[HIGH COURT OF AUSTRALIA.]

McARTHUR . . . . . APPLICANT;

AND

WILLIAMS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936.

MELBOURNE, *Feb.* 25, 26.

SYDNEY, *April* 21.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Fugitive Offender—Extradition from Australia to New Zealand—Warrant issued in New Zealand—Warrant indorsed by magistrate for New South Wales—Order for extradition to New Zealand—Authority of New South Wales magistrate—Information on oath—Informant having no personal knowledge of offence—Whether personal knowledge necessary—Validity of warrant—Fugitive Offenders Act 1881 (44 & 45 *Vict. c.* 69), *secs.* 12, 13, 14, 19, 39*—*Order in Council* (*Imp.*), 12*th October* 1925*.

For the purposes of the *Fugitive Offenders Act* 1881 Australia is one British possession. But within the several States State judicial officers have authority under the law of the "possession" and so are competent to act under the provisions of that statute.

* Part II. of the *Fugitive Offenders Act* 1881 provides :—Sec. 12 :—"This Part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Part of this Act shall apply to the group of British possessions mentioned in the Order." Sec. 13 : "Where in a British possession of a group to which this Part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend, within the jurisdiction of the indorsing magistrate, the person named in the warrant, and bring him before the indorsing magistrate or some other magistrate in the same British possession." Sec. 14 :—"The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was

McKelvey v. *Meagher*, (1906) 4 C.L.R. 265, *John Sharp & Sons Ltd.* v. *The Katherine Mackall*, (1924) 34 C.L.R. 420, *Re Munro and Campbell*, (1935) N.Z.L.R. 159, and *Re Munro*, (1935) N.Z.L.R. 271, considered.

The Imperial Order in Council of 12th October 1925 specifying the "Commonwealth of Australia" as a British possession for the purposes of Part II. of the *Fugitive Offenders Act* 1881 conformed to the statute in doing so.

A New Zealand warrant was brought to Australia and indorsed by a police magistrate for New South Wales under sec. 13 of the *Fugitive Offenders Act* 1881. The defendant was arrested under the warrant and was brought before a stipendiary magistrate at Sydney, who made an order reciting that he was satisfied, as required by sec. 14 of the *Fugitive Offenders Act*, that the warrant was issued by a person having lawful authority to issue it and directing that the defendant be returned to New Zealand.

Held that the New South Wales magistrate had jurisdiction to order the return of the defendant under sec. 14 of the *Fugitive Offenders Act* 1881.

An information was sworn before a New Zealand magistrate stating that the informant had just cause to suspect and did suspect that the defendant had published a prospectus false in certain material particulars, which was an indictable offence under sec. 257 (*a*) (iii) of the *Crimes Act* 1908 of New Zealand. The magistrate issued a warrant for the arrest of the defendant. The informant had no personal knowledge of the facts of the case, and no witness was called before the magistrate to substantiate the matter of the information.

Held that the warrant was valid under the *Justices of the Peace Act* 1927 of New Zealand.

Special leave to appeal from the decision of the Supreme Court of New South Wales (Full Court) refused.

issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof. A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power . . . as he has in the case of a person apprehended under a warrant issued by him." Sec. 19:—"Where the return of a prisoner is sought or ordered under this Part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just. Any order or refusal to make an order of

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

This was an application by John William Shaw McArthur for special leave to appeal to the High Court from a decision of the Supreme Court of New South Wales refusing to discharge McArthur from custody under sec. 19 of the *Fugitive Offenders Act* 1881. An information upon oath was laid by Frederick Leslie Robinson, a New Zealand detective, against McArthur before a stipendiary magistrate in New Zealand charging McArthur with publishing a prospectus false in certain material particulars, which was an indictable offence under sec. 257 (*a*) (iii) of the *Crimes Act* 1908 of New Zealand. The stipendiary magistrate then issued a warrant for the arrest of McArthur. This warrant was brought to Australia and was indorsed by Mr. Swiney, who was a police magistrate and justice of the peace for New South Wales, under the provisions of sec. 13 of the *Fugitive Offenders Act* 1881. McArthur was arrested in New South Wales and brought before Mr. G. R. Williams, stipendiary magistrate, at Sydney, who made an order reciting that he was satisfied as to the matters mentioned in sec. 14 of the *Fugitive Offenders Act* and directing Robinson to take McArthur and convey him to Wellington in New Zealand and there carry him before some justice or justices of the peace to answer the charge before them. McArthur applied to the Full Court of the Supreme Court of New South Wales to be discharged, and, alternatively, he moved for a writ of prohibition or a writ of certiorari. The Supreme Court dismissed these applications.

discharge by a magistrate under this section shall be subject to an appeal to a superior court." Sec. 39 of the Act provides:—"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 . . . The expression 'superior court' means . . . (4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession."

An Order in Council made on 12th October 1925 under sec. 12 of the *Fugitive Offenders Act* applied Part II. of the Act to a group of British possessions consisting of the Commonwealth of Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, Gilbert and Ellice Islands and British Solomon Islands.

From that decision McArthur sought special leave to appeal to the High Court.

Wilbur Ham K.C. (with him Dr. *Louat*), for the applicant. The information was laid by Robinson, not upon his own knowledge of the facts, but only upon information received by him. In cases of suspicion the facts from which suspicion can be inferred should be set out in the information. The informant did not have the suspicion which justified the issue of a warrant (*Hale, Pleas of the Crown* (1800), vol. 2, at p. 109 ; *Blackstone's Commentaries* (1844), vol. 4, p. 287 ; *Hawkins' Pleas of the Crown* (1824), vol. 2, p. 131 ; *Dixon* v. *Wells* (1) ; *Ridley* v. *Whipp* (2) ; *McIntosh* v. *Simpkins* (3) ; *Bridgeman* v. *Macalister* (4) ; *Ex parte Coffon* (5) ; *Ex parte Grundy* (6) ; *R.* v. *Coulombe* (7)). No warrant should have been issued on such an information, and the New Zealand warrant and the whole of the proceedings founded upon it are void and should be quashed on prohibition, which is the only remedy available (*Ex parte Counsel* (8)). Since the Order in Council passed in 1925 under sec. 12 of the *Fugitive Offenders Act* the Commonwealth is the only British possession which is relevant to the *Fugitive Offenders Act* in the group specified in the Order in Council, and the States can no longer be regarded as separate British possessions. The Orders in Council applying the *Fugitive Offenders Act* to British dominions are set out in *Halsbury's Statutes*, (1929), vol. 8, p. 473. The New South Wales magistrate did not have jurisdiction because the Federal legislature had not conferred authority upon him. Since the Order in Council of 1925 the whole basis of *McKelvey* v. *Meagher* (9) has gone (*Re Munro and Campbell* (10)).

Monahan K.C. (with him *De Baun*), for the respondent. It is sufficient for the magistrate to accept the statement of the person laying the information, and he need not require him to verify every

(1) (1890) 25 Q.B.D. 249, at p. 257.
(2) (1916) 22 C.L.R. 381, at pp. 386, 388-390.
(3) (1901) 1 K.B. 487, at p. 490.
(4) (1898) 8 Q.L.J. 151, at pp. 152, 153.
(5) (1905) 11 Can. Cr. Cas. 48.
(6) (1906) 12 Can. Cr. Cas. 65.
(7) (1912) 20 Can. Cr. Cas. 31, at pp. 33, 34.
(8) (1887) 8 L.R. (N.S.W.) 315, at p. 322 ; 4 W.N. (N.S.W.) 74, at p. 77.
(9) (1906) 4 C.L.R. 265.
(10) (1935) N.Z.L.R. 159, at p. 161.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

statement in it. The words " or otherwise " in sec. 19 of the *Fugitive Offenders Act* should be read as *ejusdem generis* with the preceding words. Here there is no injustice in extraditing the accused. No witness could come forward and swear to any facts constituting the offence, the charge being an intent. The issue of the warrant is deemed to be valid until the contrary is shown, and the warrant was consequently validly executed in New South Wales. This is not a case in which the court should give special leave to appeal. It is not a matter of grave public importance. It is only the States that can be regarded as British possessions, as it is only the State that has a general jurisdiction over crime. The court should refuse the application.

Wilbur Ham K.C., in reply. The words " or otherwise " in sec. 19 of the *Fugitive Offenders Act* cannot be read as *ejusdem generis* with the preceding words, because they are so extremely dissimilar in import. A consideration of whether the accused was guilty or innocent is quite irrelevant.

Cur. adv. vult.

April 21. The following written judgments were delivered :—

LATHAM C.J. On 2nd October 1935 Robinson, a New Zealand detective, swore an information before Mr. E. D. Mosley, a New Zealand magistrate in which he stated that he had just cause to suspect and did suspect that McArthur had committed an offence under the New Zealand *Crimes Act* 1908, sec. 257 (*a*) (iii). The particular offence charged was that McArthur being a director of a public company called " The Investment Executive Trust of New Zealand Limited " did publish a prospectus inviting the public to subscribe to a second series of debentures which was false in certain material particulars, to wit, in that it was therein stated that the said company had adopted a policy of diversification or the spreading of capital over a large number of sound investments which statement concealed the true nature of the company's investments he knowing the said prospectus to be false in the particulars aforesaid with intent thereby to induce persons to advance money to such company.

The magistrate then issued a warrant for the arrest of McArthur. This warrant was brought to Australia and Mr. A. Swiney, a police magistrate and justice of the peace for New South Wales, indorsed the warrant, acting under the provisions of sec. 13 of the *Fugitive Offenders Act* 1881. McArthur was arrested and brought before Mr. G. R. Williams, stipendiary magistrate, Sydney, who made an order reciting that he was satisfied as to the matters mentioned in sec. 14 of the *Fugitive Offenders Act* and directing Robinson to take McArthur and convey him to Wellington in New Zealand and there carry him before some justice or justices of the peace to answer before him or them the said charge. The warrant was addressed to Robinson and to all constables in the police force in the State of New South Wales, and to all governors of gaols, gaolers and lock-up keepers in New South Wales, or in any other British possession.

McArthur then applied to the Supreme Court of New South Wales to be discharged and, alternatively, he moved for a writ of prohibition or a writ of certiorari. These applications were dismissed. The matter now comes before this court upon application for special leave to appeal from the judgments of the Full Court of the Supreme Court.

The first ground upon which the applications are based is that the warrant issued by the New Zealand magistrate was not valid because it did not satisfy the requirements of the *Justices of the Peace Act* 1927 of New Zealand. A magistrate before whom a person who has been apprehended under a warrant indorsed under sec. 13 of the *Fugitive Offenders Act* is brought is required by sec. 14 to be satisfied first that the warrant is duly authenticated as required by the Act, secondly, that it was issued by a person having lawful authority to issue the same, and, thirdly, he must also be satisfied on oath that the prisoner is the person named or otherwise described in the warrant. The second requirement is the provision which is important for the purposes of the argument on this point. If the New Zealand warrant was not issued by a person having lawful authority to issue it, the New South Wales magistrate ought not to have made an order for the return of the prisoner under sec. 14. It is put that the existence of a valid warrant is a condition of the jurisdiction of the New South Wales magistrate. In my opinion, sec. 14, expressly requiring that

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

the magistrate should be satisfied that the warrant was issued by a person having lawful authority to issue it, commits to the magistrate the power to decide whether the warrant was so issued or not. The magistrate may decide this question in a manner which in the opinion of a superior court may be right or wrong, but he has jurisdiction to decide it, and if he decides it wrongly the remedy must be found in some form of appeal, if there is provision for such an appeal, and not in the prerogative writs. (See the case referred to in argument by my brother *Evatt*: *R.* v. *Lincolnshire Justices*; *Ex parte Brett* (1).)

Sec. 19 of the *Fugitive Offenders Act* is in the following terms: "Where the return of a prisoner is sought or ordered under this Part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or a magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just."

It does not appear that after the order for the return of McArthur any application was made to a magistrate to discharge the order under sec. 19, but McArthur moved the Supreme Court of New South Wales as a superior court under the provisions of that section. The Full Court was of opinion that the alleged invalidity of the original warrant was not a ground upon which application could be made under sec. 19, because that section referred to certain specific grounds upon which alone an order could be discharged. It was contended upon behalf of the applicant, however, that the words "or otherwise" were sufficiently wide to permit any ground of appeal which was relevant to the determination of the question whether it would, having regard to all the circumstances of the case,

(1) (1926) 2 K.B. 192.

be unjust or oppressive to return the prisoner in accordance with the order of the magistrate.

The reply made to this argument was that the words " or otherwise " should be construed on the principle of *ejusdem generis*. There is sometimes no difficulty in seeing that the meaning of general words, following specific words, should be limited by reference to the specific words so as to apply only to things or circumstances of the same kind as those described by the specific words. In some cases, unless this rule were applied, the general words would have a meaning which, in view of the nature of the subject matter, would be irrational, and they would deprive the specific words of all real significance (*In re Clark*; *Ex parte Schulze* (1)). But this rule is not a rule of law; it is a rule of construction, applied for the purpose of ascertaining intention, and the rule is accordingly controlled by another " equally general " rule, namely, " that statutes ought, like wills or other documents, to be construed so as to carry out the objects sought to be accomplished by them " so far as it can be collected from the language employed. " Hence, the same general words would receive a wider interpretation in a remedial than in a penal statute " (*Halsbury, Laws of England*, 1st ed., vol. 27, p. 145, and the cases there cited). In the case of this particular statute, it is clear, in my opinion, that sec. 19 is remedial in character. The object of the provision is to give a prisoner an opportunity of showing that it would be unjust or oppressive to carry out the order of the magistrate. Special mention is made of the trivial nature of a case and of absence of good faith as grounds for the discharge of the prisoner. It would be a strange position if there were an opportunity of reviewing the magistrate's order upon these grounds, but no opportunity of raising, in a proceeding by way of review, such a question as that of the validity of the warrant upon which the whole proceeding was based. I would not accept such an interpretation of the section unless the words were clearly capable of no other meaning. These words are capable of a more generous construction and that construction should, in my opinion, commend itself in the case of a provision directed towards the preservation of the liberty of the subject against possible unjust and oppressive detentions and

(1) (1898) 2 Q.B. 330.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

deportations. In my opinion, therefore, the words " or otherwise " should not be construed upon the *ejusdem generis* principle, and the objection to the validity of the warrant was therefore, in my view, open to the prisoner upon the application to the Full Court.

The objection to the New Zealand warrant is based upon evidence which showed that the informant, Robinson, had no personal knowledge of the matters upon which the charge was based. Robinson, when cross-examined before the magistrate in Sydney, said that he had seen the prospectus in question and had read some papers which included an opinion of the Crown Solicitor upon the case. He had, however, no other knowledge or information upon the matter. He had sworn the information under the orders of his superior officers. It was contended that upon the true construction of the relevant provisions of the *Justices of the Peace Act* 1927 the New Zealand magistrate ought not to have issued the warrant—that he ought to have examined Robinson and that when he found that Robinson had no personal knowledge of the facts he ought to have insisted upon the oath of some other person or persons who had personal knowledge of the facts. This argument is based upon the following sections of the *Justices of the Peace Act* 1927 :—

" 131. (1) Whenever a charge is made before a justice that any person in New Zealand has committed or is suspected to have committed any indictable offence whatsoever, if the person so charged is not already in custody, the justice may issue his warrant (No. 6) to apprehend such person and to cause him to be brought before some justices to answer such charge and to be further dealt with according to law."

" 136. In all cases where a charge for any indictable offence is made before any justice as aforesaid, if the person charged is not already in custody, an information in writing (No. 31) on the oath of the informant or of some witness or witnesses shall be laid before such justice."

The reference to " (No. 31) " in sec. 136 is explained by sec. 372, which provides as follows : " The several forms in the First Schedule hereto and referred to numerically in the body of this Act, or forms to the like effect, shall be deemed good, valid and sufficient in law."

Form 31 is as follows :—" The information of C.D., of , taken on oath this day of , 19 , before me, J.S., Esquire, one of His Majesty's justices of the peace for New Zealand, who says that [he has just cause to suspect and doth suspect that] A.B., of , [labourer], [Here set out the substance of the offence], being an indictable offence. Taken and sworn before me, the day and year first above mentioned, at . J.S.

" If the facts on which the information is founded are not within the personal knowledge of the informant, add—The matter of the above information is now substantiated before me by the oath of , of . J.S."

The objection to the warrant depends upon the contents of the forms mentioned in the sections. The requirements of the sections themselves were satisfied. A charge for an indictable offence was made before a justice. An information in writing on the oath of the informant was laid before the justice. The justice then issued his warrant. But it is urged that the forms add other requirements to those set out in the terms of the sections. The form of warrant (No. 6) recites that an information was laid and " the matter of such information has been substantiated on oath." In this case the matter of the information was substantiated upon the oath of the informant but, it is contended, the footnote to form 31 shows that the matter of the information must, when the facts on which the information is founded are not within the personal knowledge of the informant, be substantiated by the oath of witnesses who have personal knowledge of those facts.

The information in this case did not contain this footnote, and the only oath taken before the magistrate was that of Robinson who had no personal knowledge of the facts on which the information was founded. The contention for the applicant was that the information was accordingly invalid and that the warrant based upon it was also therefore invalid.

The terms of sec. 372 provide, in my opinion, a good answer to this contention. The reference to form No. 31 in sec. 136 means no more than that form 31, if used, shall be deemed good, valid and sufficient in law. The statute does not require that that form must be used.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

This consideration disposes of the objection raised, but, in view of the argument submitted to the court, I desire to add that I agree that a magistrate must not act lightly in issuing a warrant, and that if he is left in doubt as to the propriety of taking an information upon the oath of the informant only, he may refuse to act until further evidence is provided.

Blackstone, 21st ed. (1844), vol. IV., pp. 290, 291, after stating that a justice of the peace has power to issue a warrant to apprehend a person accused of felony, though not yet indicted, goes on to say that "he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed." See *Hale, Pleas of the Crown* (1800), vol. 2, p. 109, to the same effect. It will be observed that the phrase used is "it is fitting." I read these words as containing advice to the magistrate that he should satisfy himself that it is proper to issue a warrant in the particular case before him, and not as laying down a legal requirement that when he already has an information upon oath of one person deposing to that which is necessary to justify the issue of a warrant, he is bound to cross-examine that person or to examine other persons upon the matter.

Even if the footnote of form 31 should be regarded as applicable in all cases, I do not think that it is mandatory in character. A magistrate need not conduct a preliminary trial before he issues a warrant. He should act responsibly, but the footnote would not be construed reasonably if it were interpreted as meaning that, before issuing an information, the magistrate must, as a condition precedent, require the oath of persons with personal knowledge of the facts upon which the charge is based. The result of such an interpretation would be that the magistrate in all except the simplest cases would have to examine a number of witnesses who would have to be brought before him for the purpose of being so examined.

There is, however, no method provided by law for compelling the attendance of witnesses for the purpose of such an inquiry being made. It is therefore prima facie unlikely that the construction for which the applicant contends is correct. In my opinion, if the footnote is to be regarded as applying in every case, it should be construed as directory and not mandatory in character.

The applicant referred to the Canadian decision of *Ex parte Boyce* (1), and to three other Canadian cases in which the decision in *Ex parte Boyce* was followed. In *Ex parte Boyce* the section under consideration empowered the justice, if he saw fit, to issue a warrant when an information was laid for a suspected offence " upon oath or upon information being made before him substantiating the matter of the information to his satisfaction." It was held that it was the duty of the justice before issuing a warrant to examine upon oath the complainant or his witnesses upon the facts upon which his suspicion and belief were founded and to exercise his own judgment thereon. It will be observed that under this section the matter of the information must be substantiated to the satisfaction of the justice. There is no such express provision in the New Zealand legislation. The other Canadian cases to which reference was made were *Ex parte Coffon* (2), *Ex parte Grundy* (3) and *R.* v. *Coulombe* (4). In these cases the section which governed the matter provided that the justice should hear and consider the allegations of the complainant, and, if of opinion that a case for so doing was made out, issue a summons or warrant. This provision (like the section considered in *Ex parte Boyce* (1)) is contained in the body of the statute and is in very different terms from those to be found in the New Zealand statute.

For the reasons given I am of opinion that the objection that the New Zealand warrant was invalid should not be sustained.

It was also contended on behalf of the applicant that the New South Wales magistrate had no jurisdiction to act under sec. 14 of the *Fugitive Offenders Act* by making an order for the return of the prisoner. The argument was based upon the fact that Part II. of the Act applies only to those groups of British possessions to which

(1) (1885) 24 N.B.R. 347.
(2) (1905) 11 Can. Cr. Cas. 48.
(3) (1906) 12 Can. Cr. Cas. 65.
(4) (1912) 20 Can. Cr. Cas. 31.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

it has been ordered that the Part should apply (sec. 12). On 12th October 1935 an order was made that Part II. of the Act should apply to a specified group of British possessions which included "Commonwealth of Australia" and "New Zealand." The provisions for return of fugitive offenders under Part II. therefore apply only as between the Commonwealth and New Zealand and not as between a State of the Commonwealth and New Zealand. It was urged that the terms of the Act showed that the magistrate acting in Australia must be a magistrate deriving his authority from the Commonwealth and not from any State. The stipendiary magistrate who ordered the return of McArthur derived his authority from the State of New South Wales and his jurisdiction extended only to the whole or part of New South Wales. Accordingly it was said that he could not act as a magistrate under sec. 14.

Sec. 14 authorizes the magistrate before whom the person apprehended in pursuance of sec. 13 is brought, to order the return of the prisoner if he is satisfied as to certain matters. The magistrate before whom such a person may be brought is shown by sec. 13 to be either a magistrate who indorsed the warrant which had been issued in another British possession or some other magistrate in the same British possession as the indorsing magistrate. The indorsing magistrate is required by sec. 13 to be "a magistrate in the last-mentioned possession," that is, the possession in or on the way to which the accused person is or is suspected of being.

The stipendiary magistrate before whom McArthur was brought was a New South Wales magistrate and he was in New South Wales. His authority to act as a magistrate was not derived from the Commonwealth but from New South Wales. The Commonwealth is declared by the order of 12th October 1925 to be a member of the group of British possessions and, in my opinion, there is no doubt that it is the Commonwealth which must be regarded as the British possession for the purposes of Part II. Sec. 13 itself recognizes that, within the British possession in which a magistrate acts, his jurisdiction may be limited by reference to locality. The section provides that an indorsed warrant shall be a sufficient authority to apprehend the accused person "within the jurisdiction of the indorsing magistrate." This phrase contemplates the case of a

magistrate whose jurisdiction possibly does not extend over the whole of the British possession in which he acts. Though the jurisdiction of a New South Wales magistrate is limited, in reference to locality, to New South Wales within the Commonwealth, and though his jurisdiction may be limited within New South Wales itself to a part of that State, I am of opinion that such a magistrate is "a magistrate in Australia." It is true that he can only act within certain local limits, but that does not, in my opinion, make him any the less a magistrate in the British possession described as Australia. This conclusion follows from the reasoning in the case of *McKelvey* v. *Meagher* (1), where this court had to consider the provisions of Part I. of the *Fugitive Offenders Act.* (The case was considered at a time when an Order in Council—made in 1883—specified the then Australian colonies as members of a group. But, as the application which was under consideration in that case was for the return of an alleged fugitive offender to Natal, and not to any other member of a group, the terms of the Order in Council were not important.) In that case it was necessary to consider the meaning in sec. 4 of the Act of the phrase "a magistrate of any part of Her Majesty's dominions." It was argued that if the Commonwealth were to be regarded as one British possession, the police magistrate in Melbourne was not a police magistrate of that "part of Her Majesty's dominions." It was held that the expression meant a person who in the place where the fugitive was found had authority to exercise the function of a magistrate (per *Griffith* C.J. (2)). Similarly Mr. Justice *Barton* held 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" (3). Mr. Justice *O'Connor* was of the same opinion (4). The decision on this point in *McKelvey* v. *Meagher* (1) applies equally to Part II. of the Act where reference is made to magistrates in secs. 13 and 14.

I am accordingly of opinion that the New South Wales magistrate had authority to indorse the warrant under sec. 13 and that the

(1) (1906) 4 C.L.R. 265.
(2) (1906) 4 C.L.R., at p. 280.
(3) (1906) 4 C.L.R., at p. 287.
(4) (1906) 4 C.L.R., at p. 292.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

magistrate before whom McArthur was brought, being satisfied of the matters mentioned in sec. 14, had jurisdiction to order the return of McArthur to New Zealand and that no reasons have been adduced which would have made it proper for the Supreme Court of New South Wales to discharge the order of the magistrate or to grant a writ of prohibition or of certiorari.

In my opinion, these considerations dispose of the matter. It is true that other problems arise where an application is made to a magistrate in another member of the group established by the Order in Council of 1925 for the return of a prisoner from that British possession to the Commonwealth. In the case of *Re Munro and Campbell* (1) the Supreme Court of New Zealand has examined some of the questions that arise. It was held that as the Commonwealth of Australia is the British possession for the purposes of Part II. it is not possible to obtain under Part II. the return from New Zealand to the Commonwealth of a person who is not charged with an offence against a Commonwealth law. This conclusion is based upon references in the statute to offences " punishable by law in that " (other) " possession " (sec. 13).

The Supreme Court of New Zealand took the view that the law mentioned must be a law of the whole of the possession in question and not a local law limited to a part only of the possession, such as the State of New South Wales. In the case of Australia the result was that surrender could properly be made only for a breach of Federal law. This view is based not only upon the terms of the Order in Council but also upon the terms of sec. 39 of the *Fugitive Offenders Act*, which provides :—" 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."

In *McKelvey* v. *Meagher* (2) attention was given to these definitions and the court took the view that the reference to legislatures must

(1) (1935) N.Z.L.R. 159.

(2) (1906) 4 C.L.R. 265.

be construed as a reference to legislatures which had authority to deal with general matters of criminal law. The Commonwealth Parliament has no such authority. In *McKelvey* v. *Meagher* (1) this consideration led to the result that, for the purpose of Part I. of the Act, the States and not the Commonwealth were to be regarded as the British possessions to or from which surrender of fugitive offenders could take place to such a British possession as Natal—at least until such time as the Commonwealth might legislate upon the matter under sec. 51 (xxix.) of the Constitution (external affairs) or possibly under sec. 32 of the *Fugitive Offenders Act*. In *Re Munro and Campbell* (2) the same consideration led to the result that New Zealand could not surrender under Part II. a fugitive offender who was charged with an offence under the law of an Australian State.

In the later case of *Re Munro* (3), surrender by New Zealand to New South Wales for an offence against New South Wales law was held to be lawful under the provisions of Part I., which require (*inter alia*) a " strong or probable presumption " of the guilt of the accused. This is not necessary under Part II. The Supreme Court of New Zealand held in this case that the Commonwealth Parliament is not (though possibly it might so legislate as to become) a central legislature within the meaning of sec. 39 of the Act.

This court need decide only the case which is before it, and the difficulties seen by the Supreme Court of New Zealand in surrendering a fugitive offender to Australia do not arise in this case, where the question is one of surrendering a fugitive offender to New Zealand. In New Zealand there is only one legislature and one system of criminal law and accordingly it is not now necessary to reach any decision upon the points of difficulty mentioned in the New Zealand cases. These questions could hardly arise in a court in Australia in proceedings under the *Fugitive Offenders Act*. It may, however, be observed that sec. 39 shows that the *Fugitive Offenders Act* is intended to be applicable and have operation in parts of His Majesty's Dominions where more than one legislature operates in the same area, and where quite probably the jurisdiction of magistrates may

(1) (1906) 4 C.L.R. 265. (2) (1935) N.Z.L.R. 159.
(3) (1935) N.Z.L.R. 271.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Latham C.J.

be limited by reference to locality and where they may derive their authority from local as distinct from central legislatures. I agree with the view of the Chief Justice of the Supreme Court that the criminal law of a State constituting part of a federal political and legal entity may properly be described as a law creating offences which are " punishable by law in " a British possession constituted by the federal area. Offences under State law are in fact so punishable and as at present advised (though, as I have said, it is not necessary to decide the point) I would not be disposed to adopt the more restricted meaning of these and other similar words in the Act.

The Full Court of the Supreme Court of New Zealand, however, has taken the opposite view in a very definite judgment. The result will be that the *Fugitive Offenders Act*, Part II., will be largely ineffective for the purpose of securing the return of fugitive offenders from New Zealand to Australia. A consideration of the decisions of this court in *McKelvey* v. *Meagher* (1), of the Supreme Court of New Zealand in *Re Munro and Campbell* (2) and *Re Munro* (3), of the Full Court of New South Wales in this case, and of this court in this case, may suggest the desirability of clarifying the position by some amendment of the legislation or by the enactment of new legislation which would be more clearly in accordance with modern conditions than the present provisions. In *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (4), this court considered the definition of " British possession " contained in sec. 18 (2) of the *Interpretation Act* 1889. This definition is very similar to that contained in sec. 39 of the *Fugitive Offenders Act*. It was held that the Commonwealth was a British possession within the meaning of sec. 18 (2), and that accordingly the High Court had certain admiralty jurisdiction by virtue of the *Colonial Courts of Admiralty Act* 1890, sec. 2, which constituted as Courts of Admiralty certain courts of law " in a British possession." The result of this decision is to leave in doubt the jurisdiction in admiralty of State courts. If the problems which arise with respect to the *Fugitive Offenders Act* should be made the subject of legislative action, I suggest that consideration

(1) (1906) 4 C.L.R. 265.
(2) (1935) N.Z.L.R. 159.
(3) (1935) N.Z.L.R. 271.
(4) (1924) 34 C.L.R. 420.

might with advantage also be given to the problem disclosed by *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1).

For the reasons which I have given the applications for special leave to appeal should be refused.

STARKE J. An information upon oath was laid before a stipendiary magistrate in New Zealand charging John William Shaw McArthur with an indictable offence under the *Crimes Act* 1908, sec. 257, of New Zealand, namely, publishing a prospectus false in certain material particulars. A warrant was thereupon issued commanding the officers of police in New Zealand to apprehend McArthur and bring him before some one or more of His Majesty's justices of the peace to answer the information and to be further dealt with according to law. But the warrant could not be executed in New Zealand, for McArthur was in Australia, in the State of New South Wales. Proceedings were therefore instituted for his return to New Zealand, under the provisions of Part II. of the *Fugitive Offenders Act* 1881 (44 & 45 Vict. c. 69), "Inter-colonial Backing of Warrants and Offences."

By sec. 12, Part II. of the Act applies "only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same." An Order in Council of August 1883 applied Part II. of the Act to a group of British possessions therein mentioned, namely New South Wales, Victoria, South Australia, Queensland, New Zealand, Tasmania, Western Australia, and Fiji. But in 1901 the Commonwealth of Australia was established, under the Act 63 & 64 Vict. c. 12: the people of the British possessions above mentioned (other than New Zealand and Fiji) were united in a federal commonwealth under the name of the Commonwealth of Australia, and each of the possessions (other than as aforesaid) became a State of the Commonwealth. An Order in Council made in October of 1925 revoked the Order in Council of August 1883, and provided that on and after 1st November 1925 Part II. of the *Fugitive Offenders Act* 1881 should apply to the group of British possessions and territories therein mentioned, that is to say: "Commonwealth of

(1) (1924) 34 C.L.R. 420.

H. C. OF A. 1936. McARTHUR v. WILLIAMS. Starke J.

Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, Gilbert and Ellice Islands, British Solomon Islands."

The warrant for the arrest of McArthur was produced before a police magistrate and justice of the peace of the State of New South Wales. And it was indorsed as follows :—

"*Fugitive Offenders Act* 1881.

New South Wales

Sydney

To Wit.

Frederic Leslie Neville Robinson, duly sworn maketh oath and saith as follows : I am a police detective of the police force of the dominion of New Zealand residing at Wellington in the said dominion.

The signature 'E. D. Mosely' subscribed to the within warrant for the apprehension of the within named John William Shaw McArthur which warrant I now bring with me, is in the handwriting of the said E. D. Mosely a stipendiary magistrate and a justice of the peace for the said dominion, who then had lawful authority to issue such warrant for the offence therein named, which is punishable by law in the said dominion by imprisonment for seven years. The said John William Shaw McArthur is within the State of New South Wales.

(Sgd.) F. L. N. Robinson.

Made and sworn by the said Frederic Leslie Neville Robinson at Sydney this twenty-third day of October 1935. Before me

(Sgd.) A. Swiney,

Police magistrate and justice of the peace for New South Wales.

State of New South Wales

To Wit Sydney.

Whereas proof upon oath has this day been made before me the undersigned a police magistrate and a justice of the peace for the State of New South Wales, that the name 'E. D. Mosely' subscribed to the within warrant is in the handwriting of the within named E. D. Mosely ; And whereas I am satisfied by the oath of the said

Frederic Leslie Neville Robinson that he had then lawful authority to issue the said warrant for the said offence and that the said offence is punishable by law in the dominion of New Zealand, I hereby authorize Frederic Leslie Neville Robinson who brings me this warrant, and also all other constables in the said State of New South Wales, to execute the said warrant within the State of New South Wales and to apprehend the within named John William Shaw McArthur, and to bring him, if apprehended in this State of New South Wales, before me or some other magistrate for the said State of New South Wales, to be dealt with according to law.

Given under my hand the twenty-third day of October One thousand nine hundred and thirty-five at Sydney in the State of New South Wales.

(Sgd.) A. Swiney,
A police magistrate and a justice of the peace
for the State of New South Wales."

McArthur was thereupon apprehended in New South Wales, and brought before a stipendiary magistrate in and for the Metropolitan Police District, who made an order for his return to New Zealand in the following form :—

"To Frederic Leslie Neville Robinson, a detective in the police force for the dominion of New Zealand, and to all constables in the police force in the State of New South Wales, and to all governors of gaols, gaolers and lockup-keepers in the last-mentioned State or in any British possession. Whereas John William Shaw McArthur (hereinafter called the accused) late of Wellington in the said dominion was on this First day of November 1935 brought before me, a stipendiary magistrate in and for the Metropolitan Police District in the said State by virtue of a warrant under the hand and seal of E. D. Mosely Esquire a justice of the peace in and for the said dominion, and which warrant was indorsed by A. Swiney Esquire a police magistrate and justice of the peace in and for the said State, pursuant to the *Fugitive Offenders Act* 1881 ; wherein the accused is charged with having committed an offence, that is to say that the said accused on or about the eighth day of April 1933 at Wellington in the said dominion being a director of a public company called ' The Investment Executive Trust of New Zealand Limited ' did publish a prospectus

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Starke J.

dated the eighth day of April 1933, inviting the public to subscribe to a second series of debentures in the Investment Executive Trust of New Zealand Limited, which prospectus was false in certain material particulars, to wit in that it was therein stated that the said company had adopted a policy of diversification or the spreading of capital over a large number of sound investments, which statement concealed the true nature of the company's investments, he knowing the said prospectus to be false in the particulars aforesaid, with intent thereby to induce persons to advance money to such company, which said offence is in the said dominion an offence punishable by law; And whereas I am satisfied that the warrant so indorsed is duly authenticated as directed by the said Act and was issued by a person having lawful authority to issue the same; and being also satisfied on the oath of Frederic Leslie Neville Robinson that the accused is the person named in the warrant, and also that the said offence is in the said dominion an offence punishable by law: These are therefore to command you the said Frederic Leslie Neville Robinson, in His Majesty's name, forthwith to take the said accused and him safely convey to Wellington in the said dominion, and there carry him before some justice or justices of the peace in and near unto the place where the offence is alleged to have been committed to answer further to the said charge before him or them and to be further dealt with according to law, and I hereby further command you to deliver to the said justice or justices the said warrant and also depositions of Arthur William Burns and Frederic Leslie Neville Robinson now given into your possession for that purpose together with this precept."

A motion was made on behalf of McArthur to the Supreme Court of New South Wales for his discharge, pursuant to the provisions of sec. 19 of the *Fugitive Offenders Act* 1881, but his motion was dismissed. Special leave is now sought to appeal to this court from the judgment of the Supreme Court.

The main argument in support of this application is that the Order in Council of October 1925 applies Part II. of the *Fugitive Offenders Act* 1881 to a group of British possessions which includes the Commonwealth of Australia as a single entity or unit, and thus, it is contended, excludes from the group the various States comprising

it. The consequence deduced is that the proceedings taken for the return of McArthur to New Zealand before magistrates deriving their authority from the State of New South Wales and not from the Commonwealth, and warrants and orders issued by them pursuant to such proceedings, are unauthorized by Part II. of the Act. The argument is founded upon the reasoning of *Blair* and *Johnson* JJ. of the Supreme Court of New Zealand in the case of *Re Munro and Campbell* (1).

It may not be out of place to observe that extradition between countries with dual systems of government and without uniform systems of law is by no means unknown. Extradition treaties are in force between Great Britain and the United States of America, and are rendered effective by legislative enactments such as the *Imperial Extradition Acts* 1870-1932. The treaties require in some instances, if not in all cases, that the acts charged be criminal by the laws of both countries. Yet we know that the criminal law of the Empire is not governed by a uniform system, and in the United States of America there is no common law of crimes and the criminal law is local to each State. But the Supreme Court of the United States held in Whitaker Wright's case, *Wright* v. *Henkel* (2), that if the offence charged were criminal by the law of the country seeking extradition, and by the laws of the State in which the fugitive was found, then it was within the terms of the treaty and extraditable. " And we cannot doubt," said the court, " that, if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States, and not an Act of Congress." See also *Pettit* v. *Walshe* (3) ; *Factor* v. *Laubenheimer* (4). It would be somewhat remarkable, I think, if Part II. of the *Fugitive Offenders Act* 1881 and the Order in Council of 1925 were less effective than the treaty provisions for the surrender of accused persons between Great Britain and America.

But the matter turns upon the proper interpretation of the Act

(1) (1935) N.Z.L.R. 159.
(2) (1903) 190 U.S. 40. ; 47 Law. Ed. 948.
(3) (1904) 194 U.S. 205 ; 48 Law. Ed. 938.
(4) (1933) 290 U.S. 276 ; 78 Law. Ed. 315.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Starke J.

and the Order in Council. Part II. of the Act is applied only to "groups of British possessions." In the Act "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" (sec. 39). "The expression 'legislature,' where there are local legislatures as well as a central legislature, means the central legislature only" (*ibid.*). Despite the observations in *McKelvey* v. *Meagher* (1), the Commonwealth of Australia clearly falls, I think, within this definition. It is a territory of His Majesty under a federal form of government, the chief characteristic of which is a division of power between the Federal and the State Governments. But territories and places within His Majesty's dominions which have local legislatures as well as a central legislature are deemed one British possession, or a unit, for the purpose of the *Fugitive Offenders Act*. In *McKelvey's Case* (2), *Holroyd*, then the Acting Chief Justice of Victoria, said: "When the *Fugitive Offenders Act* was passed, nearly nineteen years before the *Commonwealth Constitution Act*, the colony of Victoria was unquestionably one of the British possessions, and if it has ever lost that character that can only be by virtue of the definition clause before referred to" (sec. 39 of the *Fugitive Offenders Act*) "and in such territories and places only within His Majesty's dominions as are under one central legislature. It may be difficult to define what is intended by the words 'central legislature'; but, as it appears to me, in declaring that British territories which severally enjoyed a greater or less degree of local self-government, but had already, or should thereafter, become subject in various matters to a higher legislative authority, should be deemed to form one part of His Majesty's dominions, the object of the Imperial Parliament must have been to enable the confederate body, if it pleased, to exercise those powers of arresting and returning fugitive offenders which, by the same Act, were being conferred upon the British dependencies composing, or which might thereafter compose,

(1) (1906) 4 C.L.R. 265.
(2) (1906) V.L.R. 304, at p. 310; 27 A.L.T. 198, at p. 200.

the confederation. *It does not necessarily follow that any dependency of the British Crown should cease to be a British possession* because such a dependency is for a special purpose to be deemed to constitute, together with other dependencies, one British possession and one part of His Majesty's dominions. The Imperial Act which we have been considering was intended to facilitate the arrest of fugitive offenders, and their return to the place whence they had fled; and in my opinion the 39th section does not oblige us to hold that separate colonies, by the mere act of confederating, deprived themselves of a jurisdiction which had been conferred upon them severally for that very purpose." (See also *Re Munro* (1).)

The suggestion merits consideration, but it is not necessary to pursue it further for the purposes of this case.

The Commonwealth has a legislative body which exercises its authority over the whole of Australia. There is one Parliament for Australia, as there is "one Parliament for Canada" (30 Vict. c. 3, sec. 17). Australia is "under one legislature," whether that legislature is properly described as a central legislature or not (Cf. *Sharp & Sons Ltd.* v. *The Katherine Mackall* (2)) and it is the "Commonwealth of Australia"—the territory of Australia—that the Order in Council of 1925 mentions as a British possession within the group to which Part II. of the *Fugitive Offenders Act* 1881 is applied. The Commonwealth, however, is not, in relation to the States, in the position of a foreign country, for the respective laws of the Commonwealth and the States together form one system of jurisprudence, which constitutes the law in force in Australia (See *Moore, Constitution of the Commonwealth of Australia*, 2nd ed. (1910), p. 69). The law of Australia includes the law of all its component parts. Thus, under the *Extradition Act* 1870, secs. 10 and 17, if the question were, in the case of a person accused of an extradition crime, whether the evidence produced was such as would, according to the law of the British possession called the Commonwealth of Australia, justify the committal for trial of the prisoner if the crime had been committed in the Commonwealth of Australia, then a tribunal having jurisdiction in the matter could not decline to find the offence charged because it violated a criminal law enacted by one

(1) (1935) N.Z.L.R. 271.

(2) (1924) 34 C.L.R. 420.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Starke J.

or more of the States, and not by the Commonwealth. So under the *Fugitive Offenders Act*, Part II., if the question be, who is a magistrate, in the British possession known as the Commonwealth of Australia, having authority to indorse a warrant issued in another British possession, then he no less fills that position because his appointment is referable to the authority of a State and not to the authority of the Commonwealth. Similar considerations would apply to Part I. of the *Fugitive Offenders Act* 1881.

I note that in *Re Gerhard* [*No.* 3] (1) *Holroyd* J. reached the conclusion that the term "Governor" of a British possession, referred to in secs. 17 and 26 of the *Extradition Act* 1870, could not be so construed as to include the Governor-General of the Commonwealth. But that conclusion cannot, I think, be supported, if the view I take of the position of the Commonwealth as a British possession be correct, and in any case seems now to be excluded by the provisions of the *Extradition Act* 1903-1933 of the Commonwealth.

The application of the *Extradition Acts* 1870-1932 and the *Fugitive Offenders Act* 1881 to a dual system of government such as is in force in Australia does not, I think, present insuperable difficulties if the laws of the Commonwealth and the States be treated as forming together one system of jurisprudence which constitutes the law in force in Australia. It is true that the Commonwealth is mentioned as a British possession—or the unit—for the purposes of forming a group under Part II. of the *Fugitive Offenders Act* 1881. But I cannot agree with the view taken in *Re Munro and Campbell* (2), that the consequence is that before an accused person can be returned in proceedings under that Part, it must be shown, so long as the Order in Council of 1925 subsists, that the offences charged violate some Act of the Commonwealth and not some Act or law of the State. It is not necessary to say whether it follows from the Order in Council that the States therefore cease to be British possessions for the purposes of Part II. of the Act. It is possible that the wider expression "Commonwealth of Australia" in the Order in Council of 1925 includes both the Commonwealth and the States as British possessions for the purposes of Part II. of the Act. (See *In re McKelvey* (3), per *Holroyd* A.C.J.) But, however this may

(1) (1901) 27 V.L.R. 655; 23 A.L.T. 181.
(2) (1935) N.Z.L.R. 159.
(3) (1906) V.L.R., at p. 310; 27 A.L.T., at p. 200.

be, the Commonwealth of Australia is, as I have said, a British possession and a member of the group constituted by the Order in Council of 1925.

Another ground upon which this appeal is based is that the New Zealand warrant was not issued by a person having lawful authority to issue the same. It was contended that the New Zealand law requires that the information upon which the warrant issued should be substantiated by an informant who had personal knowledge of the facts upon which the information issued. The contention turns upon the proper interpretation of the *Justices of the Peace Act* 1927 of New Zealand. This court would, I should think, adopt any interpretation given to the relevant sections of the Act by the Supreme Court of New Zealand, but, so far as I know, the proper interpretation of the Act has not been considered in New Zealand, and must, therefore, be dealt with by this court.

The only question is whether the New Zealand magistrate had jurisdiction to issue his warrant for the apprehension of the accused: the magistrate's decision upon matters within his jurisdiction, even if erroneous, cannot be questioned: there is no appeal in these proceedings from the magistrate's decision. In *R.* v. *Hughes* (1) *Huddleston* B. said that "the information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend" (*Caudle* v. *Seymour* (2)). No case decides that the information deposed to on oath must be within the personal knowledge of the informant: such a requirement would be impracticable in many cases without an extended hearing. A warrant should not be lightly issued, but the evidence—its credibility and its character—that justifies its issue is a matter for the judicial discretion of the person issuing it. There is nothing in the *Justices of the Peace Act* 1927 of New Zealand which conflicts with this view, unless it be the note to form 31 in the schedule to that Act. But there is nothing in that note which suggests that the personal knowledge of the informant is the foundation of the magistrate's jurisdiction. The informant, according to the form, may verify the charge or his suspicion that an offence has been committed, and if the facts on which the information is founded

(1) (1879) 4 Q.B.D. 614, at p. 632.
(2) (1841) 1 Q.B. 889; 113 E.R. 1372.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Starke J.

are not within his personal knowledge, then the information may be substantiated by the oath of someone else. But all this is directed to matters within the discretion of the magistrate, and not to the foundation of his jurisdiction.

Lastly, I should add that in my opinion the provisions of sec. 19 of the *Fugitive Offenders Act* 1881, and also of sec. 10 of Part I., give a very wide discretion to the tribunals therein mentioned—wide enough, I think, to cover the objections taken in this case if they were otherwise sustainable and without resort to the prerogative writs as suggested in the Supreme Court.

Special leave should be refused.

DIXON, EVATT AND McTIERNAN JJ. The order which the appellant attacks as invalid directs, in effect, that he be returned to New Zealand in custody to be dealt with according to law as if he had been there apprehended. It was made by a stipendiary magistrate of New South Wales purporting to act under sec. 14 of the *Fugitive Offenders Act* 1881. That statute has an Imperial operation. It provides means by which a person accused of an offence against the law of one part of the Empire may be apprehended in some other part where he is found and conveyed thence to answer the charge in the country where the offence was committed. The purpose of the enactment is to enable the arrest in one jurisdiction under the Crown of persons who have offended in another jurisdiction under the Crown.

The division of the Empire into separate systems of legal administration makes such an Imperial law necessary. As it springs from the existence of separate jurisdictions, so it is indispensable that it should define what shall constitute a separate jurisdiction for the purpose of the reciprocal surrender of offenders and of the exercise of the judicial and administrative authority over the liberty of the person which the statute confers. In the Commonwealth of Australia the administration of the criminal law is in the hands of the States. The Commonwealth is concerned only with the criminal law of the territories and with the enforcement of the penal provisions which the Federal Parliament has enacted under its enumerated powers. What, in Australia, is the unit of jurisdiction for the purposes of the

Fugitive Offenders Act 1881 and how it operates in reference to such a federal system are questions which, although raised soon after the establishment of the Commonwealth, have not ceased to be a source of difficulty. The statute takes the territorial authority belonging to a legislature as the test of what is for its purposes a unit of jurisdiction. Territories and places under one legislature constitute a unit. If there are local legislatures as well as a central legislature, the unit is determined by the territorial authority of the central legislature. These principles are embodied in the definitions of the expressions " British possession " and " legislature " (sec. 39). The difficulty that has been felt in the application to Australia of such principles arises from the features of its legal system and the supposed inappropriateness of the phraseology of some of the cardinal provisions of the statute.

In a legal system where it is not the central but the local legislatures that possess authority over the substantive law by which crime is defined and over the adjective law by which it is punished, where the jurisdiction of courts and magistrates is dependent, not upon the territorial boundaries by which the power of the central legislature is limited, but upon the boundaries within which the power of the local legislatures is exercised, and where authority is drawn from independent sources and not from the centre, it has been felt anomalous to make the rendition of offenders an affair of the central government and to apply to six separate systems of law existing within the whole area expressions referring to the law of a country as an entirety. The decision of this court in *McKelvey* v. *Meagher* (1) gave an answer to objections raised to the exercise by State authorities of powers attending the surrender of an offender to another part of the Empire. But the answer given was supported by reasons some of which have assisted the Supreme Court of New Zealand towards a conclusion which denies to Australia the more effective of the two processes provided by the statute when the surrender is sought of offenders against the criminal law of the States. (See *Re Munro and Campbell* (2)). In *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (3) this court gave to the definition of " British

(1) (1906) 4 C.L.R. 265.
(2) (1935) N.Z.L.R. 159.
(3) (1924) 34 C.L.R. 420.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

possession " in sec. 18 (2) of the *Interpretation Act* 1889 an effect which appears equally to flow from a combination of the similar definitions of that expression and of the word " legislature " as they occur in the *Fugitive Offenders Act* 1881, notwithstanding that in *McKelvey* v. *Meagher* (1) the court had been unwilling to concede such an operation to them. Further, by an Imperial Order in Council, made 12th October 1925, the view that the Commonwealth as a whole is the unit of jurisdiction for the purposes of the statute has been acted upon. In these circumstances it seems desirable that we should consider independently of authority how, upon the text of the statute, it operates in relation to Australia.

An examination of the provisions of the *Fugitive Offenders Act* 1881 has led us to think that a complete and unqualified application of the definition of " British possession " in sec. 39 is required and that from it no difficulties arise which a proper understanding of our legal system will not remove.

Sec. 39 in the definition of " British possession " provides that all territories and places within the Crown's dominions which are under one legislature shall be deemed to be one British possession and one part of the Crown's dominions. It provides that the word " legislature," where there are local legislatures as well as a central legislature, means the central legislature only.

Australia is part of the King's dominions where there are local legislatures as well as a central legislature. The description does not refer to the manner in which the legislative powers may be distributed among the legislatures, nor is it expressed to require the existence of a supremacy of the central over the local legislatures. There is no reason to suppose that such questions were intended to enter into the application of the test which the simple language of the definition lays down. Nor can we see any justification, in construing the text of the definitions or in interpreting the whole statute, for introducing into the test propounded a further condition, a condition that the central legislature shall possess complete, or, at any rate, prima facie power over the subject of criminal law. The definitions operate to make the Commonwealth of Australia, considered as an entirety, the unit of jurisdiction for the purposes

(1) (1906) 4 C.L.R. 265.

of the statute. But when that is done, the Act is not concerned, we think, with the source whence Australian law springs.

When the return by Australia of a fugitive from another British jurisdiction is sought, the authority must be invoked of those judicial and executive officers who under the law of Australia occupy offices satisfying the descriptions which the Imperial statute adopts for vesting the requisite powers over the persons of fugitives. But they no less satisfy those descriptions when their offices are established under the law of a State and not under the law of the Commonwealth.

There are particular functions assigned by the *Fugitive Offenders Act* to the Governor of the whole possession, a description which the Governor-General alone fulfils. But, in general, there is, in our opinion, no requirement that the authority which, under the law of the possession, belongs to an office shall run throughout the entire territory. Indeed, in the case of those provisions of the Act which apply to the United Kingdom, it necessarily follows from the different legal and judicial systems of England and Scotland that neither a criminal code nor a judicial authority which extends over the whole country was considered necessary for their complete operation.

When it is a fugitive from Australia whose return is sought from another jurisdiction of the Crown, it is, in our opinion, of no importance whether the offence for which his apprehension is sought is an offence against the law of a State or against the law of the Commonwealth. State law is part of the total content of the law in force in Australia. A contravention of the law of a State is an offence against Australian law if committed within the territorial boundaries of the State. The qualification expressed in the condition that it must be committed within the State may be regarded as if it were an ingredient in the definition of the offence. Apparently, if, in a unitary form of government, the one legislature forbade under penalty acts or forbearances within a part only of its whole territory, no difficulty would be felt in applying the Act to the case of an offender against that law. But there is nothing in the statute to suggest that it takes into account the source whence the law which the fugitive has violated derives its force in the possession

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

which seeks his return. In arriving at this conclusion, we have considered the operation of the provisions of the whole statute; we have not confined our attention to Part II. which relates to groups of adjacent British possessions and alone affects this case. For it is impossible to determine how that Part of the statute applies in the case of such a federated system as ours without also considering the application of Part I., which is concerned with every part of the Empire, and also the supplemental provisions of Part IV. Nor can Part III. be neglected.

In Part I. the leading provision is sec. 2, which enacts that where a person is accused of having committed an offence to which that Part of the Act applies in one part of His Majesty's dominions and he has left that part, he shall, if found in another part, be liable to be apprehended and returned in manner provided by the Act. By sec. 9, the offences to which Part I. applies are described as treason and piracy and "every offence . . . punishable in the part of His Majesty's dominions in which it was committed, . . . by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment."

It appears to us to be quite clear that for the purpose of these provisions Australia as a whole, including those of her territories which form portion of the Crown's dominions, constitutes the unit of jurisdiction, that is, the one "part of His Majesty's dominions." So much necessarily follows from the definitions in sec. 39. But we think offences against State law, no less than offences against Federal law, fall within the description contained in the words "punishable in the part of His Majesty's dominions in which it was committed." No doubt the expression "the part of His Majesty's dominions" must receive its defined meaning so that it refers to the jurisdiction in which the offence was committed and not merely to the locality where it took place within the jurisdiction. But there is nothing in the words to require that it shall be an offence everywhere within that jurisdiction. The language of sec. 9 is to be applied in each case to the particular offence charged against the fugitive. This is shown by the use of the word "committed," which, of course, has the effect of "alleged to have been committed." In each particular case it is enough that, if the fugitive committed

the acts charged, he thereby made himself liable within the territory seeking his return to punishment of the specified kind. A similar interpretation should be given to the analogous expression in sec. 13, "punishable by law in that possession." If the territory does not possess a uniform criminal law, it must appear not simply that somewhere or other within that territory the law made such an offence thus punishable, but also that in the actual locality where he committed the acts charged they amounted to such an offence. In other words, for the purpose in hand, it is just as if the locality of the crime entered into its definition.

The criminal law is not uniform throughout England, Scotland, Northern Ireland, the Channel Islands and the Isle of Man; but sec. 37 expressly provides that they shall be deemed for the purpose of the Act to be one part of His Majesty's dominions. If that provision is borne in mind in considering how the detailed machinery of Part I. for apprehending fugitive offenders found in the jurisdiction applies to the administrative and judicial organization of Australia, much of the difficulty which has been thought to arise is dispelled.

The authorities who may indorse a warrant under sec. 3 include a judge of a superior court. This expression is defined by sec. 39 to mean, in England, the Court of Appeal and the High Court of Justice; in Scotland, the High Court of Justiciary, and, in a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession.

No single court exercises throughout Australia the criminal jurisdiction which the High Court of Justice has throughout England, but, within their several territorial boundaries, the Supreme Courts of the States and of the Federal territories do possess such a jurisdiction. Sec. 3 appears to make indorsement by any of the authorities it mentions sufficient throughout the whole unit of jurisdiction for the apprehension of the offender. Thus the indorsement of a judge of the Supreme Court of New South Wales might be sufficient in, e.g., Victoria, or the Federal Capital Territory. This consequence does not appear to us at all incredible. The language of the Act seems to give currency in England to an indorsement of a judge

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

of the Court of Justiciary of Scotland and to give currency in Scotland to an indorsement by a Bow Street magistrate. It is evident that, for the purpose of indorsing warrants, powers are given to persons holding the offices specified quite independently of the limits upon the authority attaching to those offices. But if it seems too incongruous that a warrant indorsed by a judge of a Supreme Court of a State should run in other States, we should think the result ought to be avoided, not by refusing to regard Australia as a single unit of jurisdiction, or the courts of the States as falling within the description " superior court in such part," but by implying in secs. 3, 26 and 39 a tacit restriction to the territorial jurisdiction exercised under the law of the British possession. Probably secs. 10, 17 and 19 are to be read in such a manner. They authorize a superior Court to exercise authority of a strictly judicial nature in respect of the liberty of the person and where more than one court exists within a single " part of His Majesty's dominions " that court should be understood as intended within whose territorial jurisdiction the person happened to be held for the time being. Of course, under sec. 3 (1) a State judge would not be likely to indorse a warrant unless he had reason to believe that the fugitive was within the State.

The legislature which answers the description in secs. 32 (2) and 39 (definition of " superior court ") is the Commonwealth Parliament. Even if it should be held that these provisions do not independently give a legislative authority, it seems probable that the Commonwealth Parliament's power to make laws with respect to external affairs would enable it to act under sec. 77 (i.) and (ii.) of the Constitution and so " determine " pursuant to secs. 32 and 39 of the *Fugitive Offenders Act* 1881 what shall be " superior courts " in Australia. These observations are true in relation to the authority also conceded by sec. 30 (4) to prescribe who shall be a magistrate under Part I.

Under sec. 3, as under secs. 5, 6 and 7, the expression " Governor " applies in Australia to the Governor-General.

Under the joint operation of secs. 4 and 26 in the one case, and of secs. 16 and 26 in the other, the provisional warrant of a magistrate has no effect where, according to Australian law, his warrant would

not run. This appears to us to follow from the words in sec. 4 and in sec. 16 respectively, "justify the issue of a warrant if the offence . . . had been committed within his jurisdiction, and such warrant may be backed and executed accordingly," and by the use in sec. 26 of the word "place" as well as the expression "part of His Majesty's dominions." It may be remarked that the words "and also every constable" in sec. 26 have the effect of overcoming the rule of the common law, where otherwise it would obtain, that a constable not specifically named in a warrant could not execute it outside his jurisdiction (See *R.* v. *Weir* (1)), and, no doubt, the words were introduced for that purpose.

In our opinion a magistrate whose office depends upon the law of a State may exercise within the boundaries assigned to his authority by that law the powers conferred upon magistrates by secs. 4, 5, 13, 14, 15, 16, 17, 19, 24 and 29. He must be in a locality where the character of a magistrate belongs to him by law.

Under sec. 13 his indorsement makes the warrant run only where his warrant would run under Australian law, but, of course, it may be further indorsed by other magistrates whose warrants run elsewhere in the State or in other States.

The order of a magistrate made under sec. 14 that the fugitive be returned to the other British possession must have effect according to its tenor as described by sec. 14 itself, and also according to sec. 25, which deals specifically with the custody of the prisoner while upon a voyage by sea. The result is that the order of a magistrate made in one State would justify the holding of the prisoner while passing through another State by land or water upon a continuous journey to the other possession.

When an order is made for the return to Australia of an offender against the law of a State a practical difficulty may be felt to exist because, both under sec. 6 which empowers the Governor to order him "to be returned to the part of His Majesty's dominions from which he is a fugitive," and under sec. 14, which empowers the magistrate to "order such prisoner to be returned to the British possession in which the warrant was issued," it may be said that all authority given by the Imperial Act over the prisoner ceases when

(1) (1823) 1 B. & C. 288; 107 E.R. 108.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

he reaches Australia, and he may first reach it at a port of a State other than that State against whose laws he has offended. It appears to have been the practice, in exercising the power given by either of these sections, to specify in the order a particular place in the possession or part of the dominion at which the prisoner was to be delivered over. When the fugitive is returned by a ship whose first port of call in Australia is the place specified in the order, or is a port of the State whose laws have been contravened, the difficulty does not arise. But it may arise when ships do not ply between any port of that State and the part of the King's dominions whence he is returned, and also when it is a Federal territory that complains of his violation of its criminal laws. But, under Part III. of the *Service and Execution of Process Act* 1901-1931, another authority is readily obtainable for taking the prisoner into custody on his arrival in a State other than that of the offence. Both under sec. 6 and under sec. 14 the order directs that the prisoner be taken into the part of the King's dominions whence he is a fugitive or to the British possession where the warrant issued " there to be dealt with according to law as if he had there been apprehended." These words may conceivably suffice to authorize his continued custody in the possession until he reaches that portion of it in which he is liable to prosecution for his offence. But however that may be, the words " as if he had been there apprehended " do not imply that on his arrival he cannot be taken or held in execution of a process depending for its authority upon the law of the possession.

The view we have adopted of the manner in which the *Fugitive Offenders Act* 1881 applies to Australia accords with what was done by this Court in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1). It accords with the mode in which that decision applied the *Colonial Courts of Admiralty Act* 1890 as affected by sec. 18 of the *Interpretation Act* 1889 to our Federal organization of courts of justice. The effect of secs. 2 (1), 3 and 15 of the first of these statutes is to confer admiralty jurisdiction upon every court of law in a British possession having civil jurisdiction unlimited as to the amount or the value of the thing in dispute, unless the legislature of the possession exercises a power conferred upon it of declaring which of such courts should

(1) (1924) 34 C.L.R. 420.

be the Colonial Court of Admiralty. Up to that decision, the Supreme Courts of a State had without objection exercised admiralty jurisdiction. They may have done so on the tacit assumption that, although the Commonwealth was the British possession, the Supreme Courts of the States were courts of law with jurisdiction unlimited as to amount and that the power had not been exercised of declaring a court to be a Colonial Court of Admiralty, as it certainly had not before the year 1914. In that year sec. 30A of the *Judiciary Act* was passed purporting to make such a declaration. But its validity was in doubt. The court decided without any dissent that sec. 18 of the *Interpretation Act* 1889 applied to fix the meaning of " British possession," and that it is the Commonwealth of Australia which answers that description. " It is clear that parts of Australia, namely, the States, are under both a central and a local legislature " (per *Knox* C.J. and *Gavan Duffy* J. (1)). Accordingly, it was decided that this court was a Colonial Court of Admiralty even if sec. 30A of the *Judiciary Act* had no validity. None of the judges denied that the Supreme Courts of the States are also Colonial Courts of Admiralty, and since the decision they have, in fact, exercised admiralty jurisdiction. In our opinion the reasoning which we have employed in relation to the *Fugitive Offenders Act* 1881 leads to the conclusion that the State Supreme Courts, as well as the High Court of Australia, do fall within the description " court of law in a British possession," and, of course, there is no limit in respect of amount upon the jurisdiction of a Supreme Court. But it is desirable to notice that under sec. 2 (1) of the *Colonial Courts of Admiralty Act* 1890 this consideration will not support their jurisdiction if sec. 30A of the *Judiciary Act* is " in force " as a declaration that this court shall be a Colonial Court of Admiralty. *Isaacs* J. expressed the opinion that sec. 30A was void because His Majesty's assent had not been declared according to sec. 60 of the Constitution. He held that it was not in force. *Starke* J. expressed the contrary opinion. The other three Justices who formed the court expressed no opinion upon the question. Whether the Supreme Courts are or are not Colonial Courts of Admiralty thus appears to depend on deciding between

(1) (1924) 34 C.L.R., at p. 426.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

the rival views of *Isaacs* J. and *Starke* J., unless the matter is dealt with by the Federal legislature.

The mode of reasoning adopted by the court in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) does not take into account the restrictive interpretation of the expression " central legislature " proposed in this court in *McKelvey* v. *Meagher* (2). The restriction said to be implied amounted to a condition that the central legislature should have power to make laws with respect to the subject matter dealt with by the Imperial enactment. According to this view, if the central legislature possessed no power over the subject matter, then, notwithstanding that it answered the express words of the definition, it was by reason of the implication outside its scope. As the claim in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) was of a description brought within the jurisdiction of the Admiralty Court by sec. 6 of the *Admiralty Court Act* 1861 and was not, in the view, at any rate, of *Isaacs* J., within the jurisdiction described by sec. 76 (iii.) of the Constitution, there was some difficulty in seeing how the Commonwealth did have legislative power over the subject matter. The subject matter was curial jurisdiction and no one suggested that the accidental fact might be laid hold of that the particular matter in litigation happened to be a transaction of commerce with other countries. *McKelvey* v. *Meagher* (2) was relied upon by counsel, as appears from the *Argus Law Reports* (3). The authority of the reasoning by which in that case the conclusion was reached is much weakened by the manner in which the court in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) gave an unqualified meaning and application to the definition of " British possession " and ignored the highly relevant restriction thereon which had been implied in the earlier case. The actual conclusion arrived at in *McKelvey* v. *Meagher* (2) is, of course, brought about also by the interpretation which we assign to the *Fugitive Offenders Act* 1881. The decisive reason upon which the court placed its decision in *McKelvey* v. *Meagher* (2) was sec. 108 of the Constitution. It may be doubted, however, whether this provision operated in the manner suggested. The Constitution brought into existence a new unit of jurisdiction

(1) (1924) 34 C.L.R. 420.
(2) (1906) 4 C.L.R. 265.
(3) (1924) 30 A.L.R., at p. 322.

composed of old units and, according to the very terms in which the *Fugitive Offenders Act* 1881 is expressed, it applied to the new unit, the Commonwealth. The Imperial statute was part of the law of a colony only because the colony was a British possession or single part of the King's dominions. When it ceased to be so, the Imperial statute ceased to be part of the law of the State as such. Sec. 108 is expressed to be "subject to this Constitution" and it is the Constitution which wrought the change in the unit of jurisdiction.

The Order in Council of 1925 revokes previous Orders in Council and then applies Part II. of the Act to a group which includes New Zealand and the Commonwealth of Australia, Papua and Norfolk Island. It treats the Commonwealth of Australia as one possession. It is impossible to regard the States and Federal territories within the political boundaries of that possession as themselves British possessions liable to render to one another offenders against their respective laws pursuant to the *Fugitive Offenders Act*. Unless Australia, as a whole, is one possession within the meaning of the statute, the proclamation is misconceived and we do not think that sec. 31 would save its provisions other than the repealing clause from the invalidity which, in the absence of such a section, would result (Cp. *Minister of Health* v. *The King* (*On the prosecution of Yaffe*) (1)). But, upon the view we have adopted, the Order in Council is correctly conceived, except, perhaps, in separately mentioning Papua and Norfolk Island which should be considered as under the central Government of the Commonwealth of Australia. The view which we have adopted is at variance however with the decision of the Supreme Court of New Zealand in *Re Munro and Campbell* (2). It was there held that, under the Order in Council, the Commonwealth was the entity, the unit, and the States only parts of it. So far we agree. But, as we understand the judgment, the consequence was deduced that the offence charged must be an offence according to the law of the Commonwealth as opposed to the law of a State. With respect, we are unable to agree in the distinction. The Commonwealth of Australia is a single unit for the purposes of the statute, because it is considered as a country, one country. It is not the Federal Government which is the unit of jurisdiction, but

(1) (1931) A.C. 494.

(2) (1935) N.Z.L.R. 159.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

the country. According to the law of the country, powers are distributed between State and Federal Governments and separate systems of criminal law exist in the different parts of the country which constitute States and Federal territories. But the country as a whole, the Commonwealth of Australia, is a place to which an offender against the laws in force in any part of it is liable to be returned under Part II. of the Act, as well as under Part I. The direction of the actual warrant in question in the case of *Re Munro and Campbell* (1) may have been open to objection, because it required the return of the prisoner to the State of New South Wales and not simply to the Commonwealth of Australia, or to a specified port of the Commonwealth of Australia. Some parts of the judgment appear to rely upon this consideration, which, consistently with our own view, may be enough to support the conclusion that the warrant was bad.

The actual decision reached by the Supreme Court of New Zealand in the later case of *Re Munro* (2) would flow from the view we have expressed, but the reasoning, which pursues that of *McKelvey* v. *Meagher* (3), is necessarily at variance with that view. We are respectfully of opinion that it does not give the true effect of the Australian political system.

The specific objection made in the present case to the authority of the magistrate who indorsed the New Zealand warrant, and to that of the magistrate who ordered the return of the applicant, is, in effect, that they possess the character of magistrates under the law of the State and not under that of the Commonwealth, which is the unit specified by the Orders in Council and contemplated by the Act. They, therefore, derive an authority limited by the State boundaries and incapable of supporting an exercise of power so extensive as that which, according to the contention, sec. 26 demands. This objection so stated and in all the forms into which it has been expanded is, we think, met by the views we have already expressed. Sec. 26 does not, in our opinion, call for an indorsement which will run throughout the possession, i.e., throughout Australia, and we think that under both sec. 13 and sec. 14 a magistrate may act if,

(1) (1935) N.Z.L.R. 159. (2) (1935) N.Z.L.R. 271.
(3) (1906) 4 C.L.R. 265.

in the place, district, or other locality where he acts, he has the powers of a justice of the peace and authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial (Cp. sec. 39, definition of "magistrate").

An objection of another kind was relied upon by the applicant. It was placed first in the argument on his behalf and raises a serious question, although it has less general importance than that first dealt with in this judgment. The objection is that the warrant was not issued in New Zealand by a person having lawful authority to do so. It is said that under the law of New Zealand his authority to grant a warrant arose only if an information was laid before him in writing on the oath of an informant, or of some witness or witnesses who possessed personal knowledge of the facts upon which the information was founded (Cf. the New Zealand *Justices of the Peace Act* 1927, secs. 136 and 372 and form 31). The effect of these provisions is to require that an information in writing on the oath of the informant, or of some witness or witnesses, shall be laid before the justice who issues his warrant of apprehension and to supply, as good, valid and sufficient in law, a form of information covering the case of an informant who directly says the offence has been committed and the case of one who says that he has just cause to suspect and does suspect that it has been committed. The form concludes with the direction :—" If the facts on which the information is founded are not within the personal knowledge of the informant, add—The matter of the above information is now substantiated before me by the oath of—."

The information against the applicant was laid on oath by a police officer. It stated that he had just cause to suspect and did suspect the commission of the offence charged. But it did not show that any witness or witnesses had substantiated the matter of the information, and, in fact, none had done so.

The informant had what may be considered a very good cause indeed for suspecting that the offence had been committed. He knew that, after an investigation of the circumstances by a Royal Commission, the Crown law authorities had advised the prosecution and that his superior officer had instructed him to lay the informa-

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

tion. But he had no personal knowledge of the facts, nor of the evidence by which they might be proved.

Was it necessary that the informant himself should possess, or appear to the justice to possess, direct knowledge of circumstances amounting to just cause for suspecting the offence, or should produce a witness who possessed, or appeared to possess, such knowledge? This is a question of New Zealand law, but it is raised here because sec. 14 requires that the magistrate before whom a prisoner is brought after his apprehension under a warrant backed under sec. 13 shall, before ordering the return of the fugitive, be satisfied that the warrant was issued by a person having lawful authority to issue the same. Sec. 13 also requires that the magistrate who is invited to back the warrant shall be so satisfied before he indorses it. It may be doubted whether this means more than that the magistrate must be satisfied of the existence in the person issuing the warrant of an authority to issue such a warrant. The sufficiency of the materials to enable him to exercise the power does not seem a fit subject for inquiry by the tribunal of another possession. The magistrate making an order under sec. 14 acts judicially and must be satisfied by evidence of such a matter of foreign law. The validity of his order, as distinguished from the legal propriety of his making it, could not, in our opinion, be affected by an erroneous determination of such a question. The actual existence under the law of one possession in the magistrate who issued the warrant of an authority to do so is not made a condition precedent to the jurisdiction of the magistrate of the other possession to order the fugitive's return. On the contrary, it is a matter which he is called upon to decide in the course of exercising his jurisdiction. It is, therefore, not a ground upon which a prerogative writ of prohibition can be obtained. No irregularity in the proceedings before the magistrate is suggested, and mere error, as distinguished from excess of jurisdiction, is no ground for a writ of certiorari and no other ground appears. These, however, were not the only remedies sought. Reliance was placed upon sec. 19 of the *Fugitive Offenders Act* as a sufficient source of authority to order the prisoner's discharge both to the Supreme Court from which special leave is sought and to this court, regarded not only as a court of appeal but as exercising

an original jurisdiction. But, under that provision, it must be made to appear that for some reason, having regard to all the circumstances of the case, it would be unjust or oppressive to return the prisoner.

In the circumstances of this case, so far as we know them, the failure of the magistrate to require direct evidence of facts amounting to just cause for suspecting the offence, even although going to the validity of his warrant, might not be considered enough to make it unjust to return the prisoner. For it appears that the informant was acting at the direction of responsible officers of the Crown in New Zealand who had examined the facts. But it is, perhaps, more satisfactory to decide upon the validity of the warrant, and, in our opinion, it is valid.

The development of a magistrate's common law authority to grant a warrant of apprehension to answer a criminal charge was slow. By the eighteenth century it was considered oppressive on his part to do so except upon sworn information (*R.* v. *Soane* (1)). Lord *Camden*, in one of the general warrant cases, expressed the opinion that, unless the act was done in the magistrate's sight, he could not without evidence or information issue his warrant for apprehending for a crime. But the court held that it was unnecessary to set out in the warrant any particulars of the grounds of suspicion or of the evidence before the magistrate (*Wilkes* v. *Lord Halifax* (2)).

A little before the passing of *Jervis's Act*, the view appears to have been finally adopted that the magistrate's authority depended upon his taking an information upon oath (*Caudle* v. *Seymour* (3)). If the information was upon oath, its validity was not destroyed by its stating only hearsay not amounting to legal evidence (*Cave* v. *Mountain* (4)). If a magistrate granted a warrant without an information it was invalid as against him and he was liable to an action of trespass to the person (*Morgan* v. *Hughes* (5)).

Since 11 & 12 Vict. c. 42 and 11 & 12 Vict. c. 43 an information or complaint substantiated on oath has been the necessary foundation of a magistrate's authority to issue a warrant. But it has never

(1) (1738) Andr. 272; 95 E.R. 395.
(2) (1763) 19 St. Tri. 981, at p. 987.
(3) (1841) 1 Q.B. 889; 113 E.R. 1372.
(4) (1840) 1 Man. & G. 257, at pp. 262, 263; 133 E.R. 330, at p. 333.
(5) (1788) 2 T.R. 225, at p. 231; 100 E.R. 123, at p. 126.

H. C. OF A. 1936.

McARTHUR v. WILLIAMS.

Dixon J. Evatt J. McTiernan J.

been considered that the validity of the warrant could depend upon the nature or sufficiency of the materials upon which a magistrate granted the warrant if there was an information on oath before him which, however irregular, was not a nullity. It is easy to understand that the existence of a written information sworn to or supported on oath might be conditions precedent to an authority to issue a warrant of apprehension. But when these conditions are satisfied, the magistrate has materials upon which he must form his judgment. In general the sufficiency or character of materials which are required for the purpose of exercising a discretion is not a matter upon which the validity of the discretionary act is made to depend (cf. *Cooper* v. *Booth* (1)).

There is nothing in the New Zealand statute, except the note to the form of information, to support the view that an oath is necessary of an informant or witness who had, or who appeared to have, personal knowledge of the facts relied upon. In our opinion that note supplies no sufficient reason for giving to the statute an interpretation which would make a warrant void if it were granted upon an information sworn by an informant who neither had nor appeared to have direct knowledge of the circumstances amounting to cause for suspecting the offence and substantiated by no other oath.

In our opinion special leave to appeal should be refused.

Application for special leave refused. No order as to costs.

Solicitors for the applicant, *D. R. Hall & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

H. D. W.

(1) (1785) 3 Esp. 135, at p. 144; 170 E.R. 564, at pp. 567, 568.