inclosed Lands Protection Act* 1901, notwithstanding the provisions of sec. 6 of the latter Act, the two sections being consistent with, and mutually assisting, one another.

The construction of a consolidating Statute depends on its language as applied to the subject matter considered as at the date of its enactment.

Decision of the Supreme Court of New South Wales: *Plowman* v. *Maybury*, 13 S.R. (N.S.W.), 34, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by George Plowman against Cecil Edmunds Bridgewater Maybury, the Sheriff of New South Wales, and his bailiff, James Leslie King, in which the plaintiff alleged that the defendants "assaulted the plaintiff and gave him into custody to a constable and compelled him to remain in the said custody for a long time whilst being conveyed by the said constable to a police station and there caused him to be imprisoned and to be kept in prison for a further long time upon a charge then preferred against him that he did 'unlawfully trespass' upon certain lands 'after having been removed therefrom' whereby the plaintiff suffered great distress and pain of body and mind and was exposed and injured in his condition and circumstances."

By their second plea the defendants alleged that one Palmer, by a judgment of the Supreme Court in its bankruptcy jurisdiction, recovered possession of a certain piece of land, and afterwards sued out of the Supreme Court a writ of *habere facias* directed to the Sheriff commanding him to give Palmer possession of the land and to make his return to the writ; that the writ was

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delivered to the defendant Maybury as such Sheriff, who thereupon by his warrant directed the defendant King as his bailiff to enter upon such land and give possession of it to Palmer; that thereupon the defendant King as such bailiff, by virtue of the writ and warrant, entered upon such land and removed from it the plaintiff who was at that time in possession of the land and who refused to give up possession of the same; and that afterwards, and while the defendant King was in and upon the said land and premises by virtue of the writ and warrant and by consent of Palmer and his agents, the plaintiff broke and entered the land (then being inclosed lands within the meaning of the *Inclosed Lands Protection Act* 1901) without lawful excuse and without the consent of Palmer or his agents or of the defendants or either of them, " whereupon the defendant " King " then gave the plaintiff into the custody of a constable to be taken before a Justice to be dealt with according to law, which said giving into custody is the alleged trespass."

To that plea the plaintiff demurred on the following grounds (*inter alia*):—

4. That sec. 352 (1) (*a*) of the *Crimes Act* 1900 is not applicable to offences committed against the *Inclosed Lands Protection Act* 1901.

5. That the said plea does not disclose any such facts as would entitle the said J. L. King to give the plaintiff into custody as stated in the said plea.

The demurrer was heard before the Full Court which upheld the fourth objection, and ordered that judgment should be entered for the plaintiff on the demurrer: *Plowman* v. *Maybury* (1).

From this decision the defendants now, by leave, appealed to the High Court.

Broomfield, for the appellants. Sec. 429 of the *Criminal Law Amendment Act* 1883 (sec. 352 of the *Crimes Act* 1900) gave an absolutely general power of arrest for offences created by that or any other Act, and, being passed subsequently to the *Inclosed Lands Protection Act* 1854, applied to offences under that Act notwithstanding sec. 3 of the latter Act. The mere fact that

(1) 13 S.R. (N.S.W.), 34.

by subsequent consolidation the *Crimes Act* 1900 was prior in date to the *Inclosed Lands Protection Act* 1901 does not affect the matter: if before consolidation there was a general power of arrest in respect of offences as to inclosed lands, that power was unaffected by the consolidation. There is no repugnancy between sec. 6 of the *Inclosed Lands Protection Act* 1901 and sec. 352 of the *Crimes Act* 1900. [He referred to *Nolan* v. *Clifford* (1); *Dean and Chapter of Ely* v. *Bliss* (2).]

Alroy Cohen, for the respondent. Sec. 429 of the *Criminal Law Amendment Act* 1883, of which sec. 352 of the *Crimes Act* 1900 is a repetition, gave no power to arrest for offences other than those created by, or punishable under, that Act, but it included offences punishable under other Acts. If sec. 429 did include a power to arrest for offences created by other Acts, the legislature would not in subsequent Acts have given a power to arrest in respect of offences created by those Acts. See *Felons Apprehension Act* 1899, sec. 11; *Gaming and Betting Act* 1912, secs. 7, 8, 9, 25; *Motor Traffic Act* 1909, sec. 5 (2); *Police Offences Act* 1901, secs. 26, 37, 57, 58; *Government Railways Act* 1912, secs. 130, 132, 133, 138; *Liquor Act* 1912, sec. 63. Part X. of the *Crimes Act* 1900, in which sec. 352 occurs, merely provides machinery for carrying the Act into effect. Sec. 3 does not carry the matter any further, but merely preserves the rights of persons who had committed offences prior to the coming into operation of the Act: *R.* v. *Keys* (3). Sec. 3 does not give an operation to Part X. which it would not have without sec. 3. General words in an Act of Parliament dealing in a general way with a particular subject matter as to which there has been an earlier Act dealing in a special way with that subject matter, do not effect a repeal of the special legislation: *In re Smith's Estate*; *Clements* v. *Ward* (4); *Tungamah Shire* v. *Merrett* (5); *Barker* v. *Edger* (6); *Goodwin* v. *Phillips* (7). If, then, sec. 352 of the *Crimes Act* 1900 and the *Inclosed Lands Protection Act* 1901 are to be treated as having been enacted in the order in which they

(1) 1 C.L.R., 429.
(2) 11 L.J. Ch., 351, at p. 354.
(3) 6 N.S.W.L.R., 135.
(4) 35 Ch. D., 589.
(5) 15 C.L.R., 407.
(6) (1898) A.C., 748, at p. 754.
(7) 7 C.L.R., 1, at p. 7.

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stood before consolidation, sec. 352 cannot be taken to have repealed sec. 6 of the latter Act. But the Statutes must be construed in order of sequence in which they now stand, so that the special enactment follows, and must be construed as unaffected by, the general enactment, and there is no power to arrest for an offence against the *Inclosed Lands Protection Act* unless the provisions of sec. 6 are complied with.

[ISAACS J. referred to *Williams* v. *Permanent Trustee Co. of New South Wales* (1).

BARTON A.C.J. referred to *Bennett* v. *Minister for Public Works (N.S.W.)* (2).]

The power to arrest given by sec. 6 is given to the owner, occupier or person in charge, and the plea does not allege that the defendant King was one of those persons.

[GAVAN DUFFY J. Even if sec. 352 authorizes arrest for an offence under the *Inclosed Lands Protection Act*, it does not authorize the handing over of the offender to a constable, which is the alleged trespass. The plea does not justify the whole of the trespass.]

That objection is covered by the fifth ground of demurrer.

[Counsel also referred to *Bullen and Leake's Precedents of Pleading*, 3rd ed., p. 822.]

Broomfield, in reply. The fifth ground does not cover the objection last mentioned, and the objection was not argued below. The arrest was an arrest by the appellants. The constable was their agent.

[RICH J. referred to *Halsbury's Laws of England*, vol. IX., pp. 299, 306.

ISAACS J. referred to *Derecourt* v. *Corbishley* (3); *Griffith* v. *Taylor* (4).]

Cur. adv. vult.

Sept. 5.

BARTON A.C.J. read the following judgment:—The appellants in this case, who are the Sheriff for the State and one of his bailiffs, were sued by the plaintiff, now respondent, for assault and false

(1) (1906) A.C., 249, at p. 252.
(2) 7 C.L.R., 372, at p. 384.
(3) 5 El. & Bl., 188.
(4) 2 C.P.D., 194, at p. 202.

imprisonment in giving the plaintiff into custody to a constable who took him to a police station, and there caused him to be imprisoned on a charge of having unlawfully trespassed on certain lands "after having been removed therefrom." The second plea is as follows:—[His Honor stated the plea as above set out.]

The plaintiff demurred to this plea, and the Full Court of this State held it bad on the fourth ground noted in the demurrer, namely, "that sec. 352 (1) (*a*) of the *Crimes Act* 1900 is not applicable to offences committed against the *Inclosed Lands Protection Act* 1901."

No question is raised, of course, as to the Sheriff's right to dispossess the plaintiff in the original execution of the writ. It is the plaintiff's subsequent arrest and detention that is the subject of this action. Upon the pleadings it must be taken as true that the plaintiff broke and entered the land, which was inclosed land within the meaning of the Act, that he was without lawful excuse, and that the consent of Palmer or of the defendants to his re-entry had not been given. The plea therefore sets up that the plaintiff committed an offence against sec. 4 of the *Inclosed Lands Protection Act* as consolidated, and the defendants maintain that sec. 352 (1) (*a*) of the *Crimes Act* justifies the apprehension, and the taking before a Justice of the Peace to be dealt with, of any person in the act of committing or immediately after having committed that offence, since it is an offence punishable on summary conviction under an Act, within the meaning of sec. 352 (1) (*a*).

The first *Inclosed Lands Protection Act* was 18 Vict. No. 27, passed in 1854, and the Act of 1901 is a consolidation of that and an intervening Statute which amended the Act of 1854 in some particulars not material to this case. The *Crimes Act* 1900 is a consolidation of the *Criminal Law Amendment Act* 1883 and some intervening Statutes, and sec. 352 of the Act of 1900 contains substantially a repetition of sec. 429 of the Act of 1883.

The first question that arises is as to the effect of sec. 429 of the Act of 1883 upon secs. 4 and 6 of the *Inclosed Lands Protection Act* as consolidated, which were secs. 1 and 3 of the original Act. The judgment under appeal turns upon the application of the principle involved in the maxim "*generalia specialibus non derogant*"

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to cases in which the legislature, after having dealt specially with a particular matter, has afterwards passed an enactment in general terms wide enough to repeal, or supersede, or qualify the original provision. In the case of *In re Smith's Estate*; *Clements* v. *Ward* (1) *Stirling* J. stated the rule in terms which the learned Chief Justice has quoted in the Supreme Court, and which I need not repeat. But I wish to quote a passage from the judgment of *Wood* V.C. in *Fitzgerald* v. *Champneys* (2), quoted by *Stirling* J. in the case cited (3), as follows:— "The reason in all these cases is clear. In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstance of that special case; and, having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated."

It is true that there is only one instance in which the *Inclosed Lands Protection Act* of 1854 authorized the giving of the offender into custody, namely, sec. 3, sub-sec. 1. There it is provided that: "Any person found committing any offence against this Act, and who refuses, when required to do so, to give his name and place of abode, may be apprehended by the owner, occupier, or person in charge of the inclosed lands upon or in relation to which the offence was committed, and delivered to the custody of the nearest constable to be taken before a Justice to be dealt with according to law." That section certainly does provide with particularity for the circumstances under which a person offending against its provisions may be apprehended and brought to justice, and it is argued that, as between that provision and sec. 429 of the Act of 1883, the rule in question applies. Sec. 429 dealt with a very wide range of offences, namely, all offences "punishable whether by indictment, or on summary conviction under this or any other Act." But in respect of arrests its terms may well stand together with those of the *Inclosed Lands Act* of 1854. Its object is the authorization of arrest without warrant

(1) 35 Ch. D., 589.
(2) 2 J. & H., 31, at p. 54.
(3) 35 Ch. D., 589, at p. 595.

with regard to a very large class of offences, one of which a person apprehended is in the act of committing, or has just committed. It does not, however widely read, purport to repeal or modify the special provision, nor do I think it could have any such effect. It merely adds to the means of bringing the offender to justice. Why should the legislature be supposed to have intended to exclude cases under the *Inclosed Lands Act* from the category of offences in which a "constable or other person" might apprehend without warrant? Would an intention to include them be an intention to "derogate" from the special provision?

Unless some reason can be found in sec. 429, or in the context and purview of the Act in which it finds a place, or in other legislation, for limiting the effect of the words employed to describe the offences included, I see no reason why it should be held not to apply to a case under secs. 1 and 3 of the *Inclosed Lands Act.* That no such limitation is to be found in sec. 429 itself is obvious, and I cannot find it in any other section of the Act of 1883. As to its purview, that Act seems to me to have been an attempt to embrace the whole of the criminal law, whether by way of the definition, or the creation, or the punishment of offences. In many instances it merely affixes more specific punishment to existing offences without altering their character or quality; in others it creates new criminal responsibilities; in others again it gives definition, as well as method and measure of punishment. But in one and another of these ways it seems to me to endeavour to provide a statutory compendium of criminal law. These are reasons why sec. 429 should include, rather than exclude, cases under any section of the *Inclosed Lands Act.*

So far, then, as the matter rests between the *Inclosed Lands Protection Act* 1854 and the *Criminal Law Amendment Act* 1883, I find no sufficient reason to uphold the fourth ground of demurrer, on which the case was decided below.

The question arises whether the matter is affected by the inverted order in which consolidation took place. For, while the *Criminal Law Amendment Act* 1883 was passed years after the original *Inclosed Lands Protection Act,* the consolidation of the

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criminal Statute law took place in the year preceding the similar treatment of the inclosed lands legislation. The learned Chief Justice and his colleagues thought that, by taking this course, the legislature evinced an intention "that the right of arrest in the case of a person found trespassing on inclosed lands was to depend on the specific and particular provisions laid down in the enactment dealing with that subject," and that "the position in which the legislation now stands resolves this question in favour of the contention set up by the plaintiff" (1).

Of course, the construction of a consolidating Act depends on disclosed intention like the construction of any other Act. But when two Acts have led to a definite state of the law in relation the one to the other of them, I am not sure that a change in their order affected by mere consolidation must needs be taken in all cases to alter that state of the law, in the absence of any internal indication of intention to make that or any other change. Whether it was really intended to alter the law must depend on the effect in each case of the inversion of the order in which the provisions stand.

As between sec. 352 (1) (*a*) of the *Crimes Act* 1900 and secs. 4 and 6 of the *Inclosed Lands Protection Act* 1901, I do not think the legislature has shown an intention that the right of arresting trespassers on inclosed lands must be regulated exclusively by the provisions of the special Act, so as to effect a suspension of the provision in the *Crimes Act* as to that class of offenders. I think that after, as well as before, the consolidation, the two provisions have been consistent the one with the other. They are complementary as regards such trespassers. The provision in the Act of 1901 may fairly be regarded as an additional protection to owners and occupiers of inclosed lands. My own view of the relation of the provisions *inter se* as they stood before consolidation, and as they stand since, is that the difference is that between A plus B and B plus A.

So far, then, as the case depends on the grounds which were argued below, I think the appeal should be allowed.

During the argument before us reference was made to the fifth ground of demurrer, which, it was suggested by my learned

(1) 13 S.R. (N.S.W.), 34, at p. 43.

brother *Gavan Duffy*, covered a possible defect in the plea. Sec. 352 gives the power of apprehension to "any constable or other person," who is authorized also to take the offender before a Justice to be dealt with according to law. The act justified in the plea is that the defendant King "gave the plaintiff into the custody of a constable to be taken before a Justice to be dealt with according to law, which said giving into custody is the alleged trespass." It is worthy of consideration whether this statement in the plea sufficiently claims the protection of sec. 352. It is questioned whether the giving of the plaintiff into the custody of a constable to be taken before a Justice is the precise thing warranted by that section. As this question is not the point upon which the demurrer was argued, and was not urged by the plaintiff in argument either here or below, and as, moreover, the parties, owing to the late stage at which it arose, had not sufficient opportunity to debate it thoroughly, we do not propose to decide it now.

The appeal will be allowed, Mr. *Broomfield* undertaking on behalf of the defendants, on the suggestion of the Court, either to amend his plea substantially, or to amend formally in such manner as to allow the plaintiff to raise any sufficient ground of demurrer, apart from that now decided, the defendants not to be subject to any costs of amendment.

Under the circumstances, we do not think we should allow any costs of this appeal.

The order of the Full Court will be discharged, and the demurrer overruled; the costs of appeal and of the demurrer to be costs in the cause.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The Supreme Court of New South Wales held the second plea bad on the ground that sec. 6 of the *Inclosed Lands Protection Act* 1901 alone applies to the facts alleged in the plea; and this for two reasons. The first reason given is that, the particular offence in question having been dealt with specially by Parliament in that section, it cannot be supposed that the general Act (represented now by sec. 352 of the *Crimes Act* 1900) at any

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time effected a repeal of the special enactment. The second reason is, that eventually the *Inclosed Lands Protection Act* 1901 is the later, and, therefore, must be taken to have superseded any possible repeal of its predecessors by the general enactment at any given moment, and to stand now as the ultimate legislative provision.

It was argued that sec. 352, sub-sec. 1 (*a*), does not apply to any offence except one created, or at least regulated, by the *Crimes Act* itself, thus excluding an offence under the *Inclosed Lands Protection Act* 1901. The material words are: "an offence punishable, whether by indictment, or on summary conviction, under any Act." If these words mean "punishable under any Act," the argument cannot be sustained. In that case, numbers of trivial offences would undoubtedly be included, but unless there be some controlling context, the natural meaning of the language used as applied to the subject matter must be followed. Moreover, the powers given by the section, though considered necessary, are not supposed to be abused. English corresponding sections (such as 24 & 25 Vict. c. 96, sec. 103) used the phrase "by virtue of this Act," and so with several other enactments on the subject (see *Russell on Crimes*, 6th ed., vol. III., pp. 77 *et seq*); and the difference is marked. Further, other sections of the *Crimes Act* tell strongly against the supposition that sec. 352 is limited as suggested. For instance, there is sec. 3, which applied, so far as they are applicable, certain other sections "to all offences, whether at common law or by Statute, whensoever committed and in whatsoever Court tried."

Among the sections so applied are those comprised in Part X. First, however, we will take in order some other sections. Sec. 6 refers to sentences passed by "any Court or Judge or Justice under this or any other Act or at common law."

Sec. 7 makes certain provisions as to possession, "where by this or any other Act the felonious receiving of any property, or its possession without lawful cause or excuse, is expressed to be an offence."

Sec. 8 defines "public place" in cases "where, by this or any other Act, any offence, conduct, or language, in a public place,

. . . is made punishable, or a person guilty thereof is made liable to apprehension."

Part X., if read in conjunction with sec. 3, and having regard to other sections mentioned and to be mentioned presently, indicates that the legislature were providing in that Part facilities for bringing to justice offenders against the criminal law generally, and were not making any distinction between offenders merely because their offences were dealt with by some other Act.

Succeeding sections, such as 344, 345, 394, 402, 407 and many others, indicate a wider outlook than that contended for.

But granting that sec. 352, if it were the only legislative provision for apprehending offenders, would apply to this particular offence, the question is, does it so apply, having regard to sec. 6 of the *Inclosed Lands Protection Act* 1901. We attach no importance in the present case to the fact that the *Crimes Act* is a consolidation. It takes effect from the day it passed, and its true construction depends on its language as applied to the subject matter considered as at that date: See *Bennett* v. *Minister for Public Works* (*N.S.W.*) (1). In *Administrator of Bengal* v. *Prem Lal Mullick* (2) Lord *Watson*, for the Judicial Committee, said:—"The respondent maintained this singular proposition, that, in dealing with a consolidating Statute, each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed."

The virtue of the demurrer really depends on whether the *Inclosed Lands Protection Act* 1901 overrides the primary provision of the *Crimes Act*. In *Goodwin* v. *Phillips* (3), it is observed, "The latest expression of the will of Parliament must always prevail"; and so, if the true interpretation of the later Act is that its provisions are to be exhaustive, all earlier enact-

(1) 7 C.L.R., 372, at p. 382. (2) L.R. 22 I.A., at p. 116.
(3) 7 C.L.R., 1, at p. 16.

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ments inconsistent with them are repealed by implication, because the second set are substituted for the first.

But, if there is no such intention to be gathered from the later Act, and if its actual provisions can be regarded as consistent with the earlier legislation, then there is no necessary implication of repeal, and, consequently, no repeal.

The two sections now under consideration are, in our opinion, not only consistent, but are mutually assistant to repress the offence dealt with in the later Act.

The *Crimes Act*, sec. 352, enables any person whatsoever without warrant to arrest a person actually committing, or immediately after having committed, an offence, but requires that, after apprehension, he shall be taken, with any property found on him, before a Justice to be dealt with according to law. But for the offence of trespassing on inclosed lands without consent and without lawful excuse, and on the offender's being asked for and refusing to give his name and address, some extra security may well have been thought necessary by the legislature. As our brother *Powers* suggested, there are districts in New South Wales where a constable is within easy distance, while the nearest Justice may be many miles away. What more natural than that authority should be given to the person whose property is invaded to apprehend the invader, and hand him to the nearest constable, the law leaving it to the latter to bring the offender before the Justice. Nor is the utility of the provision in that view confined to distant places: it may operate with advantage even in populous neighbourhoods; and so has been left general.

We can see no inconsistency between the two provisions, nor any reason why the second should be regarded as a substitute for the first. If it is, the legislature has made no provision whatever for the apprehension of such an offender by a constable even though he is found in the very act of committing the offence, and even though he refuses to give his name and address; and further, it makes no provision for apprehending him by anybody where he is found "immediately after committing the offence." The *Inclosed Lands Protection Act*, while making by secs. 4 and 5 certain comparatively slight matters offences, is evidently

designed for the prevention of greater ones probably contemplated by such intruders, and sec. 6 is a means to that end, by empowering the immediate handing over to a constable of a person acting so suspiciously. We are unable to assent to the view taken by the learned Judges of the Supreme Court that the necessary implication of sec. 6 of the later Act is a complete abrogation of sec. 352 so far as concerns the offences aimed at specially by the *Inclosed Lands Protection Act* 1901.

During the argument it was pointed out that the plea alleged that the defendant King delivered the plaintiff into the custody of a constable, and not that the defendant was personally proceeding to bring him before a Justice.

This is a phase not dealt with by the learned Judges of the Supreme Court, and not argued or suggested by learned counsel there. It raises, however, a most important question as to whether this case is or is not within the protection of sec. 352.

Discussion as to the form of the plea and of the relevant point of demurrer, coupled with the fact of this question being now raised for the first time, indicates that it would be unsafe to attempt to dispose of it at once.

Consequently, in the circumstances, we agree with the course proposed by the learned presiding Justice.

POWERS J. I concur in the judgment of the Court.

Appeal allowed. Order appealed from discharged, and demurrer overruled. Costs of appeal and of demurrer to be costs in the cause.

Solicitor, for the appellants, *J. R. Baxter Bruce.*
Solicitor, for the respondent, *H. C. G. Moss.*

B. L.