CrimR 1

[HIGH COURT OF AUSTRALIA.]

FFROST . . . . . APPELLANT;
APPLICANT,

AND

STEVENSON . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1937.

SYDNEY, *May* 10, 11, 13; *Aug.* 13.

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

Extradition—From Commonwealth to Mandated Territory of New Guinea—Fugitive Offenders Act—Applicability—Form of order under, and under Service and Execution of Process Act—Service and Execution of Process Act 1901-1934 (*No.* 11 *of* 1901—*No.* 45 *of* 1934), *secs.* 18, 28 (1) (*b*), 28 (1A)—*Fugitive Offenders Act* 1881 (44 & 45 *Vict. c.* 69), *secs.* 13, 14, 19, 36, 39—*Orders in Council*, 12*th October* 1925.

Constitutional Law—Mandated Territory of New Guinea—Legislative power of Commonwealth—In general—Extradition of offenders—Power of treaty legislation—Repugnancy—Colonial Laws Validity Act 1865 (28 & 29 *Vict. c.* 63), *sec.* 2—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (*xxix.*), 52 (*iii.*), 122.

Judiciary—Constitutional powers of the Commonwealth and States—Questions as to the limits inter se—Judiciary Act 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), *sec.* 40A.

The Mandated Territory of New Guinea is a place out of His Majesty's Dominions in which His Majesty has jurisdiction. The relevant Orders in Council under the *Fugitive Offenders Act* 1881 (Imp.) are therefore effectual to apply Part II. of that Act for the purpose of the mutual surrender of fugitives between the Mandated Territory and the Commonwealth.

So *held* by the whole court.

Held, further, by *Latham* C.J. and *Evatt* J., and *semble* by *Rich* J. (*Dixon* and *McTiernan* JJ. not deciding), that the Commonwealth Parliament has power to make legislative provision for the mutual surrender of fugitives between the Mandated Territory of New Guinea and the Commonwealth, and that secs. 28 (1) (*b*) and 28 (1A) of the *Service and Execution of Process Act* 1901-1934, to the extent at least to which they make such provision, are valid. *Per Latham* C.J.: The source of the power is the combination of secs. 122 and 51 (xxix.) of the Constitution, or, possibly, sec. 52 (iii.) in relation to sec. 122. *Per Evatt* J.: Its source is sec. 51 (xxix.).

Held, further, by *Latham* C.J. and *Evatt* J. (*Rich* J. not deciding, and *Dixon* and *McTiernan* JJ. *contra*), that the relevant provisions of the *Service and Execution of Process Act* 1901-1934 and the regulations thereunder, in their application to the surrender of fugitives between the Commonwealth and the Mandated Territory, are not repugnant to the relevant provisions of the *Fugitive Offenders Act* 1881 (Imp.), and the Orders in Council applying the same as between the Commonwealth and the Mandated Territory.

Held, further, by the whole court, that the determination of the validity of secs. 28 (1) (*b*) and 28 (1A) of the *Service and Execution of Process Act* 1901-1934, in their application to the surrender of a fugitive from New South Wales to the Mandated Territory of New Guinea involved a question of the limits *inter se* of the constitutional powers of the Commonwealth and the States within sec. 40A of the *Judiciary Act* 1903-1934.

Form of order for return of a fugitive under the *Fugitive Offenders Act* 1881 (Imp.) and the *Service and Execution of Process Act* 1901-1934, respectively, and, in particular, whether such order must be in the form of a warrant, considered.

Status of the Mandated Territory of New Guinea, and source of, and limitations, if any, upon the Commonwealth's legislative power thereover, discussed.

The Commonwealth's power of treaty legislation under sec. 51 (xxix.) of the Constitution considered by *Evatt* J.

Decision of the Supreme Court of New South Wales (Full Court) varied.

APPEAL from the Supreme Court of New South Wales.

An application was made by Galfred Mervyn Collins Ffrost to the Full Court of the Supreme Court of New South Wales to make absolute an order nisi for a writ of prohibition to restrain further proceedings on an order made on 26th January 1937, by a magistrate of the State of New South Wales, that the applicant, Ffrost, should "be returned to the Territory of New Guinea, and for that purpose should be delivered into the hands of" the respondent, "Henry James Stevenson, Warrant Officer of the New Guinea Police Force,

H. C. OF A. 1937.

FFROST v. STEVENSON.

bringing the warrant." Alternatively, a writ of *certiorari* was asked for removing into the Supreme Court the application for the order, that it might be quashed, and, also, a writ of *habeas corpus* directed to Stevenson and the governor of Long Bay Gaol.

Ffrost, for about three years, had been employed by Burns, Philp & Co. Ltd. as an overseer and medical assistant at Meto Plantation, Witu, in the Mandated Territory of New Guinea. He had finished, or had almost finished, his three years' service with his employer when it released him from his engagement to enable him to return to Sydney, where he arrived about the end of November 1936, and he continued to reside there with a view to completing, at Sydney University, a medical course of which, prior to the engagement referred to above, he had already completed the first four years.

On 8th January 1937 at Rabaul, Territory of New Guinea, a native, Bonri, was found guilty by Chief Judge *Wanliss*, on a charge of manslaughter, of unlawfully killing another native, Mul Mul, at Meto Plantation, in the Witu Group, on 28th October 1936. During the hearing of this charge statements were made which implicated Ffrost in the killing of Mul Mul. As the result of these statements a warrant was issued under the *District Courts Ordinance* 1924-1935 (N.G.), at Rabaul, on 9th January 1937, by one D. Waugh, who signed as district officer and justice of the peace. In the warrant it was stated that information on oath had been laid before the magistrate that Ffrost, on 28th October 1936, unlawfully killed Mul Mul contrary to the provisions of sec. 303 of the *Criminal Code* of the State of Queensland in its application to the Mandated Territory, and commanded the arrest of Ffrost. Upon being informed by way of an information of the issue of the above-mentioned warrant and of its contents, a magistrate of the State of New South Wales, at Sydney, on 9th January 1937, and purporting to act under sec. 18 of the *Service and Execution of Process Act* 1901-1934, issued a provisional warrant commanding that Ffrost be apprehended and brought before a New South Wales magistrate. Ffrost was arrested on 11th January 1937. When the original warrant issued at Rabaul reached Sydney a New South Wales magistrate, on 25th January 1937, indorsed on it a statement that he had been informed on oath of the authenticity of the signature of

D. Waugh appearing thereon and that Waugh had lawful authority to issue the warrant. This is the form of indorsement used under sec. 13 of the *Fugitive Offenders Act* 1881 as a backing of an original warrant sufficient to authorize the apprehension of the person named and the bringing of him before a magistrate. At this stage, therefore, there were two processes out against Ffrost, the provisional warrant issued at Sydney on 9th January 1937, and purporting to be under the *Service and Execution of Process Act* 1901-1934, and the backing of 25th January 1937, presumably purporting to be made under the *Fugitive Offenders Act* 1881. When Ffrost was brought before a magistrate on 25th January, the magistrate had before him both the provisional warrant and the backed original warrant. A contention was raised on Ffrost's behalf before the magistrate that the *Fugitive Offenders Act* 1881 was not applicable, and that, therefore, no order could be made for his return under sec. 14 of that Act. That was contested, and it was submitted that that Act was available, and that, if it were not, the order for Ffrost's return could be made under the *Service and Execution of Process Act* 1901-1934. The magistrate ruled that the provisions of the *Fugitive Offenders Act* 1881 did not apply, and that the *Service and Execution of Process Act* 1901-1934 did apply. Apparently a further indorsement was then made on the original warrant by the magistrate who had made the first indorsement authorizing, in almost the identical words of the second schedule to the *Service and Execution of Process Act*, the apprehension and the bringing before the court of Ffrost. The magistrate who was dealing with the application for Ffrost's return to the Mandated Territory held that the combined effect of the two indorsements sufficiently complied with the requirements of sec. 18 of the *Service and Execution of Process Act*, and, on 26th January, made under that section an order for Ffrost's return to the Mandated Territory. An application for the exercise by the magistrate in Ffrost's favour of the discretion conferred by sub-sec. 4 of that section, based upon the grounds: (*a*) that, at the trial of Bonri, the Chief Judge had adversely and severely criticized Ffrost's alleged conduct in the matter; (*b*) that, if returned, Ffrost would, possibly, be tried before the Chief Judge without a jury; (*c*) that another person had already been convicted of the manslaughter of

H. C. OF A. 1937.

FFROST v. STEVENSON.

Mul Mul; and (*d*) that upon the evidence of police witnesses Ffrost, until this occurrence, had lived an unblemished life, and therefore it would be unjust and oppressive to return Ffrost to the Mandated Territory, was rejected by the magistrate.

Sec. 12 of the *Fugitive Offenders Act* 1881 provides that Part II. of that Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to His Majesty to apply the same, and it empowers His Majesty by Order in Council to direct that Part II. shall apply to the group of British possessions mentioned in the Order. Sec. 39 provides that the expression, " British possession ", means any part of His Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and Isle of Man; and that all territories and places within His Majesty's dominions which are under one legislature shall be deemed to be one British possession and one part of His Majesty's dominions. The expression, " legislature," is defined as meaning the central legislature where there are local legislatures as well as a central legislature. Sec. 36 provides that His Majesty may direct that the Act shall apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place out of His Majesty's dominions in which His Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application. On 12th October 1925 an Order in Council was made reciting the provisions of sec. 36 and that New Guinea and Nauru were places out of His Majesty's dominions in which His Majesty had jurisdiction, and ordering (*a*) by clause 2, that on and after 1st November 1925 the *Fugitive Offenders Act* 1881 should apply to New Guinea and Nauru as if those territories were British possessions, subject to certain provisions therein stated but which are not material for the purposes of this report, and (*b*) by clause 6, that, for the purposes of Part II. of the Act, the Territories of New Guinea and Nauru should, with the Commonwealth of Australia, Papua and Norfolk Island, be deemed to be one group of British possessions. On the same day a further Order in Council was made in which, after referring to the Order in Council mentioned above, and reciting, *inter alia*, that by reason of the contiguity of the dominions, colonies

and territories thereinafter mentioned and the frequent intercommunication between them, it seemed expedient to His Majesty and conducive to the better administration of justice therein that Part II. of the *Fugitive Offenders Act* 1881 should apply thereto, it was provided that on and after 1st November 1925, Part II. should apply to the group of British possessions and territories thereunder mentioned, that is to say, Commonwealth of Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, Gilbert and Ellice Islands, and British Solomon Islands.

Questions arose as to whether the Mandated Territory of New Guinea was a " part of His Majesty's dominions " or was a " place out of His Majesty's dominions in which His Majesty has jurisdiction."

In this connection the position was that, at the outbreak of the Great War in August 1914, the north-eastern portion of New Guinea was under the control of Germany. It was stated to have been annexed by Germany on 16th November 1884. In September 1914 it was occupied by a British expeditionary force consisting of Australian troops and warships, and from then until May 1921 it was administered by British military authorities. The Treaty of Peace, which was signed on 28th June 1919, provided by Part IV., art. 119 that " Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions." Part I. of the Treaty, containing the Covenant of the League of Nations, included art. 22, which provides as follows :— " To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves . . . there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization. . . . The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to the advanced nations . . . who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League. There are territories such as South West Africa and certain of the South Pacific Islands, which . . . can best be administered under the laws of the

H. C. OF A. 1937.

FFROST v. STEVENSON.

mandatory as integral portions of its territory, subject to the safeguards above-mentioned in the interests of the indigenous population. In every case of mandate the mandatory shall render to the Council an annual report in reference to the territory committed to its charge." In May 1919 it had already been decided by the allied powers that German New Guinea should be entrusted under mandate from the League of Nations to the Commonwealth of Australia; but no mandate was immediately issued. On 31st July 1919 the Imperial *Treaty of Peace Act* 1919 (9 & 10 Geo. V. c. 33) was passed empowering His Majesty to do such things as appeared to him to be necessary for giving effect to any of its provisions. On 30th September 1920 the Parliament of the Commonwealth of Australia, in anticipation of receiving a mandate for German New Guinea, passed the *New Guinea Act* 1920. German New Guinea was declared to be a territory under the authority of the Commonwealth by the name of the Territory of New Guinea (sec. 4). The Governor-General was authorized to accept the mandate for the government of the Territory when issued to the Commonwealth under the Covenant of the League of Nations (sec. 5). Except as provided by statute, the Acts of the Parliament of the Commonwealth should not be in force in the Territory unless expressed to extend thereto or unless applied to the Territory by ordinance (sec. 13). Until Parliament makes other provision for the government of the Territory, the Governor-General may make ordinances having the force of law in the Territory (sec.14). The Act was to commence on a day to be fixed by proclamation (sec. 2). The mandate was dated 17th December 1920 and emanated from the Council of the League of Nations. It recited art. 119 of the Treaty of Peace, and that the Principal Allied and Associated Powers had agreed that, in accordance with art. 22, Part I. of the treaty, a mandate should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia, to administer New Guinea, and had proposed that the mandate should be formulated in terms which were set out; and that His Britannic Majesty on behalf of the Commonwealth had agreed to accept the mandate and had undertaken to exercise it on behalf of the League of Nations in accordance with certain provisions therein set forth. It also recited that by the said art. 22, par. 8, it

was provided that the degree of authority, control or administration to be exercised by the mandatory not having been previously agreed upon by the members of the League of Nations, should be explicitly defined by the Council of the League. The Council of the League of Nations, confirming the mandate, defined it in the following terms, *inter alia* :—" Art. 2. The mandatory shall have full power of administration and legislation over the territory subject to the present mandate, as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the Territory, subject to such local modifications as circumstances may require. The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present mandate." The mandate reached Australia in April 1921. On 7th April 1921 a proclamation was made fixing 9th May 1921 as the date upon which the *New Guinea Act* 1920 should commence.

The Full Court of the Supreme Court discharged the order nisi referred to above. That court held (*a*) that the provisions of sec. 28 (1) (*b*) of the *Service and Execution of Process Act* 1901-1934, which provides that the Governor-General may make regulations for the service and execution in any State of the civil and criminal process of the courts of the Territories of the Commonwealth, and the regulations by which the provisions of that Act had been made applicable to the service and execution in any State of the civil and criminal process of the courts of the Territory of New Guinea, were *ultra vires* and invalid; and (*b*) that New Guinea was not, in law or in fact, a place within His Majesty's dominions within the meaning of the *Fugitive Offenders Act* 1881, and the Orders in Council were, therefore, valid; that the provisions of the *Fugitive Offenders Act* applied; and that the order made by the magistrate could be supported under that Act.

From that decision Ffrost, by special leave, appealed to the High Court.

Further facts appear in the judgments hereunder.

C. M. Collins (with him *Sturt*), for the appellant. No appeal lay to the Supreme Court from the definite finding of the magistrate

H. C. OF A. 1937. FROST v. STEVENSON.

that the *Fugitive Offenders Act* was not applicable; therefore that court was in error in allowing that part of the magistrate's decision to be challenged. The powers and procedure under the *Fugitive Offenders Act* are different from those under the *Service and Execution of Process Act*.

[EVATT J. referred to *R.* v. *Horwitz* (1).]

The effect of sub-sec. 4 of sec. 18 of the *Service and Execution of Process Act* was dealt with in *In re George* (2). As the magistrate made an order under the *Service and Execution of Process Act*, and stated that he would not make an order under the *Fugitive Offenders Act*, the appellant's rights became different. A right of appeal to the Supreme Court lies in respect of an order made under the *Fugitive Offenders Act*, but no appeal lies in respect of the exercise by a magistrate of his discretion under the *Service and Execution of Process Act* (*O'Donnell* v. *Heslop* (3); see also *Gardner* v. *Parker* (4)).

[EVATT J. referred to *George Hudson Ltd.* v. *Australian Timber Workers' Union* (5).]

Recognition was given by the Commonwealth Legislature in the *New Guinea Act* 1920—that is, before the making of the Orders in Council in October 1925—to the Mandated Territory of New Guinea as a territory under the authority of the Commonwealth. It is a territory which belongs to the King in right of the Commonwealth (*Mainka* v. *Custodian of Expropriated Property* (6)). It should be considered as under the central government of the Commonwealth; in this respect it is similar to Papua and Norfolk Island (*McArthur* v. *Williams* (7)).

[EVATT J. The Mandated Territory of New Guinea is not a British possession. The nature of the government over mandated territory is shown in *Jerusalem-Jaffa District Governor* v. *Suleiman Murra* (8).]

The decision in that case was based upon the fact that an Order in Council had been made under the *Foreign Jurisdiction Act* 1890, and there was not any act similar to the *New Guinea Act*; the only

(1) (1904) 6 W.A.L.R. 184.
(2) (1909) V.L.R. 15, at pp. 19, 20; 30 A.L.T. 141, at p. 142.
(3) (1910) V.L.R. 162; 31 A.L.T. 173.
(4) (1925) 28 W.A.L.R. 22.
(5) (1923) 32 C.L.R. 413.
(6) (1924) 34 C.L.R. 297, at pp. 300, 301.
(7) (1936) 55 C.L.R. 324, at p. 361.
(8) (1926) A.C. 321.

question there before the court was as to a right of appeal. There is the one central legislature for New Guinea and the Commonwealth. New Guinea is within His Majesty's dominions and, having the same legislature, the Commonwealth is deemed to be the same possession, and the *Fugitive Offenders Act* has no application to parts of His Majesty's dominions being within a British possession. That Act would apply as between the Mandated Territory and the Commonwealth if the Mandated Territory were not a British possession and the Order in Council were properly made.

[DIXON J. referred to *R.* v. *Crewe (Earl)*; *Ex parte Sekgome* (1).]

The Commonwealth was in occupation of the Territory at the date of the passing of the *New Guinea Act*, and under the mandate, which was given subsequently, the Territory was to be administered as an integral portion of the Commonwealth. The Commonwealth has full powers of legislation and administration of the Territory. These are acts of a sovereign nature and show that the Territory is British territory as distinct from territory of any other nation. The mandate for the Territory having been given to His Majesty for and on behalf of the Commonwealth, with power to the Commonwealth to apply its own laws to the Territory, there was no power in the King in Council to make the Order in Council by which the provisions of the *Fugitive Offenders Act* were made to apply to New Guinea. The laws to be applied are the laws of the Commonwealth. No powers of legislation or of administration similar to those given to the Commonwealth were given to the Imperial Parliament, and, therefore, there was no power in His Majesty to extend the provisions of an English Act to New Guinea. Also, since the Treaty of Versailles the Order in Council, if made at all, should have been made by the King on the advice of his ministers of the Commonwealth of Australia, and not on the advice of his English ministers. Assuming that the Mandated Territory is a place out of His Majesty's dominions in which His Majesty has jurisdiction within the meaning of sec. 36 of the *Fugitive Offenders Act*, the Order in Council made under that section, by bringing the Territory of New Guinea and the Commonwealth under the provisions of sec. 12 of that Act, then brings in sec. 39, and, as the Commonwealth and the Territory of New Guinea

(1) (1910) 2 K.B. 576.

H. C. OF A. 1937. FROST v. STEVENSON.

are under one legislature, the Act is not applicable. The Order in Council itself contemplates that one has to regard the Commonwealth, Papua, Norfolk Island, New Guinea and Nauru as not in a group of British possessions between which the *Fugitive Offenders Act* is to apply, but as a main group upon which the second Order in Council, which, apparently, was made under sec. 12, would operate. Notwithstanding the wide power given by sec. 36, clause 6 of the Order in Council does not constitute the qualification suggested by the Supreme Court, that is, that it took New Guinea out of the British possessions; otherwise it would mean that, for the purposes of the qualification, Papua and Norfolk Island, although under one legislature, were to be deemed not to be under one legislature. The Mandated Territory is under one legislature with the Commonwealth within the meaning of the *Fugitive Offenders Act*, and they, therefore, form one British possession for the purposes of that Act. In the circumstances of this case, that is, the prejudice against the appellant expressed by the judge, the fact that the trial would take place without a jury, that a person has already been convicted of the offence, and that the unreliability of the evidence generally would, doubtless, result in his acquittal, it would be unjust and oppressive to return the appellant to New Guinea, there to stand his trial.

E. M. Mitchell K.C. (with him *Bowie Wilson*), for the respondent. The application for the appellant's return to New Guinea was made alternatively under one or other of the *Fugitive Offenders Act*, or of the *Service and Execution of Process Act*, and the magistrate simply held that he had not the power to order the return under the first-named Act, but that he had the power under the other Act to so order. There is, in sec. 18 (4) of the *Service and Execution of Process Act*, the amplest power of appeal (*In re George* (1); *O'Donnell* v. *Heslop* (2)). Further, the appellant comes to this court by way of special leave to appeal. Under sec. 37 of the *Judiciary Act*, on an appeal this court has wide powers and may make such order as ought to have been made in the first instance (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (3)), or, alternatively, under

(1) (1909) V.L.R. 15; 30 A.L.T. 141. (2) (1910) V.L.R. 162; 31 A.L.T. 173.
(3) (1923) 32 C.L.R., at p. 426.

sec. 115 of the *Justices Act*, which relates to applications for prohibition, the court may make such orders as would be just in the circumstances. Whether the magistrate made a mistake as to the source of his jurisdiction is immaterial. If he did in fact have jurisdiction from another source to make the order he made, then the court will uphold his order. If it were remitted to the magistrate the whole matter would be at large. The Mandated Territory of New Guinea is outside His Majesty's dominions for the purposes of the *Fugitive Offenders Act* (*Jerusalem-Jaffa District Governor* v. *Suleiman Murra* (1)). A mandate which is exercised on behalf of the League of Nations prima facie is inconsistent with the view that the Territory which is the subject of the mandate forms part of His Majesty's dominions. The Territory was neither annexed by, nor ceded to the British Empire, or His Majesty, nor has His Majesty any power to dispose of it. Reference in the *New Guinea Act* to the territory as being under the authority of the Commonwealth does not operate to make it part of His Majesty's dominions ; that authority of the Commonwealth is by way of mandate.

[DIXON J. referred to *R.* v. *Christian* (2).

[LATHAM C.J. referred to *Jolley* v. *Mainka* (3).]

The scope of sec. 122 of the Constitution was dealt with in *Buchanan* v. *The Commonwealth* (4), *R.* v. *Bernasconi* (5), *Mainka* v. *Custodian of Expropriated Property* (6), *Porter* v. *The King* ; *Ex parte Yee* (7), and *Jolley* v. *Mainka* (8). The expression " otherwise acquired " in that section is sufficiently wide to apply to the form of acquisition which could be described as acceptance of a mandate ; that is, a form of acquisition of political control over territory ; such a construction would leave those decisions unaffected. An acquisition of that nature may involve full representation, or qualified representation or limited representation. The making, in the Order in Council, of the Mandated Territory a British possession necessarily made it, for the purposes of the *Fugitive Offenders Act*, one British possession with the Commonwealth ; it was not competent for the Council to do it otherwise. On the basis that the

(1) (1926) A.C. 321.
(2) (1924) App. D. (S. Af.) 101.
(3) (1933) 49 C.L.R. 242, at p. 250.
(4) (1913) 16 C.L.R. 315.
(5) (1915) 19 C.L.R. 629.
(6) (1924) 34 C.L.R. 297.
(7) (1926) 37 C.L.R. 432.
(8) (1933) 49 C.L.R. 242.

H. C. OF A. 1937.

FFROST v. STEVENSON.

Mandated Territory is outside His Majesty's dominions, sec. 39 of the *Fugitive Offenders Act* does not apply, but, although the Mandated Territory is outside His Majesty's dominions, it is a place where His Majesty has jurisdiction within the meaning of sec. 36 of that Act; therefore, pursuant to that section, the Act may, subject to the conditions, exceptions and qualifications contained in the Order in Council, be applied to the Territory as if it were a British possession. The necessity for the two Orders in Council made in respect to New Guinea is explained by the fact that the first Order was for the purpose of applying sec. 36, and the second Order, sec. 36 having been applied, was for the purpose of constituting the group mentioned in the second Order. The Orders in Council were made under and in accordance with the provisions of sec. 36 in respect of a place within the jurisdiction of His Majesty, which is a sufficient answer to the contention that His Majesty had no power to apply English law on the advice of his English ministers. There is no evidence which justifies the suggestion that the appellant will not obtain a perfectly fair trial; therefore the court should not, in the exercise of the discretion conferred by sec. 19, refuse to return the appellant. Although the provisions of the *Fugitive Offenders Act* and the *Service and Execution of Process Act* agree in principle and have a similar objective, they are not exactly similar in terms, some of the provisions of the first mentioned Act having been varied in, and some omitted from, the other Act.

The legislative power of the Commonwealth Parliament to administer the Mandated Territory rests, alternatively, upon sec. 122 of the Constitution or upon placitum xxix., or placitum xxx., of sec. 51 of the Constitution. The *Service and Execution of Process Act* is supported by placitum xxx. That placitum deals with islands of the Pacific in respect of which the Commonwealth may have some special interest by reason of geographical position, and was framed in general terms to give a very wide area of power. Its purpose was to enable the making of treaty arrangements, or any other treaties or conventions, which might be of mutual interest, and which might reciprocally benefit both the Commonwealth and the islands, e.g., the service of process. Placitum xxx. would cover not merely the extradition of offenders out of the Commonwealth,

but also the enforcement of inter-reciprocal judgments. The expression, " islands of the Pacific," includes any portion of an island under a separate power. The position of New Guinea as an " island of the Pacific " within the meaning of placitum xxx. remained unaffected by the giving of a mandate thereover to the Commonwealth (See, generally, *Quick and Garran's Annotated Constitution of the Australian Commonwealth* (1901), p. 637 ; and *Harrison Moore's Commonwealth of Australia*, 2nd ed. (1910), pp. 467, 468). Sec. 122 of the Constitution, by itself, or aided by placitum xxix., confers upon the Commonwealth the right to establish an organization for the administration of justice in the Territory ; to pursue fugitives out of the Territory ; and to demand their capture at any place where the Commonwealth has territorial jurisdiction. A law passed by the Commonwealth Parliament for those purposes and applicable to the Mandated Territory of New Guinea would be a law for the peace, order and good government of New Guinea. So also a similar law passed by the local Legislature of New Guinea would be a law for the peace, order and good government of New Guinea, notwithstanding that it authorized the return of fugitives from places outside New Guinea. The Mandated Territory and the Commonwealth are under one central legislature ; therefore the Parliament, in its right to make laws for the peace, order and good government of New Guinea, has the right to execute anywhere in the territory of the Commonwealth a warrant for the purpose of securing the person whom it finds in its own territory having committed a breach of its own laws. A law under sec. 122 for the government of the territory may operate outside the territory (*Porter* v. *The King* ; *Ex parte Yee* (1)).

[DIXON J. referred to *British Coal Corporation* v. *The King* (2).]

Sec. 122 confers a power not merely to make laws for the peace, order and good government of the territories, but also for the peace, order and good government of the Commonwealth with respect to the territories, that is, New Guinea comes within the scope of sec. 122, equally with the Northern Territory, Papua and Norfolk Island. This is a matter which, under sec. 52 of the Constitution, is within the exclusive powers of the Commonwealth ; there is support

(1) (1926) 37 C.L.R. 432.

(2) (1935) A.C. 500.

H. C. OF A. 1937. FFROST v. STEVENSON.

for the view that the territory was acquired by the Commonwealth for public purposes within the meaning of that section (*The Commonwealth* v. *New South Wales* (1)). As to whether the States can be called upon to enforce these matters is immaterial (*Le Mesurier* v. *Connor* (2)). The power to govern under sec. 52 includes power to make any laws which are proper or necessary for the peace, order and good government of the territory. A law for the administration of justice in the territory is such a law. A law made outside the territory to operate in the territorial jurisdiction of the Commonwealth is a law for the peace, order and good government of the territory if it has a real and substantial relation to matters, affairs and transactions occurring in the territory. A law for the peace, order and good government of the territory under sec. 122 must be considered as a law for the peace, order and good government of the territory considered as a dependency of the Commonwealth. Having regard to the fact that the Territory is a dependency of the Commonwealth, the power to make a law for the peace, order and good government of the Territory also involves a right to make a law operating outside the Territory, but inside the territorial jurisdiction of the Commonwealth, if it is closely connected with the necessary incidents of a law for peace, order and good government within the Territory. The power conferred in the Constitution to govern a dependency is at least as large as, and may be larger than, the power to make all internal rules and regulations respecting the territory (*Ex parte Reggel* (3); *Kopel* v. *Bingham* (4)). How far, if at all, the Federal authority was entitled to depend upon the assistance of States and State courts was dealt with in *Kentucky* v. *Dennison* (5) and *Robertson* v. *Baldwin* (6); see also *Mitchell* v. *Barker* (7). Sec. 18 of the *Service and Execution of Process Act* enables State magistrates, in the capacity of State magistrates, and not as officers of the Commonwealth (*R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (8)), to act upon it and, if they choose, to exercise jurisdiction. In so acting the magistrates would not be officers of the

(1) (1923) 33 C.L.R. 1, at p. 60.
(2) (1929) 42 C.L.R. 481.
(3) (1885) 114 U.S. 642; 29 Law. Ed. 250.
(4) (1909) 211 U.S. 468; 53 Law. Ed. 286.
(5) (1860) 65 U.S. 66; 16 Law. Ed. 717.
(6) (1897) 165 U.S. 275; 41 Law. Ed. 715.
(7) (1918) 24 C.L.R. 365.
(8) (1916) 22 C.L.R. 437.

Commonwealth. The Mandated Territory is held by the Commonwealth by virtue of the power contained in placitum xxix. of sec. 51 of the Constitution, which relates to external affairs. Assuming that the territory is a foreign country (*Jerusalem-Jaffa District Governor* v. *Suleiman Murra* (1)), the power to return or extradite from the Commonwealth prisoners charged with offences in places outside the Commonwealth, e.g., Papua, Norfolk Island and New Guinea, is amply comprehended within the " external affairs " power (*R.* v. *Burgess* ; *Ex parte Henry* (2)) ; therefore sec. 28 (1A) of the *Service and Execution of Process Act* is fully justified under placitum xxix. (See also *Attorney-General for Canada* v. *Attorney-General for Ontario* (3)). Similarly, the recognition and acceptance in the Commonwealth of process and judgments coming from a foreign country, e.g., the Mandated Territory, to the Commonwealth is also within the " external affairs " power. Assuming that sec. 122 does not deal with the matter of the relations between the Commonwealth and the islands, then that is a matter that can be dealt with under the " external affairs " power as additional to sec. 122.

C. M. Collins, in reply. The magistrate declined jurisdiction under the *Fugitive Offenders Act* ; therefore the Supreme Court had no power to do what the magistrate ought to have done, and exercise jurisdiction. In those circumstances the provisions of sec. 115 of the *Justices Act* are not available to support the order of the Supreme Court. The power to deal with New Guinea does not come within placitum xxx. The *Service and Execution of Process Act*, so far as the mandate is concerned, is not an Act which attempts to deal with the Commonwealth and the islands of the Pacific. The Mandated Territory of New Guinea is a territory otherwise acquired by the Commonwealth within the meaning of sec. 122. The decisions in *Buchanan* v. *The Commonwealth* (4), *R.* v. *Bernasconi* (5) and *Porter* v. *The King* ; *Ex parte Yee* (6) show that the provisions of Chapter III., that is, secs. 71-80 of the Constitution, do not apply. Just as, in *Buchanan* v. *The Commonwealth* (4), it was held that sec. 55

(1) (1926) A.C. 321.
(2) (1936) 55 C.L.R. 608, at pp. 640, 641.
(3) (1937) A.C. 326.
(4) (1913) 16 C.L.R. 315.
(5) (1915) 19 C.L.R. 629.
(6) (1926) 37 C.L.R. 432.

H. C. OF A. 1937. FFROST v. STEVENSON.

did not apply, so sec. 51 (xxiv.) would not apply to give the Commonwealth, in making a law for the government of the Territory of New Guinea, a power to impose any obligation upon a State court. The decisions of the courts of the United States of America are not applicable. There is no provision in the Constitution of the United States of America, as in the Commonwealth Constitution, for the acquisition of territory. Further, the United States of America became itself a sovereign State, and thus had power to acquire territory and to convert territory into States. The *Service and Execution of Process Act* does not purport to deal with external affairs, but purports to deal with territories; therefore, so far as it purports to relate to the Mandated Territory, it is *ultra vires*. If the Territory was acquired, or is being dealt with under the external affairs power, the *Service and Execution of Process Act* does not purport to deal merely with the rendition of prisoners between the Territory and the Commonwealth. Having regard to placitum xxiv., which provides for the service and execution of process between the States as distinct from territories, there is a limitation on the extent to which the external affairs power can be used for the rendition of prisoners between the Territory and the Commonwealth.

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered :—

LATHAM C.J. 1. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales refusing to make absolute a rule nisi for writs of habeas corpus, prohibition or certiorari to a stipendiary magistrate of the State of New South Wales and refusing also to exercise certain powers conferred on the court by sec. 19 of the English *Fugitive Offenders Act* 1881.

The stipendiary magistrate made an order for the return of one Ffrost in custody to New Guinea, there to stand his trial upon a charge of unlawfully killing one Mul Mul contrary to the provisions of sec. 103 of the *Criminal Code* of the State of Queensland in its application to the Territory of New Guinea. Ffrost was arrested and brought before the magistrate on 11th January 1937 upon a provisional warrant, issued under sec. 18 (5) of the *Service and Execution of*

Process Act 1901-1934, and the proceedings were adjourned. An original warrant for the arrest of Ffrost was issued in New Guinea on the same day. Ffrost was again brought before the magistrate on 25th January 1937. The magistrate then indorsed the original warrant, which had by this time been forwarded to Sydney, in the manner required by the *Fugitive Offenders Act* 1881 (44 & 45 Vict. c. 69), sec. 13, which section is in Part II. of that Act.

The magistrate agreed with a contention that the *Fugitive Offenders Act* was not applicable, but held that the Federal *Service and Execution of Process Act* was applicable. A further indorsement was made on the original warrant in accordance with sec. 18 of the latter Act. Thus, when the magistrate made his order, the warrant bore indorsements which satisfied the requirements of both of the Acts mentioned.

On 26th January the magistrate ordered that Ffrost be returned to New Guinea. The order of the magistrate is in the following terms:—"I therefore order Galfred Mervyn Collins Ffrost to be returned to the Territory of New Guinea and for that purpose to be delivered into the hands of Henry James Stevenson, Warrant Officer of the New Guinea Police Force, bringing the warrant."

Ffrost obtained an order nisi returnable before the Full Court of the Supreme Court. Upon the return of the order nisi the Full Court refused to make it absolute and refused also to order under sec. 19 of the *Fugitive Offenders Act* that the prisoner be not returned. The Full Court held that the *Service and Execution of Process Act* was not applicable to the case but that the *Fugitive Offenders Act* was applicable.

2. Both the *Fugitive Offenders Act* and the Federal *Service and Execution of Process Act*, Part III., authorize, in cases where they are applicable, the arrest in one jurisdiction (to use a general term) of a person charged in another jurisdiction with an offence, and the return of that person to the latter jurisdiction, there to stand his trial. The *Fugitive Offenders Act*, Part I., authorizes such return as between different parts of His Majesty's dominions. Part II. provides a more simple procedure for such return as between British possessions to which that part has been applied by Order in Council made under sec. 12 of the Act. Such an order may be made in the case of a group of British possessions to which, by reason of their

H. C. OF A. 1937.

FFROST v. STEVENSON.

Latham C.J.

contiguity or otherwise, it may seem expedient to His Majesty to apply Part II. of the Act. Under sec. 36 the Act can be applied also to a place out of His Majesty's dominions in which His Majesty has jurisdiction as if such a place were a British possession. Orders in Council have been made which treat New Guinea as a place out of His Majesty's dominions within the meaning of sec. 36 and which apply Part II. of the Act to a group including the Commonwealth of Australia and New Guinea. It is necessary to determine whether, in view of the exceptional position of New Guinea as a mandated territory, these orders are effective to bring Part II. of the Act into operation in this case.

The Constitution, sec. 51 (xxiv.), confers power upon the Commonwealth Parliament to make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States. Part III. of the Act deals with the execution in one State of the criminal process of another State. It is clear that sec. 51 (xxiv.) does not authorize legislation with respect to the return of accused persons as between the Commonwealth and a territory of the Commonwealth. Sec. 28 of the Act, however, provides that the Governor-General may make regulations for applying the provisions of the Act, with or without modifications, as between States and territories of the Commonwealth, and sub-sec. 1A provides that for the purposes of the section " Territories of the Commonwealth " includes any territory governed by the Commonwealth under a mandate. Regulations have been made in pursuance of this provision. It is necessary to determine whether the Commonwealth Parliament has power to enact sec. 28 so far as it applies to mandated territories.

If the *Fugitive Offenders Act* should be held to be applicable as between the Commonwealth and New Guinea and if the *Service and Execution of Process Act*, sec. 28, and the regulations should also be held to be so applicable, it will become necessary to determine whether the Acts can stand together, or whether the Federal Act (in its application as between the Commonwealth and New Guinea) is repugnant to the *Fugitive Offenders Act* so that, under the *Colonial Laws Validity Act* 1865, it is void and inoperative to the extent of the repugnancy. If both Acts are applicable, or if either one of the Acts

is applicable, it must then be decided whether the order made by the magistrate can be supported either under both Acts, or under the Act which is held to be applicable.

3. The first question which arises is whether the *Fugitive Offenders Act* is applicable as between the Commonwealth of Australia (including the State of New South Wales) and New Guinea.

The *Fugitive Offenders Act*, sec. 36, provides that " it shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application."

Two Orders in Council were made on 12th October 1925 under the *Fugitive Offenders Act*. The first recited that New Guinea was a place out of His Majesty's dominions in which His Majesty had jurisdiction and provided that on and after 1st November 1925 the Act should apply to New Guinea as if that Territory were a British possession, with certain qualifications which are not material for the purpose of this case. This Order also provided that " for the purpose of Part II. of the said Act the said Territories of New Guinea and Nauru shall, with the Commonwealth of Australia, Papua and Norfolk Island, be deemed to be one group of British possessions." The second Order in Council recited that the Act had been applied to New Guinea by the first Order in Council as if it were a British possession, and that it was desirable by reason of the contiguity of the dominions, colonies and territories mentioned in the Order that Part II. of the Act should apply to them. As already stated, sec. 12 of the Act provides for the application of Part II. in such a case. The Order then provided that Part II. of the Act should as from 1st November apply to a specified group of British possessions and territories including the Commonwealth of Australia and New Guinea.

There is no doubt that His Majesty has jurisdiction in New Guinea. If New Guinea is a " place out of His Majesty's Dominions," sec. 36 authorizes the application of the Act, and sec. 12 authorizes the inclusion of New Guinea in a group with the Commonwealth of Australia.

H. C. OF A. 1937. FFROST v. STEVENSON. Latham C.J.

But if New Guinea is a British possession within the meaning of the *Fugitive Offenders Act*, that Act cannot be applied as between the Commonwealth and New Guinea, because sec. 39 provides that all territories and places which are under one legislature shall be deemed to be one British possession and one part of His Majesty's dominions. Both the Commonwealth and New Guinea are under the Commonwealth Parliament (See *McArthur* v. *Williams* (1)). Part II, applies only as between one British possession and " another British possession," which are in the same group (see sec. 13), not as between two parts of " one British possession."

As already stated, one of the Orders in Council made under the *Fugitive Offenders Act* recites that New Guinea is a place out of His Majesty's dominions in which His Majesty has jurisdiction. This recital, however, cannot, in my opinion, be relied upon as conclusively establishing the alleged fact which it recites. An Order in Council purporting to be made under an Act cannot give itself validity by including in its terms an allegation that a necessary condition precedent is satisfied. It is true that sec. 31 of the Act provides that every Order made for the purposes of the Act shall, while it is in force, have the same effect as if it were enacted in the Act. But even such a provision cannot authorize the making of an order if conditions precedent are not satisfied. Sec. 31 gives statutory effect to the order if it is made for the purposes of the Act ; it does not provide that any statement which has been inserted in the order, for example, in a recital, is to be conclusively taken to be true : See *Institute of Patent Agents* v. *Lockwood* (2)—a case which goes as far as any case can go in giving effect to such a provision as sec. 31. But even in that case, if the rules in question had not been made by the proper body and had not related to a particular subject-matter, they would have been invalid : See *Minister of Health* v. *The King* (*On the prosecution of Yaffe*) (3). Thus if, for example, an order were made under sec. 36 purporting to make the *Fugitive Offenders Act* applicable in relation to Russia, where His Majesty has no jurisdiction, the order would simply be inoperative. So also, if New Guinea is not a place which is out of His Majesty's dominions, the order in relation to New Guinea is ineffective.

(1) (1936) 55 C.L.R. 324.
(2) (1894) A.C. 347.
(3) (1931) A.C. 494. at pp. 501 et seq.

Courts are required to take judicial notice of the extent of His Majesty's dominions (See cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 621). The law treats such a question as one not to be determined in cases of doubt by particular courts upon such evidence as particular litigants may choose to submit, or upon an examination by particular courts of documents which are possibly ambiguous in their terms. Whether a particular territory is or is not within His Majesty's dominions is to be conclusively determined, in any case of doubt, by a formal statement made by a Minister of the Crown in response to a formal inquiry by a court (*Duff Development Co.* v. *Kelantan Government* (1)). A recital in an executive order made under a statute cannot be regarded as being such a formal statement within either the ordinary rules of evidence or the special provisions of the *Foreign Jurisdiction Act* 1890, sec. 4, which provides a statutory procedure whereby a court may obtain from a Secretary of State a statement which shall be conclusive evidence of the existence or extent of any jurisdiction of His Majesty in any foreign country.

The magistrate in the present case did not obtain any authoritative information as to whether New Guinea was or was not a place outside His Majesty's dominions. The court is supposed to take judicial notice of the fact, whatever the fact may be, but in this case, unfortunately, the court has not the advantage of having any conclusive statement before it and this court cannot in these proceedings take fresh evidence. The court must therefore do the best it can to reach a conclusion upon the question upon such material as is available. Though conclusive evidence is wanting, there is, I think, sufficient evidence to make it possible to determine the question.

Consideration of the provisions of the Treaty of Peace with Germany shows, I think, that mandated territories did not become possessions, in the ordinary sense, of the mandatory powers. There has been much difference of opinion among jurists as to the question of sovereignty in relation to such territories. Professor *Quincy Wright* of the University of Chicago in his work *Mandates under the League of Nations* (1930) refers (p. 319) to fifty juristic discussions in which the question has been examined. There have been many

(1) (1924) A.C. 797.

H. C. OF A. 1937.

FROST v. STEVENSON.

Latham C.J.

discussions of the subject since. I doubt whether any light can be thrown upon the question to be decided by this court by considering the applicability to mandated territories of a conception which is itself so uncertain and so disputable as that of sovereignty. Authorities of the highest standing differ among themselves as to whether or not the conception of sovereignty is applicable, in what sense it is applicable, and, if it is applicable, as to where sovereignty resides. The grant of mandates introduced a new principle into international law. The Peace Treaty in art. 22 of the Covenant of the League of Nations refers to former German colonies and territories as having "ceased to be under the sovereignty of" Germany. By art. 119 of the Peace Treaty Germany renounced in favour of the five Principal Allied and Associated Powers "all her rights and titles over her oversea possessions." The Principal Allied and Associated Powers granted mandates to certain powers in respect of those oversea possessions. The League of Nations then defined under art. 22 of the Covenant "the degree of authority, control or administration to be exercised by the mandatory." In the case of "C" mandates, including the mandate for New Guinea, the mandatory power, which is the Commonwealth of Australia, has full powers of "administration and legislation over the territory subject to the mandate as an integral portion of its territory" (Art. 2 of the mandate). This provision is in accordance with the terms of art. 22. In the original draft of the covenant the relevant provision of art. 22 provided that the territories in respect of what are now known as "C" mandates were granted "can be best administered under the laws of the mandatory *as if* integral portions of its territory." But on the suggestion of the Japanese delegate the word "if" was omitted (See *Wright, op. cit.*, p. 42). It is clear that it was intended that, in the case of "C" mandates, the fullest powers of government should be conferred upon the mandatory power. In the case of "A" mandates, on the other hand, art. 22 provided that the existence of the communities in question "as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." The distinction between this provision and the provision applying to "C" mandates,

that they are to be administered as integral portions of the territory of the mandatory, is very marked, and, accordingly, some authorities have contended that sovereignty resides in the mandatory under a "C" mandate. On the other hand, it has been urged that sovereignty resides, first, in the five Principal Allied and Associated Powers, or, secondly, in the League of Nations, or, thirdly, in the communities which inhabit the mandated territories. It is, in my opinion, impossible to adopt any one of the three latter propositions in the case of New Guinea.

It is clear that, subject to the limitations imposed by the mandate relating to safeguards provided "in the interests of the indigenous population," the Commonwealth of Australia is legally omnipotent in the Territory of New Guinea. It is obvious that the five Principal Allied and Associated Powers, whose partnership has long since been dissolved, cannot make any law for New Guinea or do any executive or judicial act in New Guinea. It is hardly necessary to say that the same proposition is true with respect to the League of Nations. The functions of the League of Nations in relation to New Guinea are completely specified in art. 22 of the Covenant and are limited to the receipt of an annual report from the mandatory and the examination by a permanent commission of the annual report, the commission being entitled to advise the Council on any matter relating to the observance of the mandate. The only governmental organization existing in New Guinea is that which is provided by the Commonwealth. To say that sovereignty resides in the unorganized natives who inhabit the country is to state a meaningless proposition.

New Guinea is being administered, as it was intended to be administered, as an integral portion of the territory of the Commonwealth and there is no other power, organization or body which is able to perform any governmental act in New Guinea. It might, therefore, be contended that in substance the Commonwealth has full sovereignty in New Guinea. It is true that the *New Guinea Act* 1920 recites conquest by Australian forces, surrender to those forces, renunciation of all rights by Germany, and occupation by the Commonwealth; but the mandate is recognized by the Act itself to be the source of the governmental powers of the Common-

H. C. OF A. 1937.

FROST v. STEVENSON.

Latham C.J.

wealth. The position of a mandatory in relation to a mandated territory must be regarded as *sui generis*. The Treaty of Peace, read as a whole, avoids cession of territory to the mandatory, and, in the absence of definite evidence to the contrary, it must, I think, be taken that New Guinea has not become part of the dominions of the Crown. This prima facie conclusion is reinforced by the recital in one of the Orders in Council made under the *Fugitive Offenders Act* on 12th October 1925 that New Guinea is a place out of His Majesty's dominions in which His Majesty has jurisdiction. This recital, as I have already said, cannot be regarded as conclusive evidence, but it is, I think, some evidence of the fact which it recites.

It is possible for His Majesty to have complete legislative, executive and judicial powers in a place which is not within his dominions. In *R.* v. *Crewe (Earl)*; *Ex parte Sekgome* (1) the Court of Appeal considered whether the Bechuanaland Protectorate was a country out of His Majesty's dominions. The territory had never been acquired by settlement or ceded to or annexed by His Majesty. But His Majesty exercised complete jurisdiction in relation to all governmental matters within the territory of the Protectorate. It was held that this fact did not bring the Protectorate within His Majesty's dominions. This case shows, therefore, that the fact that His Majesty has complete and exclusive governmental authority in New Guinea is not enough to show that New Guinea is a place within His Majesty's dominions.

Art. 257 of the Treaty of Peace, dealing with government property in the former German colonies, provides as follows: "All property and possessions belonging to the German Empire or to the German States situated in such territories shall be transferred with the territories to the mandatory power in its capacity as such and no payment shall be made nor any credit given to those Governments in consideration of this transfer."

This article therefore contemplates the transfer of the territory to the mandatory in its capacity as a mandatory power. The intention of this provision must be taken to have been to provide for the transfer of the territory to the mandatory, but only in its capacity as a mandatory. The mandatory, as a kind of international

(1) (1910) 2 K.B. 576.

trustee, receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory. Thus the article quoted, while recognizing that the territory is actually to be transferred to the mandatory, emphasizes the conditions and limitations upon governmental power which constitute the essence of the mandatory system. Thus the title under which the territory is to be held as a mandated territory is different from that under which a territory transferred by simple cession would have been held. The article shows that the intention was to achieve a transfer of a territory without making that territory in the ordinary sense a possession of the mandatory.

A territory which is a " possession " can be ceded by a power to another power so that the latter power will have complete authority in relation to that territory. Such a cession by a mandatory power would be quite inconsistent with the whole conception of a mandate. A mandated territory is not a possession of a power in the ordinary sense.

The conclusion which I have thus reached is that New Guinea is a place out of His Majesty's dominions in which His Majesty has jurisdiction, so that the *Fugitive Offenders Act* has been properly applied to it by the Order in Council made under sec. 36 of that Act. I do not think it necessary to deal in detail with the argument based on the provision of sec. 39 of the Act to the effect that the Order makes New Guinea a British possession, and that then sec. 39 operates to make New Guinea one British possession with the Commonwealth because both New Guinea and the Commonwealth are under one legislature. The result of these provisions is, it is argued, that, in the case of New Guinea, the Order applying the Act itself makes the Act inapplicable. In my opinion this argument is not well founded. Sec. 39 relates only to places which are " within Her Majesty's dominions." Therefore it does not apply to New Guinea. The Order made under sec. 36 does not purport to make New Guinea a British possession. It only operates to make the Act applicable as if it were a British possession.

Thus the *Fugitive Offenders Act* applies as between Australia and New Guinea. The New Guinea warrant was indorsed by the magistrate as required by the *Fugitive Offenders Act* and he therefore

H. C. OF A. 1937.

FFROST v. STEVENSON.

Latham C.J.

had jurisdiction to make the order which he made. There is, therefore, no ground for applying the remedies of prohibition, certiorari or habeas corpus.

4. The difficulty which arises in the present case arises not from any want of jurisdiction in the magistrate under the *Fugitive Offenders Act* but from the fact that the magistrate, after hearing argument, reached the conclusion that he had no power to act under the *Fugitive Offenders Act* but that he had power to act under the regulations made under sec. 28 of the *Service and Execution of Process Act*. The New Guinea warrant bore an indorsement which satisfied the provisions of the *Service and Execution of Process Act*, and, if the Act applied, the magistrate had jurisdiction under that Act to order the return of Ffrost to New Guinea.

New Guinea is not a State of the Commonwealth, and the Commonwealth Parliament, therefore, cannot use the power conferred by sec. 51 (xxiv.) of the Constitution for the purpose of securing the service and execution in a State of civil or criminal process of the courts of New Guinea. Therefore, sec. 28 in relation to New Guinea must be justified, if at all, under some other legislative power than that conferred by sec. 51 (xxiv.). It therefore becomes necessary to ascertain the source of Commonwealth legislative power with respect to New Guinea.

What I have already said shows that it can be held that a territory has been acquired by the Commonwealth, in the capacity of a mandatory power, without also holding that His Majesty in right of the Commonwealth possesses sovereignty over the territory in the sense in which such sovereignty would have been possessed if the territory had simply been ceded to His Majesty.

Sec. 122 of the Constitution is in the following terms : " 122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

By the concurrence of the Principal Allied and Associated Powers, the Council of the League of Nations, the Governor-General acting as the representative of His Majesty, and the Commonwealth Parliament expressing its will in the *New Guinea Act* 1920, the Territory of New Guinea has been placed under the authority of and has been accepted by the Commonwealth. The act of the Governor-General as the King's representative (secs. 2 and 61 of the Constitution) was the step which placed the Territory under such authority. Thus, in my opinion, the Territory of New Guinea is a territory which has been placed by the King under the authority of the Commonwealth and which has been accepted by the Commonwealth, so that sec. 122 became applicable in relation to the Territory.

If, however, this should be regarded as doubtful, the Territory can at least be regarded as a territory " otherwise acquired by the Commonwealth." The provisions of sec. 122 should not, in my opinion, be limited by a doctrine that territory can be acquired only by conquest, occupation, or cession involving an annexation. The words " otherwise acquired " are words of wide significance (See per *Starke* J. in *Jolley* v. *Mainka* (1)), and, appearing as they do in a Constitution, should be interpreted in a liberal sense so as to apply to new methods of acquisition falling short of the acquisition of complete sovereignty, as complete sovereignty is understood in some one or other of the many controversial theories of sovereignty which are familiar to international jurists. The Territory of New Guinea does belong to His Majesty " in right of the Commonwealth of Australia " so far as a mandated territory can belong to any power (*Mainka* v. *Custodian of Expropriated Property* (2)). It is not a British possession but it is a territory in respect of which the Commonwealth Parliament has exclusive power to make laws by virtue of sec. 122 of the Constitution.

Thus I am of opinion that the Territory is not in His Majesty's dominions, but that it is a territory which has been placed by His Majesty the King under the authority of the Commonwealth and has been accepted by the Commonwealth, or, alternatively, that it is a territory which has been otherwise acquired by the Commonwealth. Therefore, under sec. 122 the parliament may make laws

(1) (1933) 49 C.L.R., at p. 252.

(2) (1924) 34 C.L.R., at pp. 300, 301.

H. C. OF A. 1937.

FROST v. STEVENSON.

Latham C.J.

for the government of New Guinea. In my opinion the source of the authority of the Commonwealth Parliament to make laws for the Territory of New Guinea is to be found in sec. 122 and not in sec. 51 (xxix.), the power to legislate with respect to external affairs. The latter power was validly exercised in order to bring New Guinea under the governmental authority of the Commonwealth, as *Evatt* J. stated in *Jolley* v. *Mainka* (1), but then sec. 122 operates, and it is this latter section which, in my view, is the source of the power to make laws for New Guinea. If it were held that sec. 51 (xxix.) is the source of that power, then it appears to me that it would be difficult to avoid overruling the decisions in *Buchanan* v. *The Commonwealth* (2), *R.* v. *Bernasconi* (3) and *Porter* v. *The King*; *Ex parte Yee* (4). In these cases it was held that laws passed by virtue of sec. 122 of the Constitution were not subject to the limitations imposed by the parts of the Constitution which treat the Commonwealth not as a complete and self-contained governing agency, but as part of a Federal system in which the Commonwealth is one element and the States are other elements. The existence of the States and of the constitutional limitations inherent in the Federal system is, according to these decisions, quite irrelevant in relation to the exercise of any power by the Parliament under sec. 122. If the legislative power of the Commonwealth with respect to the territories were held to depend upon the provisions of sec. 51 (xxix.) it would follow that sec. 55 would be applicable to laws passed under that power—contrary to *Buchanan's Case* (2)—that trial upon indictment of any offence must be by jury—contrary to *Bernasconi's Case* (3)—and that the judges of courts in the territories must have a life tenure—contrary to *Porter's Case* (4). It appears to me, for the reasons which I have given, to be quite possible to apply sec. 122 to New Guinea without holding that the Territory of New Guinea has been annexed by or ceded to His Majesty so as to become a British possession.

5. The next question which arises is whether, even if sec. 122 of the Constitution applies to New Guinea, the legislative powers of the Commonwealth Parliament include a power to bring into opera-

(1) (1933) 49 C.L.R., at p. 289.
(2) (1913) 16 C.L.R. 315.
(3) (1915) 19 C.L.R. 629.
(4) (1926) 37 C.L.R. 432.

tion the *Service and Execution of Process Act* as between the Commonwealth and New Guinea. It has been argued that any law made under a power to make laws for the Commonwealth is prima facie enforceable only in the Commonwealth, while any law made under a power to make laws for New Guinea is prima facie enforceable only in New Guinea. Thus, it is said, a law passed under sec. 122 cannot authorize the arrest of a person in New South Wales, and it is contended that there is no other relevant legislative power. These objections do not appear to me to be sound in their application to the subject matter under consideration.

As I have already said, sec. 51 (xxiv.) of the Constitution cannot be relied upon to support the law in question, because New Guinea is not a State. There is, however, another relevant provision in the Constitution in sec. 51 (xxix.), under which the Parliament has power to legislate with respect to external affairs. According to the foregoing reasoning New Guinea is a place which is outside of His Majesty's dominions and, though it is a territory under the authority of the Commonwealth, it is not itself a part of the Commonwealth, though the Commonwealth is authorized to govern New Guinea as an integral portion of the Commonwealth. Thus the relations between New Guinea and the Commonwealth form part of the subject of external affairs. Provisions for reciprocal surrender of persons charged with criminal offences constitute one of the most ordinary forms of legislation with respect to external affairs. Therefore, under sec. 51 (xxix.) of the Constitution, the Commonwealth Parliament has power to legislate for the peace, order and good government of the Commonwealth with respect to the surrender by the Commonwealth to New Guinea and the acceptance in the Commonwealth from New Guinea of such persons. Under sec. 122, for reasons already given, the Commonwealth Parliament has power to legislate for the peace, order and good government of New Guinea with respect to the surrender by New Guinea to the Commonwealth and the acceptance in New Guinea from the Commonwealth of such persons. By a combination of these powers, the Commonwealth Parliament is able to authorize the making of regulations providing for the application of the *Service and Execution of Process Act* as between New Guinea and Australia. There is, therefore, power to confer

H. C. OF A. 1937.

FFROST v. STEVENSON.

Latham C.J.

upon a magistrate all the powers given to him by the relevant part of the *Service and Execution of Process Act*.

As at present advised, I think that this legislation can also be justified under sec. 52 (iii.) of the Constitution as Commonwealth legislation operating in Australia. This provision gives power to the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to matters declared by the Constitution to be within the exclusive power of the Parliament. Sec. 122, relating to the government of territories, does not use the word " exclusive," but the effect of sec. 122 is that the Parliament has exclusive power, by virtue of the Constitution, to make laws for the territories to which the section applies. By the operation of sec. 52 (iii.) in relation to sec. 122, the Commonwealth Parliament would appear to have power to make laws for the Commonwealth with respect to the government of New Guinea. In view, however, of my opinion that sec. 51 (xxix.) authorizes sec. 28 of the *Service and Execution of Process Act* in its application within the Commonwealth, it is not necessary to reach a concluded opinion upon the suggestion mentioned.

6. I have thus reached the conclusion that the *Fugitive Offenders Act* is applicable in this case and also that the *Service and Execution of Process Act* is applicable. It is suggested, however, that the latter statute, which is a Federal statute, is repugnant to the former statute, which is an Imperial enactment, within the meaning of sec. 2 of the *Colonial Laws Validity Act* 1865. If this be so, then the Federal Act is void and inoperative to the extent of the repugnancy. My brother *Dixon* in his reasons for judgment examines the differences between the two Acts, and, without repeating in detail the various points to which he draws attention, it is sufficient for me to say that I agree with his conclusion that the two Acts provide two different systems applying to the same subject matter. Does it follow that the Acts are repugnant ? After careful consideration I am not satisfied that they are repugnant. They provide, I think, merely different methods of dealing with the same matter, and the application of both methods does not result in any conflict. The Crown may proceed under either Act as it thinks proper. Even if two separate applications were made to two magistrates, and one

made an order for return under the *Fugitive Offenders Act* and the other made an order for return under the Federal Act, there would be no conflict. Each order would operate only by rendering lawful an arrest, detention and conveyance of the accused person which would otherwise be unlawful. Any person acting under either order would be protected. The fact that another person acting under another order would also have been protected is immaterial. The orders only authorize and empower action. In ordinary criminal practice there may be several warrants in existence for the arrest of the same person under different statutes of the same State or under the statutes of several States. The fact that one warrant exists does not make the others invalid.

The case appears tome to be quite different from that of *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1), where it was held that there was repugnancy between the Imperial *Merchant Shipping Act* and the Commonwealth *Navigation Act*. The *Merchant Shipping Act* 1894 contained provisions relating to the engagement and discharge of seamen. If those conditions were satisfied the seaman and his employer were bound by an agreement for service or discharged from that agreement, as the case might be. The *Navigation Act*, dealing with the same subject matter, required the fulfilment of additional conditions before a valid agreement was created, on the one hand, or discharged on the other hand. There was necessarily a conflict between these two systems of control. In the case of discharge, for example, the effect of the *Merchant Shipping Act* was that the parties were released from the mutual obligations arising from the agreement for service if a certain procedure was followed. The effect of the *Navigation Act* was that the parties should not be so released unless certain fees were paid which were not required to be paid by the *Merchant Shipping Act*. It was plain that the Acts conflicted. It is impossible that there should at the same time both be and not be a discharge of the same agreement between the same persons. No such position exists in the present case. Powers to arrest, detain and convey a person may exist in several authorities without conflict.

(1) (1925) 36 C.L.R. 130.

H. C. OF A. 1937.

FROST v. STEVENSON.

Latham C.J.

It is objected, however, that a conflict in procedure arises if both Acts are held to be applicable because, if, as in this case, an order does not specify the Act under which it is made, a prisoner is not in a position to know what procedure he should follow and what precisely his rights are if he desires to apply for a discharge of the order or to appeal from either the order or a refusal to make an order of discharge. Sec. 19 of the *Fugitive Offenders Act*, as pointed out in detail by my brother *Dixon*, specifies certain grounds upon which application may be made for a discharge of the order and also specifically gives a right of appeal to a superior court. Sec. 18 (4) of the *Service and Execution of Process Act* provides for an application for the discharge of the order to the magistrate granting the order or to any judge of the State, and the grounds upon which such application may be made are not quite in the same terms as those which appear in sec. 19 of the *Fugitive Offenders Act*. Further, there is no general provision in the Federal Act for a right of appeal to a superior court. Statutory Rule No. 147 of 1930, which was made under sec. 28 of the *Service and Execution of Process Act*, provides that if the prisoner has not been returned within three months from the date of the order a justice of the High Court shall have power to review the order by way of rehearing. There is no such provision for review in the case of an order made under the *Fugitive Offenders Act*.

I agree that where the magistrate has not by the terms of the order which he makes made it quite clear that he is exercising a jurisdiction under one or other of the Acts, the prisoner is in a position of some difficulty. But it is open to him to resolve the difficulty by making applications for discharge under both Acts. The rights in relation to appeal are not the same under the two Acts, but the only result, an inconvenient result, I agree, is that two appellate proceedings may be necessary in order to get an order set aside. The prisoner has more than one avenue of review open to him. He does not by following one course preclude himself from adopting the alternative course. There would be no conflict between decisions of different tribunals dealing with separate applications or appeals under the respective Acts. The decisions would be decisions limited to the consideration of the order in relation to a

different Act in each case. A final order that a prisoner should not be returned by virtue of the provisions of one Act would not be inconsistent with an order that he should be returned by virtue of the provisions of the other Act. These considerations show that there are procedural inconveniences in the co-existence of the two Acts and that it might be advantageous to exclude the application of one of them in the case of mandated territories, but, in my opinion, they do not show that the Federal statute is repugnant to the *Fugitive Offenders Act*.

7. There is only one further matter which requires consideration. Both the *Fugitive Offenders Act* (sec. 14) and the *Service and Execution of Process Act* (sec. 18 (3) (*a*)) provide that the order for the return of the apprehended person may be made by warrant under the hand of the magistrate making it, and may be executed according to its tenor. It is suggested that the order to be made should be in the form of a warrant. The order made in this case was not in that form. The point was not argued in the appeal and it is not among the grounds of appeal. There is, I think, more to be said for this contention in relation to the *Fugitive Offenders Act* than in relation to the *Service and Execution of Process Act*. Reg. 2 of the regulations under the *Service and Execution of Process Act* (as enacted by Statutory Rule No. 147 of 1930) appears to me to draw a distinction between a warrant and an order in the detailed provisions for review of the order for the return of the prisoner who has been arrested by virtue of the warrant. Regs. 4A and 4B provide that a justice of the High Court shall have jurisdiction to review the order for the return by way of rehearing. Reference is made to the evidence given " on the making of such order." It is provided that, upon the review of the order, the justice may affirm or vary the order, or quash the order and substitute a new order in its stead, and it is then provided that the order as affirmed or varied, or in the event of an order being substituted, the order substituted shall be executed according to its tenor as if it had been made by the justice of the peace or the judge. These provisions are to be read as if they were inserted in the Act after sec. 18 (4). In my opinion they show that the order for the return of the prisoner may be made by order and need not necessarily be made by warrant. The justice

H. C. OF A. 1937. FFROST v. STEVENSON. Latham C.J.

of the High Court is authorized to make an order, not to issue a warrant. " Review of an order " is a clear and readily intelligible phrase. " Review of a warrant " would be an unusual phrase. There is not, I think, sufficient reason for holding that the order made by the magistrate, at least under the *Service and Execution of Process Act*, must necessarily assume the form of a warrant. If, however, a warrant is necessary, the order would be a sufficient justification for the issue of a warrant.

As to the merits of the application for the discharge of the order, I agree with the view of the Full Court that no sufficient reason has been shown for discharging the order.

Thus in my opinion the order made was made with jurisdiction under both the *Fugitive Offenders Act* 1881 and the Commonwealth *Service and Execution of Process Act* 1901-1934.

RICH J. It is unnecessary to detail the story of the control of the Mandated Territory of New Guinea by the Commonwealth. It is enough to state that German New Guinea was taken and occupied by the naval and military forces of Australia and that Germany renounced in favour of the principal Allied and Associated Powers all her rights over her overseas possessions, undertaking to recognize and accept the measures taken by such powers for the purpose of carrying her renunciation into effect. New Guinea was then assigned by the League of Nations to " His Britannic Majesty for and on behalf of the Government of the Commonwealth of Australia." It is well established by the decisions of this court that in relation to the Mandated Territory the Commonwealth has sufficient legislative power fully to justify the *New Guinea Act* 1920 (*Mainka* v. *Custodian of Expropriated Property* (1); *Jolley* v. *Mainka* (2)). Whether that legislative power arises under sec. 122 of the Constitution or under sec. 51 (xxix.), as the judgment of *Evatt* J. in the latter case maintains, I can see no reason for limiting it in such a way as to leave without support sec. 28 (1) and (1A) of the *Service and Execution of Process Act* 1901-1934. After all, it is a legislative power exercisable by the Parliament of Australia and the government of the territories whether mandated or not is to be

(1) (1924) 34 C.L.R. 297. (2) (1933) 49 C.L.R. 242.

carried on in conjunction with the general government of the Commonwealth, consisting as it does of six States as well as the territories. I cannot see why a power to legislate for the administration of criminal justice of the territories should not carry with it as an incident authority to apprehend fugitive offenders within the States. But in any case I am clearly of opinion that the Orders in Council of 12th October 1925 are valid and efficacious to apply the *Fugitive Offenders Act* 1881 on the footing that New Guinea is a possession and a member of a group to which Australia also belongs. The juridical status of New Guinea is such as to make it within the province of the Imperial Executive to declare that it is outside His Majesty's dominions for the purpose of that Act and to apply it accordingly. It results, therefore, from what I have said so far, that, under the Commonwealth power, by means of sec. 28 of the *Service and Execution of Process Act* 1901-1934, provision has been made for the return of offenders, and under the Imperial statute another provision has been made. The two provisions closely resemble one another although they are not identical. If there is a repugnancy between them, of course the Federal statute must give way under the *Colonial Laws Validity Act* 1865 (*Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1)). In the present case the proceedings culminating in the order for the apprehension and return of the offender to New Guinea have been conducted with what might fairly be called ambiguity. The warrant was indorsed so as to comply with the *Fugitive Offenders Act*, but the magistrate in making his order preferred, according to his reasons, to act under the Commonwealth provision. Apparently under the Imperial statute a warrant is necessary, and no such warrant has been made out or signed by the magistrate. Under the Federal provision the form of order is not prescribed, and it seems that it would be good, if good according to the law of the State where it is made. In New South Wales magistrates may give effect to their decisions by minute or order. In the present case the order, apart from its formal expression, could be justified, in my opinion, under the *Fugitive Offenders Act*. There is nothing to prevent the magistrate making out a warrant pursuant to his order and signing it. I do

(1) (1925) 36 C.L.R. 130.

H. C. OF A 1937.

FFROST v. STEVENSON.

Rich J.

not think that, simply because he has not taken this step and has refrained from doing so because of reliance on the *Service and Execution of Process Act* 1901-1934, we should bring up the proceedings upon certiorari and quash them. The difficult question of repugnancy could only arise through persistence in refusing to put the order in a form giving it a clear validity under a statute which is certainly in force, whether the Commonwealth provisions are or are not excluded because of repugnancy with it. In these circumstances I think that no certiorari or prohibition should go. In the view the Supreme Court took of the matter, secs. 38A and 40A of the *Judiciary Act* 1903-1934 applied. In disposing of the proceedings our order should treat them accordingly and not as appeals.

Dixon J. The appellant unsuccessfully sought from the Supreme Court relief against an order of a magistrate directing that he should be returned in custody to the Mandated Territory of New Guinea to answer a charge of manslaughter.

In making the order, the magistrate professed to act under the provisions of the Commonwealth *Service and Execution of Process Act* 1901-1934. Sec. 28 of that Act empowers the Governor-General to make regulations for further applying the provisions of the Act, with or without modifications, to the service and execution in any State or part of the Commonwealth of the civil and criminal process of the courts of the territories of the Commonwealth. The expression " Territories of the Commonwealth " includes any territory governed by the Commonwealth under a mandate (sec. 28 (1A)). " Court " is defined in sec. 3 to include any judge or justice of the peace acting judicially, and, although this description of the functions of a magistrate granting a warrant of apprehension is very unhappy, the context and subject matter of the enactment seem to require the adoption of an interpretation that will cover the issue by magistrates of warrants of apprehension.

Regulations have been made applying the provisions of the Act to New Guinea among other territories (Statutory Rules 1925 No. 105; 1930 No. 147; 1931 No. 27; 1931 No. 44). They are applied subject to some modifications the effect of which, so far as material, is to give to a justice of this court power to review an

order for the return of a prisoner if the order is such that he is or may not be required to be returned within three months.

The Act deals, of course, with much else besides the return to a State or a territory of persons charged with offences, but the present case is concerned only with that subject. So much of that subject as relates to the return from Australia of persons accused of offences against the laws of New Guinea and vice versa is covered also by the Imperial *Fugitive Offenders Act* 1881, Part II. of which has been applied by two Orders in Council dated 12th October 1925. Sec. 36 of the *Fugitive Offenders Act* 1881 provides that it shall be lawful for the Sovereign from time to time by Order in Council to direct that the Act should apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place out of the King's dominions in which the King has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

One of the two Orders in Council, after reciting this section, goes on to state that New Guinea and Nauru are places out of His Majesty's dominions in which His Majesty has jurisdiction and proceeds to order that the Act shall apply as if those territories were British possessions, subject to certain provisions, one of which is that for the purpose of Part II. of the Act, the Territories of New Guinea and Nauru shall, with the Commonwealth of Australia, Papua and Norfolk Island, be deemed to be one group of British possessions. The purpose of the second Order in Council appears to be to make a still larger group, so as to include New Zealand, Western Samoa, Fiji, the Gilbert and Ellice Islands and the British Solomon Islands.

In reciting that New Guinea and Nauru are places out of His Majesty's dominions, the first Order in Council adopts the view that, because these territories are held under mandate, they do not form part of the dominions of the Crown properly so called, but are a special example of the class of place subject to the King's jurisdiction or authority although not British possessions.

Sec. 31 of the *Fugitive Offenders Act* 1881 provides that an Order made for the purposes of the Act shall, while it is in force, have the same effect as if it were enacted in the Act. The nature and extent of the authority claimed by the Crown in and over a territory

H. C. OF A. 1937. FFROST v. STEVENSON. Dixon J.

is primarily a matter for the executive (Cp. *The Fagernes* (1)). These two considerations appear to me to be a complete answer to the contention that the attempt to deal with New Guinea under sec. 36 is ineffectual and void because, in contemplation of law, it is a territory forming part of the dominions of the Crown. In his judgment in *Jolley* v. *Mainka* (2) *Evatt* J. has examined the position of New Guinea in a manner showing clearly the difficulties that, in any case, exist in treating the Mandated Territory of New Guinea as part of the dominions. The provisions of the Commonwealth Constitution relating to territories are the chief source of embarrassment in dealing with New Guinea, not the question under which description it should be classified among the kinds of place where the authority of the British Crown runs. For, having regard to the interpretation which sec. 122 of the Constitution has received in *Buchanan* v. *The Commonwealth* (3), *R.* v. *Bernasconi* (4), *Porter* v. *The King*; *Ex parte Yee* (5) and *Wall* v. *The King*; *Ex parte King Won and Wah On* [*No.* 1] (6), different consequences may be produced by referring the *New Guinea Act* 1920-1935 to some legislative power other than that contained in sec. 122. Further, it may possibly be said that sec. 122 implies that none of the other powers conferred on the parliament by the Constitution is to be taken to authorize the government or control of territories outside the Commonwealth ; in other words, that it alone is the source of power to govern territories. But I do not think that any such question is involved in, or very much affected by, a decision that the Order in Council under sec. 36 of the *Fugitive Offenders Act* 1881 is valid. In the present case I do not think it is necessary to decide more.

The reason why the question whether New Guinea has been validly dealt with under sec. 36 is important is to be found in the definition of " British possession " contained in sec. 39. Under that definition " 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," and " the expression ' legislature ' where there are local legislatures as well as a central

(1) (1927) P. 311.
(2) (1933) 49 C.L.R., at pp. 270, 280.
(3) (1913) 16 C.L.R. 315.
(4) (1915) 19 C.L.R. 629.
(5) (1926) 37 C.L.R. 432.
(6) (1927) 39 C.L.R. 245.

legislature, means the central legislature only" (See *McArthur* v. *Williams* (1)). Accordingly, as the Parliament of the Commonwealth exercises a legislative power over New Guinea, if it were a part of the Crown's dominions, there would be much to be said for the view that it formed part only of one possession, namely, the Commonwealth and its territories. From that it would follow that the *Fugitive Offenders Act* 1881 could not apply to authorize the surrender of prisoners as between New Guinea and Australia ; for, on the assumption made, they would be no more than different places in the same possession and not different possessions. It was suggested that this result followed even if sec. 36 applied. The suggestion was based upon the view that when an Order in Council under sec. 36 directed that the Act should apply to a place out of His Majesty's dominions in which the Crown had jurisdiction as if it were a British possession, then that place should be considered a territory or place within His Majesty's dominions for the purposes of the definition. The consequence would be that if a central or a superior legislature had authority over it as well as over some other territory, both territories would combine to form one possession. Two errors are, I think, involved in this view.

In the first place, the definitions in sec. 39 are to be used for the purpose of ascertaining the meaning and operation of the terms in the body of the statute. It is an error to use a provision in the body of the statute, such as sec. 39, for the purpose of giving a new application to a definition. It was not meant that the definition thus transmuted by the application of a provision out of the body of the statute should then be applied in order to change the operation of another such provision. In other words, in interpreting the enactment the order of approach is, first, to find the prima facie meaning of the terms and for that purpose to rely upon the definition clause, and then to bring that knowledge to the construction of all the provisions of the statute.

The other error consists in a departure in thought from the exact course prescribed by sec. 36. The section says that the Order in Council may direct that the Act shall apply as if the place to which it relates were "a British possession," not "a territory or place

(1) (1936) 55 C.L.R. 324.

H. C. OF A. 1937. FFROST v. STEVENSON. Dixon J.

within His Majesty's dominions," and this latter is the expression found in the definition clause. The description "a British possession" means a place under one legislature including all parts under a central legislature if there are local legislatures also. Thus the Act is to be applied upon the assumption that the place is, so to speak, an entire and complete British possession, not a part of one.

The Orders in Council are, in my opinion, effectual to apply Part II. of the *Fugitive Offenders Act* 1881 to Australia and to the Mandated Territory of New Guinea for the purpose of the reciprocal surrender of offenders.

As the *Fugitive Offenders Act* 1881 is an Act of the Imperial Parliament extending to Australia and New Guinea, any law of the Commonwealth found repugnant to its provisions, or to an Order made under its authority, must be, to the extent of the repugnancy, void and inoperative. Sec. 2 of the *Colonial Laws Validity Act* 1865 applies to laws made under the Commonwealth Constitution (*Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1)). It provides that any colonial law which shall be in any respect repugnant to the provisions of any Act of Parliament (that is, of the United Kingdom) extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Thus the existence of the Imperial *Fugitive Offenders Act* 1881 and its application to the Mandated Territory bring into question the validity of the attempt made by Statutory Rules 1925 No. 105 and Statutory Rules 1930 No. 147 to apply as between New Guinea and Australia so much of Part III. of the *Service and Execution of Process Act* 1901-1934 as deals with the apprehension in one place of a person who is charged with an offence against the laws of another. I proceed to consider this question, namely, whether the attempt to apply to New Guinea that portion of Part III. of the *Service and Execution of Process Act* is repugnant to the *Fugitive Offenders Act* 1881.

The provisions dealing with the apprehension in one place of persons charged with offences against the laws of another place are contained in sec. 18 of the Federal Act. Sub-sec. 1 (*a*) of sec. 18 relates specifically to the case of apprehension for offences, and sub-

(1) (1925) 36 C.L.R. 130.

secs. 2, 3, 4 and 5 provide machinery for that as well as other cases. The general plan of these provisions closely resembles that of Part II. of the *Fugitive Offenders Act* 1881. But they differ in a number of respects. Some of the differences could scarcely produce very substantial consequences. There are matters, however, in relation to which one set of provisions prescribes or authorizes a course widely varying from that to be pursued under the other. In particular, as a result in part of the *Judiciary Act* 1903-1934 and in part of the regulations, the rights of appeal or review are different.

Of the minor differences it will be sufficient to mention the following. The Commonwealth provisions do not (*vide* last part of sub-sec. 1 and sub-sec. 3) but the Imperial Act does (*vide* secs. 13 and 14) give (*a*) specific directions that the magistrate indorsing the warrant shall be satisfied that it was issued in the place whence it comes by a person having lawful authority and that the offence it charges is there punishable by law; (*b*) specific directions that the magistrate before whom the prisoner is brought when apprehended shall be satisfied of the due authentication of the warrant, of the authority of the person issuing it and of the identity of the prisoner. When an order for the return of a prisoner is made under the Imperial Act, the order directs (See sec. 14) that he be "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." An order made under the Commonwealth provisions does not include that direction. After an order for his return has been made, a prisoner may apply for his discharge, if under the Imperial Act, to a magistrate or to the Supreme Court of a State or of New Guinea, as the case may be (See sec. 19, sec. 39 (4) and *McArthur* v. *Williams* (1)). Under the Commonwealth provisions, after a magistrate has ordered the prisoner's return, the application must be to some judge of the State (See sec. 18 (4)). Under each set of provisions an order may be made upon the application either for the discharge of the prisoner or that he shall be returned only after the expiration of a named period, or any other order may be made that seems just. The magistrate before whom he is brought in the first instance may exercise the same powers. But the two sets of provisions do not

(1) (1936) 55 C.L.R., at p. 356.

H. C. OF A. 1937.

FFROST v. STEVENSON.

Dixon J.

express in the same terms the grounds upon which the tribunal may so act. Under the Commonwealth provisions it is enough that the charge is of a trivial nature, that the prisoner's return is not sought in good faith, or that for any reason it would be unjust or oppressive (sec. 18 (4)). Under the Imperial Act (sec. 19) it must appear that it is unjust or oppressive or too severe a punishment, and it must so appear either because of the trivial nature of the offence, or because of his return not being sought in good faith in the interests of justice, or generally having regard to the distance, to the facilities of communication and to all the circumstances of the case.

The more important differences in the operation of the two sets of provisions lie in the consequences which ensue when a return has been ordered and the prisoner has not secured his discharge under one or other of the powers just described. If he has unsuccessfully applied to the Supreme Court of a State and his application has been considered in banco, then, being a prisoner dealt with under the Imperial Act, he may apply to this court for special leave to appeal, but, except for such an appeal by special leave, the order of the Supreme Court in banco is final. The superior court under sec. 19 is the Supreme Court because it fulfils the requirement of the definition contained in sec. 39 ; it has the like criminal jurisdiction to that which is vested in the High Court of Justice in England. But under the Commonwealth provisions a very different position arises. In the first place, a prisoner whose return to New Guinea has been ordered as under their authority may apply to a justice of the High Court to review the order, if it does not require his return within three months. The review is expressed to be by way of rehearing and the powers intended to be given to the justice, extend to confirming, quashing or varying the order (Statutory Rule 1930, No. 147).

In the next place, the order of the magistrate for the return and the order of the judge of a State refusing a discharge would alike be made in Federal jurisdiction and, accordingly, an appeal would lie to the High Court under sec. 73 (ii.) of the Constitution as affected by sec. 35 (1) (*b*) and sec. 39 (2) (*b*) and (*c*) of the *Judiciary Act* 1903-1934. It may be a question whether sec. 39 (2) and its sub-para-

graphs govern an authority which is given by a Federal statute to State courts for the first time and does not otherwise exist (Cp. *Seaegg* v. *The King* (1) and *Adams* v. *Cleeve* (2)). But it is unnecessary for the purposes of this case to distinguish between appeals from magistrates as of right and by special leave. It is enough that under sec. 73 (ii.) of the Constitution and sec. 35 (1) (*b*) of the *Judiciary Act* 1903-1934 an appeal may be brought from the magistrate's order by special leave. If his order were made under the Imperial Act no direct appeal from it would lie direct to this court unless the words in sec. 73 (ii.) of the Constitution, " court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council ", received the interpretation contended for in *Kamarooka Gold Mining Co., No Liability* v. *Kerr* (3), an interpretation which so far this court has shown no disposition to place upon them (Cp. *Parkin and Cowper* v. *James* (4)). Perhaps it should be added that, if a justice of the High Court acted under Statutory Rule 1930 No. 147, an appeal from his order would probably lie as of right to the Full Court under sec. 73 (i.) of the Constitution. For apparently the authority it was intended to confer falls under the description of original jurisdiction rather than of appellate.

The right of appeal from orders for the return or for the discharge of prisoners is not the only matter in which consequences of some importance would flow from the differences between the two sets of provisions. A prisoner apprehended under the Imperial Act may apply for his discharge if he is not conveyed out of the possession within a month of the order for his return (sec. 17). If he is not prosecuted within six months of his arrival in the possession to which he is returned or if he is acquitted, he may ask the Governor of that possession to send him back free of cost and the Governor is authorized to do so (sec. 18). The Imperial Act allows a prisoner held under an order for his return to be sent by one of His Majesty's ships, and requires the master of a ship belonging to a British subject bound to the place to which the prisoner is to be returned to afford him and the person having him in custody a passage, subject to conditions that are laid down by the statute (sec. 27). The Imperial Act

(1) (1932) 48 C.L.R. 251, at p. 256.
(2) (1935) 53 C.L.R. 185, at pp. 190, 191.
(3) (1908) 6 C.L.R. 255.
(4) (1905) 2 C.L.R. 315, at p. 330.

H. C. OF A. 1937. FFROST v. STEVENSON. Dixon J.

provides for the retaking of a prisoner who escapes (sec. 28); and it also authorizes the removal of a prisoner from the jurisdiction to which he has been returned to another jurisdiction for the purpose of his trial, if he may be tried in that other jurisdiction (sec. 35). None of these consequences flows from apprehension and return under the Commonwealth provisions, which contain no similar sections or clauses.

In my opinion the application of the Commonwealth provisions to the reciprocal return of prisoners between Australia and New Guinea is repugnant to the Imperial statute and to the Orders in Council bringing the Mandated Territory of New Guinea under the operation of that statute and grouping it with Australia. It may be that the test of repugnancy under sec. 2 of the *Colonial Laws Validity Act* 1865 is not the same as the test of consistency under sec. 109 of the Commonwealth Constitution (Cp. *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1)). If it were the same, *Hume* v. *Palmer* (2) would be sufficient authority for this conclusion. But, taking a narrower test of consistency or repugnancy, it appears to me that the co-existence of the two sets of provisions I have described would produce an antinomy inadmissible in any coherent system of law. It must be borne in mind that the judicial officers in whom the rival enactments respectively repose powers, authorities or functions, are laid under a duty to execute them. It would not be open to a magistrate, if a prisoner was brought before him after apprehension under the Imperial Act, to refuse to deal with him at all. He could not simply abnegate his authority under that statute. It is his duty to act under the statute. In the same way, if the Commonwealth provisions were also in force, he would fall under a duty to exercise the powers, authorities and functions which would proceed from them. Up to the point of the apprehension of the prisoner and his being brought before the magistrate, the procedure prescribed by the two sets of provisions is almost identical; so nearly so that if both were valid, the magistrate would be called upon to exert both authorities simultaneously. But, as appears from the examination made of the rival provisions, at this point the divergence begins. If the magistrate made an order for the return of the prisoner it would be

(1) (1925) 36 C.L.R. 130. (2) (1926) 38 C.L.R. 441.

subject to two varying courses of appeal and review and would involve somewhat different consequences in many other respects, accordingly as it was considered an order under the Commonwealth provisions or considered an order under the Imperial Act. I think that this must amount to a repugnancy, and, of course, it is the Commonwealth provision which, to the extent of the repugnancy, must give way. I have not overlooked the fact that in *Lorenzo* v. *Carey* (1) this court decided that Federal jurisdiction might be conferred upon a court already possessing State jurisdiction upon the same subject matter, and so decided notwithstanding that the appeals lying from the exercise of each jurisdiction were not necessarily the same. Nor have I overlooked the observation made in the judgment of the court that, when Federal jurisdiction is given to a State court and the State jurisdiction belonging to it is not taken away, their Honours saw no difficulty in that court exercising either at the instance of a litigant (2). It has always appeared to me that, once the conclusion was reached that Federal jurisdiction was validly conferred, then under sec. 109 it was impossible to hold valid a State law conferring jurisdiction to do the same thing, whether subject to no appeal or subject to appeal in a different manner or to a different tribunal or tribunals, or otherwise producing different consequences. If the observation I have mentioned is to be pressed to such an extent, it can, I think, be justified only by the special nature of the legislative authority arising from sec. 77 (ii.) and (iii.) of the Constitution as the court interpreted those paragraphs.

For these reasons I think that the regulations which seek to apply to New Guinea the provisions of the *Service and Execution of Process Act* 1901-1934 (Statutory Rules 1925 No. 105; 1930 No. 147; 1931 No. 27; 1931 No. 44) are void for repugnancy in so far as they would otherwise make applicable sec. 18 (1) (*a*) of that Act to the reciprocal return of offenders between Australia and the Mandated Territory of New Guinea. The magistrate's order, therefore, cannot be supported under the Commonwealth legislation.

In this view it is unnecessary to consider the correctness of the opinion expressed in the Supreme Court to the effect that, apart from any repugnancy to the Imperial statute, no power resided in

(1) (1921) 29 C.L.R. 243.

(2) (1921) 29 C.L.R., at p. 252.

H. C. OF A. 1937.

FFROST v. STEVENSON.

Dixon J.

the Commonwealth Parliament to legislate for the service and execution of process as between the State and territories. It becomes a question irrelevant to the decision of the case. Further, of all territories a mandated territory is the last to choose for the purpose of examining the general powers of the Parliament to make laws, operating within a State, with reference to the administration of justice in a territory. I shall not embark upon the question, but I do not wish my not doing so to be regarded as implying agreement with the view expressed in the Supreme Court.

The ground upon which the order of the magistrate was finally supported by the decision under appeal was that, notwithstanding the reliance by the magistrate on the *Service and Execution of Process Act*, the order he avowedly made under that Act was a sufficient exercise of the authority conferred upon him by the *Fugitive Offenders Act* 1881. I am unable to agree that his order amounted to a valid exercise of his authority under the Imperial Act. In stating the differences between the two sets of provisions, I have already described the variation in those which govern the duty of the magistrate up to and including the making of his order. In the Imperial Act there is present, and in the Commonwealth provisions there is absent, an express requirement that he should be satisfied on oath (*a*) that the warrant was duly authenticated as directed by that Act; (*b*) that it was issued by a person having authority to do so; (*c*) that the prisoner is the person named in the warrant. The order to be made is of a somewhat different tenor. The criteria laid down for the exercise of the magistrate's discretion to discharge a prisoner or name a time for his return vary, although it is true that the variation is not wide. Before an order made in the intended exercise of a supposed power can be upheld as an order validly made under another power, all the conditions attending the lawful exercise of the one must be identical with the conditions supposedly prescribed for the exercise of the other. The legal foundation of an order under the one must be the same as that intended for an order under the other. But the features I have mentioned all combine to deprive the legal basis of an order properly made under the Imperial Act of that identity with the basis intended by the Commonwealth provisions which is necessary.

There is a further consideration which, in my opinion, is fatal to the order of the magistrate as an order resting upon the Imperial Act. The order is not made as a warrant. It appears to be a minute or memorandum signed by the magistrate made as under the *Justices Act* 1902-1931 (N.S.W.). Now I think that the Imperial Act requires a warrant. It is true that sec. 14 says that " such order for return may be made by warrant under the hand of the magistrate making it " and does not say that it must be so made. The point, however, of the permissive " may " is in allowing it to be under hand. For at common law a warrant is " a precept under hand and seal to some officer " &c. (*Jacobs' Law Dictionary, s.v.* " Warrant "); and *Jervis' Act* required a seal for a warrant to apprehend (11 & 12 Vict. c. 43, sec. 3). Sec. 17 of the *Fugitive Offenders Act* 1881 speaks of the date of the warrant and of " the person holding the warrant." Sec. 26, in its not unimportant second paragraph, which continues process in force notwithstanding the death of the person signing a warrant or indorsement, or his ceasing to hold office, includes in its enumeration a warrant, a summons, a subpœna and process, but not an " order." Sec. 27 speaks of " the authority signing the warrant." Sec. 28 refers to an escape from the custody of a person acting under " a warrant issued or endorsed " under the Act. Sec. 33 speaks of a " warrant previously issued for his return." For the operation of all these provisions a warrant is necessary and the Act appears to me to mean that there shall be a warrant for the return of the prisoner.

For the reasons I have given I think that the order of the magistrate is bad and would at common law be liable to quashing on certiorari. Sec. 146 of the *Justices Act* 1902-1931 (N.S.W.) provides that no conviction or order of a justice shall be removed by any writ or order into the Supreme Court. But in *Evans* v. *Donaldson* (1) this court decided that the section does not apply to orders made by justices in the exercise of a jurisdiction independent of the *Justices Act*.

In my opinion the appeal should be allowed and the order of the Supreme Court discharged. In lieu thereof the order nisi for a writ of certiorari removing the magistrate's order should be made absolute and the magistrate's order should be quashed.

(1) (1909) 9 C.L.R. 140.

H. C. OF A. 1937. FFROST v. STEVENSON.

EVATT J. This matter comes to the court pursuant to special leave to appeal granted on April 27th last after the appellant had unsuccessfully applied to the Full Court of the Supreme Court of New South Wales to make absolute a rule nisi for a writ of habeas corpus, prohibition or certiorari.

The material facts leading up to the magistrate's order for the return of the appellant to the Mandated Territory of New Guinea are fully set out in the judgments delivered in the Supreme Court and I shall deal immediately with the main heads of this very important case.

The Full Court of New South Wales was of opinion, first, that secs. 28 (1) (*b*) and 28 (1A) of the Commonwealth *Service and Execution of Process Act*, which the magistrate had adjudged applicable to the case, were invalid; but second, that the order of the magistrate could be regarded as warranted by the terms of the *Fugitive Offenders Acts* 1881, an Imperial Act.

I. Inter-se Question Involved.—Sec. 28 (1) (*b*) of the *Service and Execution of Process Act* 1901-1934 provides that the Governor-General may make regulations for applying the provisions of the Act to the "service and execution in any State or part of the Commonwealth of the civil and criminal process of the courts of the territories of the Commonwealth". Sec. 28 (1A) provides that, for the purpose of sec. 28, territories of the Commonwealth include any territory governed by the Commonwealth under a mandate. Pursuant to sec. 28 (1) (*b*) and sec. 28 (1A), the provisions of the *Service and Execution of Process Act* were extended by regulation to the service and execution in any State or part of the Commonwealth of the civil and criminal process of the courts of New Guinea.

The Full Court of New South Wales was of opinion that sec. 28 (1) (*b*) of the *Service and Execution of Process Act* and the regulations by which that Act has been made applicable to the service and execution in any State of the civil and criminal processes of the courts of the Territory of New Guinea, are "*ultra vires* and invalid." Thus it was held that the Commonwealth Parliament has no constitutional authority to authorize the arrest of a fugitive offender within a State for the purpose of his being returned for trial in any territory of the Commonwealth (whether mandated or territory

proper). In effect the Supreme Court decided that, within the boundaries of the States, the Commonwealth Parliament and Executive have no lawful power either under sec. 122 or sec. 51 (xxix.) or sec. 51 (xxiv.) to interfere with personal liberty for the purpose of the mutual rendition of offenders as between any Commonwealth territories and the States concerned.

In the opinion of the Supreme Court, sec. 122 of the Constitution, which gives the Parliament power to legislate for " territories ", does not extend to " the enforcement of executive acts done in that territory outside the boundaries of the territory and within the States ". Further, in its opinion, sec. 51 (xxix.) did not authorize the legislation and sec. 51 (xxiv.) is in terms limited to the service and execution of the civil and criminal process and judgments of the States and has no relation to " territories."

By implication and, I think, expressly, the Supreme Court ruled that, as between the Commonwealth and the State of New South Wales, any such interference with liberty within the borders of New South Wales must be authorized by the legislature of the State to the exclusion of the Commonwealth. In deciding that sec. 28 (1) (*b*) and sec. 28 (1A) of the Act were invalid, the Supreme Court determined a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. But the effect of secs. 38A and 40A of the *Judiciary Act* is to deprive the Supreme Courts of jurisdiction to determine any such question, so that the Full Court should have refrained from addressing itself to the question of the validity of the two provisions of the *Service and Execution of Process Act* and proceeded no further with such portion of the cause which was before them.

In *Jolley* v. *Mainka* (1) I expressed the opinion that the general power of the Commonwealth Parliament under sec. 51 (xxix.) to legislate within the borders of the Mandated Territory of New Guinea did not give rise to any contest of constitutional power between Commonwealth and State. The reasons expressed for such conclusion were that " neither the *New Guinea Act* nor the ordinances thereunder made operate outside New Guinea itself, and the States are in no way concerned or affected." The position is very different

(1) (1933) 49 C.L.R., at pp. 285, 286.

H. C. OF A. 1937. FROST v. STEVENSON. Evatt J.

when an attempt is made to exert the legislative power of the Commonwealth within the area of a State. Whether the present attempt was valid or invalid, any decision as to the Commonwealth's constitutional authority to act in such a way involves a question as to the lawful boundary within each State of the constitutional powers of the Commonwealth. This was pointed out on the application for special leave to appeal to this court, but the court was of the opinion that the most convenient course was to bring the whole cause up by granting special leave. The *Judiciary Act* makes it imperative to maintain a strict demarcation of functions between the Supreme Court and this court.

II. Legal Status of New Guinea.—It remains for this court to determine the correctness of the opinion expressed in the Supreme Court as to the validity of secs. 28 (1) (*b*) and 28 (1A). In the present case it is unnecessary to determine this question in relation to the territories proper of the Commonwealth, because we are concerned only with the return of an offender to the Mandated Territory of New Guinea which, in my opinion, is neither Commonwealth territory properly so called nor any part of the King's dominions, possessions or territories. The question of the validity of the provisions of the *Service and Execution of Process Act* so far as they relate to the Mandated Territory necessarily involves an investigation of the legal basis of the Commonwealth's jurisdiction over such territories. Similarly the lawful application to such Territory of the Imperial *Fugitive Offenders Act* 1881 is based upon the constitutional theory recited in the Orders in Council relating to New Guinea, that it is a place outside the King's dominions but in which the King has jurisdiction. The latter theory was elaborated and justified in my judgment in *Jolley* v. *Mainka* (1). As to the material provisions of the *Service and Execution of Process Act*, the Supreme Court (albeit in excess of its jurisdiction) considered that it was impossible to regard them as laws validly passed under sec. 122 for the government of New Guinea because, in relation to the arrest and return of persons like the appellant, they operated outside the Territory and within the borders of these States. As I do not think it is correct to base the Commonwealth's jurisdiction over New Guinea on sec. 122, I

(1) (1933) 49 C.L.R., at p. 264.

refrain from expressing any opinion upon that portion of the Supreme Court's judgment which may come before this court for review in another connexion.

As the constitutional basis of Australia's government of New Guinea has to be examined, I think that it is necessary for me to add something to what I said in *Jolley* v. *Mainka* (1). The opinion I there expressed to the effect that the Territory is not a place within or belonging to the King's dominions has been acted upon by the Supreme Court so far as the *Fugitive Offenders Act* is concerned. But the reasoning by which that opinion was reached seems to me also to require the conclusion that sec. 51 (xxix.), and not sec. 122, is the source of the Commonwealth's *legislative* power to govern New Guinea in pursuance of its *executive* power and international duty to carry out the obligations imposed on it by the terms of the mandate.

In any analysis of the legal and constitutional basis of the government of the Mandated Territory the primary duty of English courts is to attend to the objects and purposes of the mandates system, to avoid "a quibbling interpretation" and "a merely pedantic adherence to particular words", "to discover and to give effect to all the beneficent intentions" embodied in the instrument (*The Blonde* (2)). Lord *Sumner* stated the principle of approach not only with eloquence but with authority. I think that the courts of the mandatory power in particular should never overlook the supreme significance of the international duties and obligations which such power has assumed, not only towards other members of the League of Nations but also towards ex-enemy powers who, prior to the War of 1914-1919, possessed absolute sovereignty over the mandated territories. So long ago as 1921, one authority referring to the mandatory system pronounced the warning that if the words "a sacred trust for civilization are to be ignored then the mandatory system is a fraud from beginning to end, merely a new method of imposing imperialistic will upon subject people" (*The Mandate for Mesopotamia*, by *Lee* (1921), p. 17).

In a previous discussion of the status of New Guinea from the point of view of international law, I suggested that it was unnecessary

(1) (1933) 49 C.L.R., at pp. 264-292. (2) (1922) 1 A.C. 313, at pp. 325, 326.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

to make dangerous generalizations as to sovereignty over or in relation to territory, and that it was far preferable to consider each question of power and jurisdiction as a particular problem (*The British Dominions as Mandatories*, vol. 1, A.N.Z.I.L., p. 27). But such a course cannot be followed in relation to Australia's constitutional system which is part of municipal as distinct from international law. Further, the municipal courts cannot possibly ignore the questions of international law which are incidentally involved in the determination of the status of a mandated territory, and, as the Privy Council case of *Croft* v. *Dunphy* (1) illustrates, there is often a very close relationship between the two.

The interaction of questions of municipal and international law is well shown in the case of *R.* v. *Crewe* (*Earl*); *Ex parte Sekgome* (2), where the English Court of Appeal was called upon to consider the status of the Bechuanaland Protectorate. The affidavit of the Secretary of State for the Colonies stated that the Protectorate

> "was a foreign country within which His Majesty had power and jurisdiction by treaty, grant, usage, sufferance or other lawful means, within the meaning of the *Foreign Jurisdiction Act* 1890, and the territory of the Protectorate was foreign territory under His Majesty's protection; that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his Royal predecessors, nor had His Majesty or any of his Royal predecessors recognized the same as, nor was it, part of his dominions but he had power and jurisdiction within the same" (3).

One question was whether the Protectorate was a "foreign dominion of the Crown" within the meaning of the *Habeas Corpus Act* 1862, which precluded the issuing of a writ of habeas by an English court "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ." *Vaughan Williams* and *Kennedy* L.JJ. held that the Protectorate was not a "foreign dominion of the Crown." *Vaughan Williams* L.J. said that the prohibition of the issue of a writ of habeas corpus applied "only to the territorial dominions of the Crown," the word "dominion" meaning "territorial dominion, and not dominion in the sense of power" (4). He added that "Bechuanaland Protectorate is under His Majesty's dominion in the sense of power and

(1) (1933) A.C. 156.
(2) (1910) 2 K.B. 576.
(3) (1910) 2 K.B., at p. 577.
(4) (1910) 2 K.B., at pp. 591, 592.

jurisdiction, but is not under his dominion in the sense of territorial dominion" (1). *Vaughan Williams* L.J. then dealt with the interpretation of the *Foreign Jurisdiction Act* 1890, stating that the expression "out of Her Majesty's dominions" in the *Foreign Jurisdiction Act* meant "outside Her Majesty's territory" (2). The last observation is particularly appropriate to the case of the Mandated Territory.

Kennedy L.J. pointed out that "the protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State" (3).

The above observations are applicable to the Mandated Territory of New Guinea.

The decision of the Court of Appeal was approved by the Privy Council in the case of *Sobhuza II.* v. *Miller* (4). The relevance to the present case of the principles it lays down is obvious. It is quite fallacious to infer from the fact that in pursuance of its international duties under the mandate the Commonwealth of Australia exercises full and complete jurisdiction over the territory as though it possessed unlimited sovereignty therein, either that the territory (*a*) is a British possession, or (*b*) is within the King's dominions, or (*c*) has ever been assimilated or incorporated within the Commonwealth or its territories.

In the case of *Jolley* v. *Mainka* (5) I gave reasons for the conclusion that the Mandated Territory of New Guinea is "not part of, but outside, His Majesty's dominions". The decision of the Privy Council in *Jerusalem-Jaffa District Governor* v. *Suleiman Murra* (6) is also based upon the conclusion that the mandated territory there in question is not within the King's dominions although the mandate under consideration belonged not to class "C" but to class "A." In their recent work on *Constitutional Law*, *Wade* and *Phillips* said that "mandated territories are not part of the British dominions. They are former enemy colonies, the administration of which is

(1) (1910) 2 K.B., at pp. 603, 604.
(2) (1910) 2 K.B., at p. 607.
(3) (1910) 2 K.B., at p. 620.
(4) (1926) A.C. 518.
(5) (1933) 49 C.L.R., at p. 278.
(6) (1926) A.C. 321.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

entrusted to the British Crown by the League of Nations which supervises the carrying out of the mandates by means of a Permanent Mandates Commission " (p. 377). In another work *Keir* and *Lawson* distinguish between various territories including " mandated territories which, though subject in a greater or less degree to its control, are not in the strictest sense annexed to its dominions, and the dominions and Crown colonies, which are integral parts of the Empire " (p. 405).

Therefore it can be stated that despite certain differences of opinion as to such questions as sovereignty in relation to the mandated territories, every recognized authority on international law accepts the view that the Mandated Territory of New Guinea is not part of the King's dominions. Over and over again this fact has been recognized by the leading jurists of Europe including many who have closely analyzed such matters in relation to the organization and administration of the League of Nations.

III. Australian Interpretation.—The one exception of the whole current of authority is the judgment of *Isaacs* J. in *Mainka* v. *Custodian of Expropriated Property* (1), where it was asserted that the Mandated Territory of New Guinea is territory " belonging to the King in right of the Commonwealth of Australia." But the assertion that the Mandated Territory is portion of the King's dominions—for I cannot understand how it can belong " to the King in right of the Commonwealth of Australia " unless it is part and parcel of the King's dominions—is quite opposed to all recognized authority in international law. If this conclusion of *Isaacs* J. cannot be supported, it at once suggests itself that the reason upon which the conclusion is based needs re-examination.

Isaacs J. seems to have impliedly accepted the theory that sovereignty over and in relation to the mandated territory is vested in the mandatory power. But, as *Bentwich* has said, the Permanent Mandates Commission, the organ of the League of Nations, has acted upon " the governing principle that sovereignty has not been acquired and has seen to it that the principle is honoured " (*The Mandates System*, p. 20).

(1) (1924) 34 C.L.R., at p. 301.

This supervision by the Permanent Mandates Commission is of significance, for that body

> " has been constantly at pains to maintain the character of a trust on behalf of the League of Nations which characterises the B. and C. mandates, and to call in question any assertion of sovereignty over the mandated territory which may slip into any document or instrument issued by the mandatory. Thus when it was stated in the preamble to a treaty made in 1926 between the Union of South Africa and Portugal that the Government of the Union of South Africa 'subject to the terms of the mandate, possesses sovereignty over the territory of South West Africa' a question was raised by the commission. The Union of South Africa did not at first satisfy the comment of the Commission, and the question was raised a second time when the report of the territory was considered by the Permanent Mandates Commission in 1927; and the distinction between territories under sovereignty and territories subject to a mandate was emphasized " (*Bentwich, The Mandates System*, p. 96).

The disputes between the Permanent Mandates Commission and the Union of South Africa were satisfactorily settled, the result being that " the commission has gained its point which, though it may appear formal, involves a principle of great importance " (*British Year Book of International Law* (1931), p. 151).

Dealing with the proposal of South Africa to assimilate or incorporate the Mandated Territory of South West Africa into the Union as a fifth province thereof it has been said :—

> " The definite purpose of the Union Government is to erect South West Africa into a fifth province of the Union which would mean definitely a complete assimilation of native policy to that in the Union, which now adopts the principle of a colour bar excluding natives from skilled work. It is clear that such unification would run counter to the terms of the mandate, and that strictly speaking it should be possible only if the mandated territory is first advanced to the rank of freedom from mandate. Whether it would be possible to achieve a position in which the League could hold that it could thus abandon the purpose of advancing native interests by the mandatory system must remain undecided but clearly any such result would be unjust to Germany, which was deprived of South West Africa on the plea that her administration there subjected the natives in the interest of the Europeans, a policy not in essentials different from that of the Union Government of 1928 " (*Wheaton's Elements of International Law*, 6th ed. (1929) (*Keith*), vol. 1, p. 110.)

Similarly, in regard to the question of treaties, Professor *Keith* states that " as mandated territories are not colonial possessions, treaties made by the mandatories do not apply to them save if that is specially mentioned " (*Wheaton's Elements of International Law*, 6th ed. (1929) (*Keith*), vol. 1, p. 110).

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

Professor *Wright* pointed out in this connection that the Council of the League has recognized that as a consequence of the mandatories' want of sovereignty the latters' treaties do not automatically extend to mandated territory (*Mandates under the League of Nations*, p. 449).

The question of the national status of the inhabitants of mandated territories was determined by the Council of the League of Nations in April 1923 in accordance with the following four principles :—

"1. The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory power and cannot be identified therewith by any process having general application.

2. The native inhabitants of a mandated territory are not invested with the nationality of the mandatory power by reason of the protection extended to them.

3. It is not inconsistent with paragraphs 1 and 2 above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the mandatory power in accordance with the arrangements which it is open to such power to make, with this object, under its own law.

4. It is desirable that native inhabitants who receive the protection of the mandatory power should in each case be designated by some form of descriptive title which will specify their status under the mandate."

Amazing cynicism has been employed by Dr. *Baty*, who characterizes art. 22 of the Treaty of Versailles as a page out of "a University extension lecture" (*British Year Book of International Law* (1921-1922), p. 119).

But can it be doubted that the general principle of the mandate is reasonably plain? According to *Brierly, the trust* is the governing principle of the new institution of the mandate (*British Year Book of International Law* (1929), p. 217). *Brierly* quotes from an account of the conception of the private trust adopted by M. *Pierre Lepaulle*, who adds that "the only possible theory is that the rights of the trustee have their foundations in his obligations; they are tools given to him in order to achieve the work assigned to him. The trustee gets all the tools necessary for such end, but only those" (*British Year Book of International Law* (1929), pp. 218, 219).

The view of *Corbett* quoted by me in *Jolley* v. *Mainka* (1) is that the mandated territory is "never to be incorporated" within the

(1) (1933) 49 C.L.R., at p. 279.

territory of the mandatory power (*British Year Book of International Law* (1924), p. 135). If so, the phrase in art. 22 of the treaty " as integral portions of its territory " suggests that "as " is an equivalent of " as it were." The accepted conclusion as to the nationality of the native inhabitants shows clearly that the territory is no part of the territory of the mandatory power, and the conclusion is quite consistent with the provision in art. 127 of the Treaty of Versailles, by which the inhabitants must be accorded the diplomatic protection of the mandatories. The accepted position as to the binding effect of treaties and the proprietary rights of the mandatory power also illustrates the same general principle. Under sec. 122 of the Commonwealth Constitution, the territories proper of the Commonwealth are regarded as being on the road to a closer and more intimate relationship with the Commonwealth constitutional organization. But so far as concerns alteration in the status of a mandated territory, Professor *Wright* states :—

> " Thus it appears that the only probable manner of changing the status of a mandated territory is through action of the League by amending article 22 by admitting a mandatory community to its membership or by otherwise recognizing the latter's independence. Thus the League of Nations seems competent and alone competent to change the status of territories now under Article 22 " (*Wright, Mandates under the League of Nations*, pp. 505, 506).

I shall make only one further quotation from the long list of writers on international law who have discussed this matter, viz., *van Maanen-Helmer*, who says : " The mandated territories do not belong to the mandatory powers " (*The Mandate System*, p. 106).

As a matter of international law it would seem to be fairly clear that, in relation to the Mandated Territory, Australia is given so much power and jurisdiction as is necessary for her to govern the territory. The power and jurisdiction is ample, but the supreme principle is that Australia is unable to treat the territories as part of its own dominions, but is subject to international duties of an onerous kind including the duties of not attempting to alter or derogate from the status of the territory under mandate. Except for the case of *Mainka* v. *Custodian of Expropriated Property* (1) it follows that sec. 51 (xxix.) is the appropriate source of the Commonwealth's legislative power to arm itself with sufficient authority to enable it

(1) (1924) 34 C.L.R. 297.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

to fulfil its international duties in relation to New Guinea. If, for instance, all the nations concerned agreed that certain islands in the Pacific should be internationalized, but that the Commonwealth should act as the sole authority to administer the area, so that no suggestion could be made that such islands were Commonwealth territories properly so called, the legislative power included by sec. 51 (xxix.) would, in my opinion, be ample to authorize Commonwealth legislation for the purpose of giving effect to the system of international rights and duties. Thus the Commonwealth has sufficient power, not only internationally to undertake the performance of international duties, but constitutionally to arm itself with power to carry out those duties.

IV. Analysis of sec. 122.—I cannot understand why it is desired or how it is possible to have recourse to sec. 122 of the Constitution as the foundation of the Commonwealth's legislative authority in relation to the Mandated Territory. Sec. 122 enables the Parliament to make laws for the government of three classes of territories. The first class consists of territories surrendered by a State to, and accepted by, the Commonwealth. Obviously such territory will be portion of the King's dominions, i.e., a British possession. The second class consists of territories placed by the King under the authority of, and accepted by the Commonwealth. Presumably this refers to a territory the disposition of which is in the King's power, because the legal act of the Commonwealth which is contemplated is indicated by the very words "accepted by" which, in the case of a territory surrendered by a State, refer unambiguously to incorporation within the territorial possessions of the Commonwealth. That the Mandated Territory of New Guinea does not come within the second class seems to me to be proved inferentially but clearly by the fact that it is not, and is now admitted not to be, any part of the King's dominions, possessions or territories. Further, it is not possible to apply the words used in the second part of sec. 122 to the acts-in-law which took place in relation to the Mandated Territory of New Guinea. In *Mainka* v. *Custodian of Expropriated Property* (1), *Isaacs* J. said that "the mandate was made on 17th December 1920." But the authority issuing the mandate over New

(1) (1924) 34 C.L.R., at p. 300.

Guinea was the Council of the League of Nations and the recitals showed clearly that the authority accepting the mandate was the King "to be exercised on his behalf by the Government of the Commonwealth of Australia." *Isaacs* J. says that the *Treaty of Peace Act* 1919 was the relevant authority for the "acceptance of the mandate by His Majesty" (1). But the Imperial Act of 1919 merely authorizes measures for the carrying out by the King of the terms of the Treaty of Versailles, and it has no bearing upon the legal authority either for accepting the mandate or governing the territory. No Order in Council has ever been issued under the Act in relation to the Mandated Territory of New Guinea. Indeed, the Treaty of Versailles made no provision for nomination of a specified mandatory power, the intention being that such function should be performed subsequently by the League of Nations. The irrelevance of the *Treaty of Peace Act* was fully appreciated by Sir John Salmond, then legal adviser to the Government of New Zealand, which based the Government by New Zealand as mandatory power over Western Samoa upon the *Foreign Jurisdiction Act* 1890, an Order in Council duly issuing thereunder. If the second portion of sec. 122 of the constitution was applicable to the territory it should be possible immediately to answer the questions: (*a*) when did the King obtain his primary authority over New Guinea? (*b*) when did the King place the territory under the authority of the Commonwealth? and (*c*) when did the Commonwealth accept such territory from the King? Such questions have not been answered and, in my opinion, they are unanswerable, because no legal transactions of the character mentioned by the second part of sec. 122 ever occurred. The *New Guinea Act* correctly assigns the authority of the Commonwealth over the territories to the action of the Principal Allied and Associated Powers in nominating it as mandatory, and sec. 5 of the Act gives statutory authority to the Governor-General not to accept the territory from the hands of the King but to accept the mandate so soon as it issued to the Commonwealth from the Council of the League of Nations. In other words, the greatest care was taken by the Commonwealth advisers to protect the international status of the Commonwealth as such and to this end the King, acting

(1) (1924) 34 C.L.R., at p. 300.

H. C. OF A. 1937.

FFROST v. STEVENSON.

Evatt J.

through his Commonwealth Ministers, accepted the mandate directly from those who in the eyes of international law had power to grant it. The process adopted also avoids any basis for the suggestion that in the first place the King, acting through his advisers at Westminster, became the mandatory power and subsequently, or even simultaneously, the King placed the Mandated Territory under the authority of the Commonwealth. All the documents show that whatever authority was obtained by the Commonwealth in relation to New Guinea was by original grant to itself (the Commonwealth being of course identified with the King in right of the Commonwealth). It would have been entirely inconsistent with the new status of the Commonwealth if its right or title or claim to govern was regarded as derivative from the King acting through his advisers at Westminster.

The above analysis may at first sight appear to be of technical importance only, but it is vital to our constitutional system that absolute precision on these matters should be maintained. It will be dangerous to hold that, somehow or other, when and by what means it is impossible to say, sec. 122 picked up the Mandated Territory within its grasp. It is a fundamental part of the British constitutional system that acts-in-law of the King of the kind mentioned in sec. 122 can be immediately ascertained and the day on which the act takes place can never be left to speculation.

The third and last portion of sec. 122 refers to territories "otherwise acquired by the Commonwealth." It is to this part of sec. 122 that the judgment of *Isaacs* J. in *Mainka* v. *Custodian of Expropriated Property* (1) assigns the status of the Mandated Territory, i.e., it is "territory belonging to the King in right of the Commonwealth of Australia." Presumably, therefore, it is territory "otherwise acquired by the Commonwealth." Of course it is theoretically possible to apply a definition of "acquisition" which is sufficiently wide to include the Mandated Territory. But "acquisition" in relation to territorial additions or gains usually denotes that the authority acquiring possesses full territorial dominion. In international law, "acquisition", in relation to the territory and boundaries of a State, is practically a term of art and there are well-ascertained

(1) (1924) 34 C.L.R., at p. 301.

methods of acquiring such territory. Further, sec. 122 strongly suggests that the territories acquired by the Commonwealth have become part and parcel of the King's territorial possessions and dominions, i.e., a portion of his Empire.

For my part it is impossible to believe that the acceptance by the mandatory power of its international trust—" sacred trust "—in the interests of those who are " not yet " able to stand by themselves in the modern world is to be regarded as a new mode of " acquisition " of territory by the mandatory power. I think that it is not right for the courts of the mandatory power to hold that the very evil which it was the object of the mandatory system to prevent, namely, acquisition by means of cession or annexation, has been achieved by the terms of the mandate. In my view, the terms of the mandate entirely contradict the idea of acquisition, cession or annexation.

Any doubt as to whether the Mandated Territory of New Guinea can be treated as a territory within the meaning of sec. 122 of the Constitution seems to me to be resolved by the fact that sec. 122 postulates that any and every territory included within it may be accorded representation in either house of the Parliament. Thus, if it is a territory proper, the Commonwealth may allow it representation within the framework of the Commonwealth parliamentary system to the extent and on the terms which Parliament thinks proper. Admittedly, the territory is not within the King's dominions, so that birth within the territory does not create the status of British subject. Yet, by sec. 42 of the Constitution, every member of each house must take an oath or affirmation of allegiance to the King. I should have thought that this fact is in itself sufficient to demonstrate that all territories which are governed under sec. 122 alone must necessarily be British possessions and part and parcel of the King's dominions.

Further, even by the court which decided it, the case of *Mainka* v. *Custodian of Expropriated Property* (1) has not been regarded as accurately defining the constitutional status of the Mandated Territory. Thus, *Isaacs* J. expressly held that the Central Court was a

(1) (1924) 34 C.L.R. 297.

H. C. OF A. 1937.

FROST v. STEVENSON.

Evatt J.

Federal court within the strict meaning of sec. 73 of the Constitution (1). Subsequently, in *Porter* v. *The King*; *Ex parte Yee* (2), *Isaacs* J. does not recede from this position, but he stresses his own opinion that the Central Court of the Mandated Territory was regarded as a Federal court " not by reason of Commonwealth legislation simply —as in this case—but because of the effect of the Imperial Act, authorizing the mandate as expressed and therefore treating the Territory as ' an integral portion of the Commonwealth ' " (3). But in the same case *Starke* J., who had expressed agreement with *Isaacs* J. in *Mainka* v. *Custodian of Expropriated Property* (4), declared that there were " some incautious expressions " used in the judgment in that case (5); and he said that the appeal to the High Court from the Central Court of the Mandated Territory was not based upon sec. 73 of the Constitution, holding that the government of the Territory of New Guinea was organized under the *New Guinea Act* " coupled with the Treaty of Peace, the mandate and the Imperial Act, 9 & 10 Geo. V. c. 33."

Accordingly one is necessarily left in some doubt as to the precise basis upon which the court in *Mainka's Case* (6) decided in favour of the jurisdiction of the High Court to hear an appeal from the Central Court of the Territory of New Guinea, that being the only question in the case which involved any consideration of the constitutional status of the Territory. At any rate, two of the three justices who had decided *Mainka's Case* (6) agreed that sec. 122 could not be regarded as constituting the sole basis for the constitutional government of the Territory, and each called in aid an Imperial statute, though for very different purposes. Similarly, none of the judges who decided *Jolley* v. *Mainka* (7) regard sec. 122 as the sole source of the constitutional power of the Commonwealth to accept the mandate.

V. The Argument of Inconvenience.—It may not be necessary for this court to determine finally whether the Mandated Territory is a territory within the meaning of sec. 122 of the Constitution until an attempt is made (if ever it is) to give it representation in the

(1) (1924) 34 C.L.R., at p. 301.
(2) (1926) 37 C.L.R. 432.
(3) (1926) 37 C.L.R., at p. 443.
(4) (1924) 34 C.L.R., at p. 305.
(5) (1926) 37 C.L.R., at p. 450.
(6) (1924) 34 C.L.R. 297.
(7) (1933) 49 C.L.R. 242.

Parliament. For the reasons which I have given here and elsewhere, I am satisfied that in sec. 51 (xxix.), the "external affairs," lies the source of the Commonwealth legislative power, and that this source is at least as ample as that which is available if sec. 122 alone is applied. But, during the present case, it has been suggested that if sec. 51 (xxix.) of the Constitution was the source of the power, several decisions of this court as to the territories either could not or might not be deemed applicable to the Mandated Territory.

The argument of inconvenience is sometimes weighty, but a careful consideration of the three cases mentioned will show that they have a very remote bearing upon the question whether sec. 51 (xxix.) authorizes the exercise of legislative power in relation to the Mandated Territory. In *Buchanan* v. *The Commonwealth* (1), the court was concerned with a territory proper, the Northern Territory. It was held that sec. 55 of the Constitution, which provides that laws imposing taxation shall deal only with the imposition of taxation, did not affect the operation of the Commonwealth Act which made provision for the acceptance and general government of the Northern Territory and which incidentally imposed certain taxation. But *Buchanan's Case* (1) affords no support for the argument that, if legislative power to govern New Guinea under the mandate is to be assigned to the "external affairs" power of the Commonwealth, sec. 55 would or might invalidate general laws imposing taxation in a similar way. The fact that sec. 55 does not apply to taxation laws applying solely within a territory proper does not prove that it does apply to taxation laws imposed in a non-British territory by virtue of sec. 51 (xxix.). Indeed, in *Buchanan's Case* (2), *Barton* J. emphasized the fact that sec. 51 (ii.) of the Constitution and inferentially sec. 55 also related to laws of taxation applicable only within that part of the Commonwealth which comprised the six States. Obviously, this reasoning would result in a similar decision being pronounced in the case of the Mandated Territory, although its government rests upon sec. 51 (xxix.).

In *R.* v. *Bernasconi* (3) it was held that sec. 80 of the Constitution which requires a trial on indictment of any offence against any law

(1) (1913) 16 C.L.R. 315. (2) (1913) 16 C.L.R., at p. 330.
(3) (1915) 19 C.L.R. 629.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

of the Commonwealth to be by jury, has no application to offences committed within a territory proper (i.e., under sec. 122). The case related only to a territory proper, viz., Papua. *Griffith* C.J. made some general observations as to chapter III. of the Constitution (dealing with the judicature) considering that such chapter could have no application whatever to the territories comprised within sec. 122.

Bernasconi's Case (1) gives rise to several comments. It cannot be denied that the constitutional guarantee contained in sec. 80 has been construed so narrowly that it has become very easy to evade the principles it was intended to safeguard (See *R.* v. *Archdall & Roskruge*; *Ex parte Carrigan and Brown* (2)). It seems to have escaped the attention of all concerned in *Bernasconi's Case* (1) that on its very face sec. 80 postulates that the right of trial by jury extends to trials on indictment of offences against Commonwealth laws, not only where the offences have been committed within any State, but also where they have been committed outside these States. It would seem plain that the latter group of offences must include offences committed within the Commonwealth's own territories (properly so called). If so, sec. 80 must be regarded as being applicable to such territories in relation to offences against any "law of the Commonwealth." If *Bernasconi's Case* (1) is to be regarded as deciding that, for the purposes of sec. 80, a "law of the Commonwealth" does not include a law applicable only to a territory, such reasoning will apply, at least equally, to the legislative power exercised under sec. 51 (xxix.) solely in relation to the Mandated Territory. If, on the other hand, a "law of the Commonwealth" does include a law passed under sec. 122 though relating solely to a territory proper, *Bernasconi's Case* (1) was wrongly decided and, the at first sight surprising generalization that no part of chapter III. of the Constitution can have any application to territories under sec. 122 is destroyed. Moreover, the result of the second hypothesis might well be that sec. 80 applies in relation to the territories proper which are a definite part of the Commonwealth's constitutional framework but not in relation to places outside the King's dominions which are governed solely as the result

(1) (1915) 19 C.L.R. 629.

(2) (1928) 41 C.L.R. 128.

of the Commonwealth's performing some international duty, where such duty may be terminated by subsequent international arrangement and where the inhabitants, not being subjects of the King, cannot be regarded as inheriting or otherwise entitled to the benefits of British legal institutions and must discover their guaranteed rights in the international instrument under which they are governed. In principle there is far less reason for applying sec. 80 to a territory so governed than to the Commonwealth's own territories where British institutions may be regarded as far more applicable.

Bernasconi's Case (1) need not be discussed further but I have said enough to show that it can hardly be used with safety by those who would suggest that it is more convenient to assign the Commonwealth's jurisdiction over the Mandated Territory to sec. 122 rather than to sec. 51 (xxix.).

In *Porter's Case* (2) a minority of the court held that the legislative power of the Commonwealth in relation to the territories proper being based solely on sec. 122, cannot be used to impose upon the High Court any duty to hear an appeal from the courts of the territories. But the majority held that, under sec. 122, the High Court can be given jurisdiction to entertain an appeal from the Supreme Court of the Northern Territory, although the latter is not a Federal court within the meaning of sec. 71 of the Constitution.

Higgins J. put the point very clearly when he stated that sec. 73 is not the sole and exclusive measure of the appellate jurisdiction of the High Court (3), but the decision does not assist the argument that it is only by resort to sec. 122 that the appellate jurisdiction of this court from courts of the Mandated Territory can be supported.

Isaacs J., who wrote the judgment in *Mainka* v. *Custodian of Expropriated Property* (4), does not regard such appellate jurisdiction as resting upon sec. 122. The minority in *Porter's Case* (2) thought that it was sec. 122 which created the difficulty. There is probably less, and certainly no greater, difficulty involved if the Commonwealth's legislative jurisdiction over the Mandated Territory rests on sec. 51 (xxix.).

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432.
(3) (1926) 37 C.L.R., at pp. 446, 447.
(4) (1924) 34 C.L.R. 297.

H. C. OF A. 1937. FROST v. STEVENSON. Evatt J.

VI.—Applicability of Fugitive Offenders Act.—On October 12th 1925, the King made two Orders in Council under the *Fugitive Offenders Act* 1881. By the first Order it was provided that the Act should apply to New Guinea and Nauru "as if those territories were British possessions." This Order in Council was authorized by sec. 36 of the Act which expressly enables His Majesty by Order in Council to direct that the Act should apply as if any place out of His Majesty's dominions in which His Majesty has jurisdiction were a British possession.

On the same day, a second Order in Council, conveniently called a "grouping Order," was made pursuant to sec. 12 of the Act. It directed that Part II. of the *Fugitive Offenders Act* should apply as between the group of British possessions and other places named in the Order. The places included, *inter alia*, the Commonwealth of Australia, New Zealand and the Mandated Territory of New Guinea. The appellant contends that inasmuch as sec. 39 of the Act so defines the phrase "British possession" that all territories and places within the King's dominions "which are under one legislature" shall be deemed to be one British possession—and, as the Parliament of the Commonwealth admittedly exercises a legislative jurisdiction over the Mandated Territory of New Guinea as well as over the Commonwealth, the Commonwealth and the Mandated Territory are to be regarded for all the purposes of the Act, including sec. 12, as one British possession and one part of the King's dominions; therefore the grouping Order which treats the Commonwealth and the Mandated Territory as separate places or possessions, is invalid, to that extent at least.

I am of opinion that this argument is fallacious. In the first place the analysis which has been made both here and in *Jolley* v. *Mainka* (1) shows that the Mandated Territory is a place out of the King's dominions in which the King has jurisdiction. Therefore the first Order in Council was validly made under sec. 36. Undoubtedly the effect of making such Order in Council is that the Act applies to the Mandated Territory as if, contrary to the fact, it were a British possession. The second Order in Council is authorized by sec. 12 and it treats the Mandated Territory as if it were a British

(1) (1933) 49 C.L.R. 242.

possession separate from the Commonwealth of Australia. But the interpretation section so far as it defines "British possession" confines itself to "British possession" proper. The appellant suggests that, as New Guinea is to be deemed a British possession by virtue of sec. 36, therefore the interpretation section has to be applied as if it were and also had been a British possession and portion of the King's dominions. But in defining "British possession," the interpretation section (sec. 39) must be regarded as speaking in advance of all other provisions in the Act. As a consequence sec. 39 makes it not only possible, but necessary, to write down in advance of all attempts to interpret the Act a list of all places which are deemed included in the connotation "British possession." Thus, the Dominion of New Zealand is such a possession, and, but for the qualification as to places under the one legislature, each State of the Commonwealth would be a separate possession. As a result, the definition of "British possession" makes it necessary to treat as a unit various British possessions which are governed by one legislature, even if only so governed for limited purposes. But it is obvious that the Mandated Territory would not be included in such a list, and it is only, so to speak, subsequently, and as a result of sec. 36, that it is treated as a British possession at all.

The effect of sec. 36 is to treat a place outside the King's dominions as one separate and independent unit for the purposes of the Act. In the present case, the incidental or accidental fact that the agency by which the King exercises jurisdiction over New Guinea is the King's Commonwealth does not result in the inclusion of New Guinea among the list of British possessions which is fixed and predetermined as a result of sec. 39.

The result is that the *Fugitive Offenders Act* was available and applicable to the return of the appellant to the Mandated Territory from the Commonwealth of Australia.

VII. Validity of the Service and Execution of Process Act, secs. 28 (1) (*b*) *and* 28 (1A).—It being established that the Mandated Territory is a place outside the British Empire and outside the Commonwealth itself, the part of the *Service and Execution of Process Act* which is now challenged by the appellant provides for

H. C. OF A. 1937.

FROST v. STEVENSON.

Evatt J.

the mutual rendition of fugitive offenders between the Commonwealth and the Territory. Why are not such provisions, so far as they provide for constraint within the Commonwealth and the States, to be regarded as laws for the good government of the Commonwealth in respect of "external affairs" (sec. 51 (xxix.))? That subject matter is an extremely wide one. Even the narrowest interpretation of it would include arrangements for the mutual execution of process as between the Commonwealth and countries external to it. The Mandated Territory being such a country, it would seem to be quite immaterial that it is the Commonwealth Parliament which happens to have legislative jurisdiction within the borders of the Mandated Territory itself. Obviously, the Commonwealth can provide for mutual rendition as between itself and any other territory under mandate, e.g., Western Samoa, and also as between such territory under mandate and New Guinea. It would be passing strange if it could not act similarly as between itself and New Guinea. If such a legislative jurisdiction is lawful it is very conveniently exercised by applying as between the Territory and the Commonwealth such provisions as are identical with, or analogous to, those in force as between the States proper.

VIII. Decision of the Privy Council.—So far as can be ascertained, the only reason for the Supreme Court's denying such legislative power under sec. 51 (xxix.) lay in the suggestion of the appellant that the recent decision of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1) may possibly be regarded as requiring some qualification of this court's recent judgment in *R.* v. *Burgess*; *Ex parte Henry* (2). But such an argument depends upon a failure to note the important differences between the Constitutions of Canada and of Australia. Unquestionably, the recent decision of the Privy Council in the case of the Labour Conventions (*Attorney-General for Canada* v. *Attorney-General for Ontario* (1)) is not only quite consistent with *R.* v. *Burgess*; *Ex parte Henry* (2) but strongly supports it. In *R.* v. *Burgess*; *Ex parte Henry* (3), *McTiernan* J. and I expressed our definite opinion that, in pursuance of its powers to legislate in respect of "external affairs," the

(1) (1937) A.C. 326.
(2) (1936) 55 C.L.R. 608.
(3) (1936) 55 C.L.R., at p. 687.

Commonwealth Parliament is endowed with authority to pass laws giving effect to treaties and conventions without reference to the State parliaments, provided that such Commonwealth laws are made for the purpose of carrying out the terms of the International Treaty or Convention which has been ratified by the Commonwealth Executive. The question being one of fundamental principle we stated our views elaborately, holding that if power exists to carry out the Air Convention it exists equally to carry out the International Labor Conventions made within the framework of the International Labor Organization. *Latham* C.J. (1) gave an impressive list of subjects—including labour matters—as to which the Commonwealth had become a party to conventions and treaties, and in relation to all of which the Commonwealth Parliament had undoubted power to pass legislation which will effectively carry into law throughout Australia the terms of the conventions.

In its recent decision the Privy Council (2) denied the right of the Parliament of the Dominion of Canada to pass laws for the purpose of carrying out certain international labor conventions throughout Canada unless the subject matter of the conventions was otherwise within the competence of the Dominion Parliament as a subject already specified in sec. 91 of the Canadian Constitution. But it is necessary to understand the method by which the court reached this conclusion. Under the Canadian Constitution the subject of legislating for the performance of treaty obligations is dealt with by a special section, viz., sec. 132, which is entirely separate from sec. 91, dealing with the general powers of the Dominion Parliament. By the very terms of sec. 132 the power of the Dominion Parliament to legislate for the carrying out of treaty obligations is confined to those obligations which bind Canada as a part of the British Empire. It does not extend to the obligations of Canada entered into upon its own international responsibility. The Privy Council held that the obligations entered into by the Dominion of Canada to carry out certain of the Labour Conventions, although they were internationally binding on Canada, were

> "not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under

(1) (1936) 55 C.L.R., at p. 641.

(2) (1937) A.C. 326.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio Case* (1), and their Lordships do not think that the proposition admits of any doubt " (2).

Thus the judgment of the Privy Council shows that sec. 132 was worded too narrowly to include within its scope treaties and conventions made by Canada otherwise than as portion of the Empire, and that, although Canada is competent to act as a separate unit in international affairs, and so to enter into treaties and conventions which bind her, sec. 132 is too rigid to permit of legislation to be passed by the Dominion alone for the purpose of carrying out the obligations arising under such treaties and conventions. It is to be noted that the labour conventions entered into by Canada were not excluded from sec. 132 because their subject matter was outside the list of subjects ordinarily within Dominion competence, but solely because of Canada's having entered into the conventions as a separate and independent member of the International Labour Organization.

Sec. 91 of the Canadian Constitution was also relied upon by those affirming the competence of the Dominion Parliament, but that section gives the central authority no power to pass " treaty legislation as such " (3). Indeed, the very fact that sec. 132 was concerned with legislation to carry out treaty obligations of a specified character suggested that there alone was to be found the full expression of the Dominion Parliament's jurisdiction over " treaty legislation as such."

Under the Commonwealth Constitution the legal position is quite different and distinct. Owing to the recognition between the years 1867 (when the Canadian Constitution was accepted) and 1901 of the growing importance and self dependence of the dominions in relation to treaties and conventions, the Australian Constitution included among the specific list of subject matters assigned to the Commonwealth the subject of " external affairs," a phrase which embraces imperial and inter-dominion and foreign affairs. It is most fortunate that the subject matter was mentioned so broadly, because, owing to the phraseology adopted in sec. 132 of the Canadian Constitution, the power of Canada to carry out its international obligations has been held to be so seriously impeded that, unless

(1) (1932) A.C. 304.
(2) (1937) A.C., at p. 349.
(3) (1937) A.C., at p. 351.

Canada deliberately chooses to confine her treaty activities to cases where she will act as part of the Empire, it will often be necessary to obtain provincial, as well as Dominion, legislation to make such treaties fully binding throughout Canada. Providing, however, that Canada accepts international obligations as part of the Empire, sec. 132 imposes no restrictions whatever upon the subject matters to which such obligations may relate. They may include labour and industrial matters, and conventions as to such matters may be carried into full force throughout Canada by virtue of sec. 132. Sec. 51 (xxix.) is the authority possessed by the Commonwealth Parliament to pass treaty legislation. Just as with sec. 132 of the Canadian Constitution, sec. 51 (xxix.) contains no limitations as to the subject matter of such treaties. But, unlike sec. 132 of the Canadian Constitution, sec. 51 (xxix.) cannot be limited to treaties entered into by Australia as part of the Empire and necessarily extends to all treaties and conventions entered into by Australia "by virtue of her new status as an international person," or otherwise. In the case of the Commonwealth treaty obligations, the variety, both as to subject matter and of form of adherence is illustrated by the documents quoted by *Latham* C.J. in *R.* v. *Burgess*; *Ex parte Henry* (1). It is obvious that, if Australia has power to give effect to any of the obligations bona fide entered into as an international person, she has power to give effect to them all. The recent Privy Council decision (*Attorney-General for Canada* v. *Attorney-General for Ontario* (2)) makes a contrary view impossible of acceptance.

Further, the *Air Navigation Case* (*R.* v. *Burgess*; *Ex parte Henry* (3)) is sufficiently illustrative of the principle that the Commonwealth, by virtue of sec. 51 (xxix.), has ample constitutional power to legislate for the performance of its treaty obligations without any reference to the parliaments of the States.

It has been suggested that the principle of *R.* v. *Burgess*; *Ex parte Henry* (3) may provide a method of amending the Constitution without the approval of the people. But this is merely a rhetorical statement. In *R.* v. *Burgess*; *Ex parte Henry* (3) *Latham* C.J., *McTiernan* J. and I also pointed out that sec. 51 is subject to the

(1) (1936) 55 C.L.R., at p. 641. (2) (1937) A.C. 326.
(3) (1936) 55 C.L.R. 608.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

Constitution, and no constitutional provisions and guarantees could be set at nought by any legislation passed by the Commonwealth under sec. 51. One of the greatest guarantees is sec. 128, which deals with constitutional amendments. It has to be remembered that when, for instance, the Commonwealth enters into a convention as a member of the International Labour Organization and ratifies the obligations specified therein, such obligations are binding in international law, so that, when subsequently the Commonwealth passes legislation giving effect throughout the Commonwealth to the convention, it is not " amending the constitution," but acting strictly within it.

The mere fact that, by the carrying out of its international obligations, the Commonwealth Parliament deals also with matters not otherwise included within the list of subjects of Commonwealth legislative power, is nothing to the point. Similar results may occur as a result of legislation with respect to most, if not all, of the subject matters specified in sec. 51. For instance, in its *Transport Workers Act*, the Commonwealth Parliament has legislated in relation to transport workers engaged in inter-State or overseas commerce by setting up a system of licensing and preferential employment. The rhetorician will say, no doubt, that the Commonwealth is concerning itself with labour matters which are not included within its general competence. But such labour laws are perfectly valid, because they are in respect of inter-State and overseas commerce, and this additional fact that they regulate to some extent the subject matter of labour and employment does not destroy the validity of the legislation (*Huddart Parker Ltd.* v. *The Commonwealth* (1)).

Similarly, under its post office power, the Commonwealth Parliament can punish the publication by means of the post of obscene or libellous communications. Generally speaking, the repression of defamation and obscenity is a matter exclusively within State authority, but, none the less, the Commonwealth laws are obviously valid as legislation dealing with a subject which is included within Commonwealth power. Many other illustrations could be readily given, but these are sufficient to show that the " external affairs "

(1) (1931) 44 C.L.R. 492.

power of the Commonwealth is a great and independent power, limited only by other express provisions of the Constitution and its own terms fairly construed, not subject to the curious and fortuitous restriction which exists in Canada solely by reason of the language employed in sec. 132 of its Constitution, and both available and necessary to maintain and develop Australia's status as one of the nations of the world.

I am therefore of opinion that the recent Privy Council decision (1) conclusively supports the validity of the principles stated in *R.* v. *Burgess*; *Ex parte Henry* (2), and that for the reasons already advanced, sec. 28 (1A) of the *Service and Execution of Process Act* is a valid law under sec. 51 (xxix.).

IX. Repugnancy between Fugitive Offenders Act 1881 (*Imperial*) *and Service and Execution of Process Act* (*Commonwealth*).—Another question of importance which has arisen is whether there is a repugnancy between (*a*) the *Fugitive Offenders Act* 1881 and the Orders in Council issued thereunder, so far as they authorize the arrest and return to the Mandated Territory of New Guinea of a person found within one of the States of the Commonwealth and (*b*) secs. 28 (1) (*b*) and 28 (1A) of the *Service and Execution of Process Act* and the regulations made thereunder, so far as they authorize the arrest and return to the Mandated Territory of New Guinea of a person found within any State of the Commonwealth. The question of repugnancy can only arise if it is previously determined that sec. 28 (1) (*b*) and sec. 28 (1A) can validly be applied so as to authorize the appellant's return to the Mandated Territory of New Guinea. For the reasons I have already given I am of opinion that they can validly be applied, so that the question is whether by sec. 2 of the *Colonial Laws Validity Act* 1865 the provisions of the Commonwealth law are repugnant to the *Fugitive Offenders Act* 1881 and the Orders in Council made thereunder, so far as the two Acts concerned themselves with the arrest and return of fugitives as between the Commonwealth and the Mandated Territory.

In neither of the two courts where this case has previously been considered was any reference made to the matter of repugnancy nor was the *Colonial Laws Validity Act* referred to even during the

(1) (1937) A.C. 326. (2) (1936) 55 C.L.R. 608.

H. C. OF A. 1937.

FROST v. STEVENSON.

Evatt J.

course of argument before us. But the question has been raised, and it is of such importance that a decision must be given upon it. Prior to the passing of the *Colonial Laws Validity Act*, the word "repugnant" was frequently used so as to impose a restriction upon colonial legislatures, assemblies or councils and the phrase "repugnant to the laws of England" plagued several generations of colonial courts and lawyers. That "repugnance" in such a context was established rather by dissimilarity than similarity of object, purpose or effect, is suggested by the observations contained in a letter of Sir James Stephen, Under-Secretary of the Colonies, who said:—

> "Why bother yourself with that everlasting phrase 'not repugnant to the laws of England'? What does it mean? Has it any meaning? Then why did you, Mr. Counsel to the Colonial Department (you will say) 'bring it into the first New South Wales Act, and keep it in the second'? Why, in the first place, that it might serve as a *pons asinorum* over which no colonial Crown lawyer should pass without giving proof of more than asinine sagacity. Secondly, because it sounds highly constitutional and decorous. Thirdly, because it may every now and then prevent some egregious absurdity. This is indeed the correct interpretation of the phrase. Whatever is tyrannical or very foolish you may safely call "repugnant," etc., but whatever is necessary for the comfort and good government of the colony you may very safely assume to be in perfect harmony with English law" (*Therry*, "*Reminiscences*," p. 318).

Sir James Stephen's advice was not always followed, even by colonial courts, and in the case of the Colony of South Australia what was called by the English law officers "the unfortunate disposition . . . to favour technical objections against the validity of Acts of the colonial legislature" (*McCawley* v. *The King* (1)) was partly responsible for the passage into law of the *Colonial Laws Validity Act*. The preamble of the Act recited the fact that doubts had been entertained as to the validity of divers laws passed by the legislatures of certain of the colonies. Accordingly, sec. 3 provided that no colonial law should be deemed to be void on the ground of repugnancy to the laws of England, unless it was repugnant to the provisions of an Imperial Act, order or regulation. The Act was referred to as the charter of the legislative independence for the colonies, Lord *Birkenhead* suggesting that it is "in Imperial history *clarum et venerabile nomen*" (*McCawley* v. *The King* (2)). But a section

(1) (1918) 26 C.L.R. 9, at p. 49.

(2) (1920) A.C. 691, at p. 709.

preserved the supremacy of the Imperial legislative authority, and that supremacy has remained unimpaired until the passing of the *Statute of Westminster* 1931, which has not yet been adopted by the Parliament of the Commonwealth, although it has been adopted in Canada, South Africa and in the Irish Free State. Sec. 2 of the *Colonial Laws Validity Act* requires that any colonial enactment which is repugnant to an Imperial Act, order or regulation shall be "read subject to such Act order or regulation," so that the colonial law, if repugnant to the Imperial law, is void "to the extent of such repugnancy *but not otherwise*." In *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1) *Higgins* J. emphasized the significance of the words "to the extent of such repugnancy but not otherwise" as importing an implied grant of power to the colonial enactments "even where they deal with matters dealt with by a British Act extending to the colony; for the colonial Act is to be valid except to the extent of any actual repugnancy or direct collision between the two sets of provisions. Such a concession on the part of the supreme Parliament marks a very high level of liberality, foresight, statesmanship" (2).

An analogous provision to the *Colonial Laws Validity Act* is sec. 109 of the Commonwealth Constitution which allows a valid law of the Commonwealth to prevail over a valid law of the State which is inconsistent with the former law but only "to the extent of the inconsistency."

To the impressive general observations of *Higgins* J. may be added the further comment that the colonial law in the case of the *Colonial Laws Validity Act* sec. 2 and the State law in connexion with sec. 109 of the Commonwealth Constitution being only invalidated *pro tanto*, it may be the duty of the court to see if it is possible to compare the two enactments, so to speak, quantitatively, in order that what is excessive or contradictory in the colonial enactment—and nothing more—shall be deemed void.

In the cases of *Stock Motor Ploughs Ltd.* v. *Forsyth* (3) and *West* v. *Commissioner of Taxation (N.S.W.)* (4) I expressed an opinion to the effect that the application of sec. 109 of the Constitution to

(1) (1925) 36 C.L.R., at pp. 155, 156.
(2) (1925) 36 C.L.R., at p. 156.
(3) (1932) 48 C.L.R. 128.
(4) (1937) 56 C.L.R. 675.

H. C. OF A. 1937.

FROST v. STEVENSON.

Evatt J.

State Acts must be attended with great care, and that the tendency to give a too extended meaning to the word "inconsistency" should be resisted. In relation to the theory that the State law can be invalidated although the Commonwealth law does not directly conflict with it but is said to "cover the field," I endeavoured to show the danger and ambiguity of such an expression (1).

Despite certain expressions used in the judgments of this court in *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (2), I am of opinion that, under sec. 2 of the *Colonial Laws Validity Act*, a similar danger exists, both in declaring and measuring "repugnancy" between an Imperial and the colonial Act.

What is the precise conflict or opposition between two statutes which we have here to consider? There are discrepancies or differences in the method of procedure required by the two statutes. For instance, under sec. 19 of the *Fugitive Offenders Act*, a person may be discharged if it is made to appear that it would "be unjust or oppressive or too severe a punishment to return the prisoner." On the other hand, under sec. 18 (4) of the *Service and Execution of Process Act*, the justice or judge may discharge the person concerned, either on a number of grounds specified, or because he is satisfied that "for any reason it would be unjust or oppressive" to order a return. Although there is a striking parallelism between the two provisions, there are some differences in terminology, and, as a matter of legal possibility, if action is taken under one Act the fugitive offender may be discharged, whereas if action is taken under the other he may be returned. Further, the rights of appeal against an order for return are not identical and, under the Australian judicial system, one of the consequences of employing a Federal Act is to import a Federal element into the exercise of such jurisdiction, and the methods of reviewing such exercise have a special character.

In my opinion, none of these matters create any repugnancy between the two sets of provisions so as to avoid the Federal Act. The Imperial Act was passed largely because of the difficulty or impossibility of a colonial law operating outside its own borders, Imperial authority being required to authorize extra-territorial constraint. The purpose of the Act was to facilitate the return of

(1) (1932) 48 C.L.R., at pp. 147, 148. (2) (1925) 36 C.L.R. 130.

fugitive offenders to places within the Empire or governed by the Crown in exercise of its foreign jurisdiction, not for the purpose of punishment, but merely for the purpose of being tried. Under Part II., which is here of direct concern, provision is made for the inter-colonial backing of warrants as between groups of possessions which are regarded as sufficiently contiguous, and, in such cases, the liability of a fugitive to be returned depends upon a quasi-ministerial backing of warrants, and no preliminary investigation of the question of guilt is required. Under Part I., which prevails more generally throughout the Empire, a preliminary investigation has to be conducted in the place where the fugitive is apprehended in the same way as if the fugitive had been charged with an offence committed within such place. The fact that Part II. permits of a method of return without any preliminary investigation of the question of guilt or innocence illustrates the policy that such question is regarded as one to be dealt with by the courts of the possession where the offence is alleged to have been committed. Thus, the essence of Part II. of the Act is that where A and B are regarded as contiguous possessions, and belonging to the same group, there is a liability imposed upon a person accused of having committed an offence punishable in possession A to be apprehended and brought back to that possession if he is found in possession B.

Under the *Service and Execution of Process Act*, which was intended to operate primarily as between the States of the Commonwealth, the procedure being closely analogous to, but not identical with Part II. of the *Fugitive Offenders Act*, no general inquiry into the question of guilt is permitted, so that the mere allegation that a person has committed an offence in one State is regarded as a prima facie authority for his apprehension in another State for the purpose of his being returned for trial to the State where the offence is alleged to have been committed. In each case, the essence of the Act is the liability to arrest in one place, so that the prisoner shall be tried according to law in the proper place. Neither Act attempts to control the manner in which the fugitive will be tried after he has been returned. A failure of proceedings under either Act has no effect whatever upon the fugitive offender's liability to be tried in the place where he is alleged to have committed an offence.

H. C. OF A. 1937. FFROST v. STEVENSON. Evatt J.

The position seems to be no different from that which would exist if within the same territorial jurisdiction several authorities were empowered to issue warrants for the arrest of an offender for having committed an offence within the jurisdiction, and the several authorities were governed by somewhat different conditions precedent to the issue of a warrant. The decision of one authority not to issue a warrant would be perfectly consistent with the decision of another authority to issue a warrant. Under the Imperial Act of 1881, a grouping Order has been made which operates as between the Commonwealth and the Dominion of New Zealand. To my mind it is almost incredible that these great dominions are incompetent to facilitate the mutual surrender of fugitive offenders except upon the special terms mentioned in Part II. of the *Fugitive Offenders Act* 1881. Despite the application to them of the *Fugitive Offenders Act* 1881, I think it would be quite competent for the two dominions to authorize mutual surrender by a mere executive certificate without the checks and safeguards of the character embodied both in the Imperial Act and the Commonwealth *Service and Execution of Process Act*.

In this case I can see no conflict between the two Acts which seem to me to create two separate, separable and cumulative liabilities. The proper procedure is for the magistrate to act first under one Act, and subsequently under the other, and the mere fact that the applications have been combined neither creates repugnancy nor, in this case, created any injustice to the appellant. As to the point about the form of the order made by the magistrate I agree with the views of the Chief Justice.

For these reasons I am of opinion that no case of repugnancy has been made out and that in relation to the Mandated Territory neither sec. 28 (1) (*b*) nor sec. 28 (1A) is void or inoperative.

X. Alleged Oppressiveness of Return.—The appellant also argued that, whether the matter is regarded as coming under the Imperial or the Commonwealth Act, it would be unjust and oppressive to order the return of the appellant to New Guinea. The charge made against the appellant is the unlawful killing of a New Guinea native, and it is contended that in January last when the Chief Judge of New Guinea was sentencing another native, the "boss boy," in

respect of the same killing, he incidentally expressed a very strong opinion as to the circumstances of the killing. It appears that a native was working on a plantation belonging to Burns Philp & Co. and that the "boss boy" pierced his eye with the sharp end of an umbrella, injuring the brain. Chief Judge *Wanliss* stated that there was evidence that the present appellant instead of treating the injured and dying native boy brutally ill-treated him. The Chief Judge said that on the evidence before him, the appellant

> "in the callous, cold-blooded way of a brute got some ficus roots—horrible weapons to thrash a man with—and thrashed this dying man while he was lying helpless on the cement. He thrashed him with one of these roots until it broke, about ten strokes. He then got another and thrashed him with that until it broke, about nine strokes. Then he got a third one and used it until it broke; five or six strokes with that and then again with a fourth until the blood was coming from his back. The evidence is that not only was blood coming from his back, but from his eye and ears. Then this man Ffrost ordered him to go back and work. It was then late, but the native who received the instructions, with more humanity than Ffrost had, saw that it was useless and disobeyed instructions and took him to the labour home."

It is plain that the Chief Judge was confining his observations to the evidence before him and that he expressed no final opinion as to the appellant's guilt. It seems to be impossible to say that the return of the appellant can be regarded as harsh or oppressive.

In relation to the Mandated Territory of New Guinea the Commonwealth has special duties as mandatory and it would be *pessimi exempli* if the court refused to order the return of a person for trial charged with the unlawful killing of a native, merely because there had been a previous trial relating to the same killing and the competent court of the Territory has incidentally expressed a strong opinion as to the conduct of the prisoner sought to be returned. Before the present appellant can be convicted, the case must be investigated quite anew. But there is not the slightest reason for holding that it would be unjust that he should be tried. For myself, I think it would be unjust if he were not tried, although I express no opinion whatever as to his guilt.

The conclusions which I have reached are :—

(1) That, in holding that secs. 28 (1) (*b*) and 28 (1A) of the *Service and Execution of Process Act* are invalid, the Supreme Court determined a question as to the limits *inter se* of the constitutional powers

H. C. OF A. 1937.

FROST v. STEVENSON.

Evatt J.

of the Commonwealth and the States, and such question is, by the *Judiciary Act*, placed outside the Supreme Court's jurisdiction.

(2) That the status of the Mandated Territory of New Guinea is very special in character, partaking of the nature of a trust; that the Territory is not a part of the King's dominions, persons born therein do not thereby become British subjects, and it cannot, by unilateral action of the mandatory power, be incorporated within its possessions or territories.

(3) That, as a result of the Commonwealth's accepting binding international duties to carry out the mandate, it is possessed of sufficient legislative power under the "external affairs" placitum, to perform such duties, and, as incidental thereto, to govern the territory according to the mandate.

(4) That sec. 122 of the Constitution does not permit of the inclusion of the Mandated Territory among the territories of the Commonwealth properly so called, all such territories being necessarily included within the King's possessions and dominions and being permitted representation on certain terms in the King's Commonwealth Parliament.

(5) That, as the Mandated Territory is outside the King's territories, the Commonwealth Parliament has power to legislate for the mutual surrender of fugitives between such territory and the Commonwealth, with the result that secs. 28 (1) (*b*) and 28 (1A) of the *Service and Execution of Process Act* are both valid in relation to the Mandated Territory, whatever may be the position in relation to the territories properly so called.

(6) That the recent judgment of the Privy Council in the *Labour Conventions Case* (*Attorney-General for Canada* v. *Attorney-General for Ontario* (1)) supports the conclusion that the constitutional position in Australia differs from that of Canada, that the "external affairs" power of the Commonwealth undoubtedly includes the power of treaty legislation as a great and independent power, that it is limited only by the other express provisions of the Constitution and its own terms fairly construed, and that it is not subject to the curious and fortuitous restriction which exists in Canada by reason of the language employed in sec. 132 of the *British North America*

(1) (1937) A.C. 326.

Act, and that it is available and necessary to maintain Australia's status as one of the family of nations.

(7) That the *Fugitive Offenders Act* was lawfully applied to the mutual surrender of fugitives as between the Commonwealth and the Mandated Territory as a place outside His Majesty's dominions, but where, nevertheless, His Majesty has jurisdiction.

(8) That there is no repugnancy between the relevant provisions of the *Fugitive Offenders Act* 1881 (Imperial) and Orders in Council thereunder and the *Service and Execution of Process Act* and regulations thereunder.

(9) That whether the matter is regarded as arising under the Imperial Act or the Commonwealth Act, there is no evidence that it would be harsh or oppressive to order the return of the appellant merely to be tried according to law.

In my opinion, the order of the Supreme Court should be set aside and the order nisi should be discharged.

McTiernan J. The appellant having been accused of an offence punishable by the laws of the Mandated Territory of New Guinea, a warrant was issued there for his arrest. Steps were taken both under the Commonwealth *Service and Execution of Process Regulations* and Part II. of the *Fugitive Offenders Act* 1881 to have the appellant, who was in New South Wales, arrested, and an order was sought before a magistrate that the appellant be returned to the Mandated Territory.

The Commonwealth regulations were made under sec. 28 of the *Service and Execution of Process Act* 1901-1934, whereby the Governor-General is empowered to make regulations applying the provisions of that Act, with or without modifications, to the service and execution in any State of the civil and criminal process of the courts of the territories of the Commonwealth in like manner as if those territories were part of the Commonwealth. Sec. 28 (1A) of that Act provides that territories of the Commonwealth include any territory governed by the Commonwealth under mandate.

The applicability of the Imperial Act also depends on executive action. By an Order in Council, expressed to be made under sec. 36 of the *Fugitive Offenders Act*, it was recited that New Guinea

H. C. OF A. 1937. FFROST v. STEVENSON. McTiernan J.

and Nauru are places outside His Majesty's dominions in which His Majesty has jurisdiction, and the Act was directed to apply to these territories as if they were British possessions, but subject to a number of provisions contained in the Order in Council, the sixth of which said that, for the purpose of Part II. of the Act, these territories shall, with the Commonwealth of Australia, Papua and Norfolk Island, be deemed to be one group of British possessions. By another Order in Council of the same date, 12th October 1925, it was recited that the *Fugitive Offenders Act* had been applied by the Order in Council abovementioned to New Guinea and Nauru as if each of them were a British possession, and Part II. of the Act was directed to apply to the British possessions and territories thereunder mentioned, which included the Commonwealth of Australia and New Guinea.

Sec. 18 of the Commonwealth Act, as applied to the above-mentioned Commonwealth regulations, and secs. 13 and 14 of the Imperial Act as applied by the Order in Council, were relied on to authorize the arrest of the appellant in New South Wales and the making of an order by the magistrate before whom he was brought for his return to the Mandated Territory of New Guinea. Although the conditions precedent to the making of an order for the return of an offender, which are prescribed by the above-mentioned provisions respectively, are fulfilled, the magistrate before whom the order is sought is authorized to discharge the offender or postpone his return in the case of proceedings under the Commonwealth Act upon any of the grounds enumerated in sec. 18 (4) thereof, and in the case of proceedings under the Imperial provisions upon any of the grounds enumerated in sec. 19 of the *Fugitive Offenders Act*. At the same time as the order for his return was sought, the appellant applied alternatively under sec. 18 (4) of the Commonwealth Act and sec. 19 of the Imperial Act for his discharge. The magistrate made an order that the appellant be returned to the Mandated Territory of New Guinea, at the same time refusing to discharge him. In making the order and refusing to discharge the appellant from custody, the magistrate professed to act under the Commonwealth regulations. If those regulations are not valid the magistrate professed to exercise a power which he did not possess.

Both the Commonwealth regulations and the provisions of Part II. of the *Fugitive Offenders Act* 1881, as applied by Order in Council, are intended to authorize the return from Australia of a person for whose arrest a warrant has been issued in the Mandated Territory of New Guinea for an offence punishable by the law of the Territory. Each set of provisions assumes to deal completely and exclusively with the return of the offender from Australia to New Guinea. The Commonwealth regulations enter a field occupied by the Imperial enactment.

The question arises, whether the Commonwealth regulations are, to the extent to which they apply to the return of offenders from Australia to the mandated territories, repugnant to valid Imperial provisions applying to the same subject matter. If repugnancy exists it becomes unnecessary to enter into the question whether the power of the Commonwealth to enact secs. 28 and 28 (1A) of the *Service and Execution of Process Act* 1901-1934 in relation to the mandated territories is derived from sec. 51 or sec. 122 of the Constitution. For, if those sections are valid under the Constitution, the repugnant regulations made thereunder are in any case void and inoperative by force of sec. 2 of the *Colonial Laws Validity Act* 1865. The test of repugnancy under this section was propounded in *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1). The Commonwealth provisions in so far as they extend to the rendition of offenders from the Commonwealth to the mandated territories cannot, in my opinion, survive that test. The Commonwealth and the Imperial provisions contain different enactments about the same subject matter. It is apparent that the two sets of provisions cannot be executed in relation to the same offender for the same offence, if he is in Australia, without conflict. There are differences, which are not merely literal, but substantial, between the grounds enumerated in sec. 18 (4) of the Commonwealth Act and sec. 19 of the Imperial Act respectively, upon which the offender is entitled to apply to be discharged or to have his return postponed. Moreover, it is expressly provided by the latter section that any order or refusal to make an order of discharge by a magistrate shall be subject to an appeal to a superior court, whereas sec. 18 (4) provides that the offender may

(1) (1925) 36 C.L.R. 130.

H. C. OF A. 1937. FFROST v. STEVENSON. McTiernan J.

seek the relief mentioned in the section from a magistrate or any judge of the State. Again, secs. 17, 18 and 27 of the *Fugitive Offenders Act* attach consequences to an order for the return of an offender, made under that Act, which are not attached to an order made under the Commonwealth regulations. It is impossible to give effect to both sets of laws at the same time. Nor can the question of inconsistency be disposed of by treating them as alternative provisions authorizing and regulating the return of offenders from the Commonwealth to New Guinea in either one of two valid methods. If then Part II. of the *Fugitive Offenders Act* has been validly applied, these are the overriding provisions which must govern the case. The crucial question, therefore, is whether the provisions of Part II. of the *Fugitive Offenders Act* have been validly applied.

In the first place it is contended that the Orders in Council applying the *Fugitive Offenders Act* are founded on the erroneous assumption that the Mandated Territory of New Guinea is a place out of His Majesty's dominions. To accede to this contention would be to contradict what the King in Council has declared to be a fact. The question whether the Mandated Territory is a place outside His Majesty's dominions is not one requiring proof by the parties to the litigation. The court may accept the information contained in the Orders in Council and take judicial notice of the fact therein recited that New Guinea is out of His Majesty's dominions. If after this statement by the King in Council a different view were taken by the court an undesirable conflict would arise (See *Duff Development Co.* v. *Kelantan Government* (1)).

It is noteworthy that the view of New Zealand, which was acted upon by the British Government, was that the *Foreign Jurisdiction Act* 1890 should be resorted to in order to provide for the government of Samoa. By an Order in Council made under this Act, full power of legislation and administration over Samoa was granted to the Government and Parliament of New Zealand, and under these powers the Dominion passed laws creating a constitution for the territory.

It is common knowledge that the mandatory system was set up by the Peace Conference. The purpose of the system is set out in art. 22 of the Covenant of the League of Nations. Acceptance of

(1) (1924) A.C., at pp. 808, 809 and 823 et seq.

the fact stated in the Orders in Council that the Mandated Territory of New Guinea is a place out of His Majesty's dominions involves no inconsistency with the decisions of this court as to the legal basis of the authority of the Commonwealth over that Territory.

By the Treaty of Versailles, the title to the former German colony of New Guinea was ceded to the Principal Allied and Associated powers. The terms of the " C " mandate, where the mandatory is a British dominion, show that the mandate is " conferred upon His Britannic Majesty to be exercised on his behalf " by the government named. The mandates were allocated in each case by the Principal Allied powers and the terms were approved by the League Council. " The Crown thus took charge of territories with full power of legislation and administration, but subject to definite conditions and to the duty of reporting to the Council of the League of Nations " (*The King and the Imperial Crown, A. Berriedale Keith*, p. 418). The peculiar characteristic of class " C " of the mandates is that they are territories which, it was declared, can best be administered as " an integral part of the territory of the mandatory," subject to the safeguards expressed in the mandate. A writer of high authority has said: " This means that the mandatory can apply his own immigration and tariff laws " (*Anson's Law and Customs of the Constitution* 4th ed. (1935), vol. 2, Part II., p. 115).

There are divergent views as to whether the language of art. 22, so far as it relates to the " C " mandates, incorporates the mandated territory in that of the mandatory or preserves the mandated territory from becoming part of the other's territorial property. The fullness of governmental authority over the territory conferred by the " C " class mandate does not necessarily involve the cession of the territory to the mandatory (See *Jolley* v. *Mainka* (1), per *Evatt* J.). The mandate for the government of New Guinea, which was made on 17th December 1920, recites that His Majesty for and on behalf of the government of the Commonwealth of Australia had agreed to accept it. Art. 2 is as follows: " The mandatory shall have full power of legislation and administration over the territory subject to the present mandate as an integral part of the Commonwealth of Australia, and may apply the laws of the Commonwealth

(1) (1933) 49 C.L.R., at p. 271.

H. C. OF A. 1937. FROST v. STEVENSON. McTiernan J.

of Australia to the territory subject to such local modifications as circumstances may require." The chain of Commonwealth authority over the Mandated Territory is traced by *Isaacs* J., as he then was, in *Mainka* v. *Custodian of Expropriated Property* (1). He concludes: "The words in the Australian mandate appear to mean, not that the Mandated Territory is deemed to be physically part of the continent of Australia, but as territory belonging to the King in right of the Commonwealth of Australia." In *Jolley* v. *Mainka* (2) *Starke* J. based the legislative power of the Commonwealth over the Mandated Territory of New Guinea on sec. 122 of the Constitution, and *Dixon* J., with whom *Rich* J. agreed, expressed no personal opinion but said that it appears to have been considered that sec. 122 of the Constitution is the source of power for the enactment of the *New Guinea Act*, the King's acceptance of the mandate, on behalf of the Commonwealth, presumably being treated as placing the Territory under the authority of the Commonwealth within the meaning of that section (3). In the same case, *Evatt* J. denies the proposition that the Mandated Territory was either placed by the King under the control of the Commonwealth, or was otherwise acquired by the Commonwealth, within the meaning of sec. 122 of the Constitution, or that this section is a source of power for the enactment of laws applying to New Guinea. He held that "the Commonwealth's *de facto* government of the Territory has its lawful source in (*a*) legislation under sec. 51 (xxix.) of the Commonwealth Constitution following upon (*b*) the Commonwealth's international right and duty to administer New Guinea according to the terms of the mandate" (4). All the justices reached the conclusion that New Guinea was "a territory under the control of the Commonwealth," which was the crucial question in the case. The recital in the above-mentioned Orders in Council that New Guinea is outside His Majesty's dominions is obviously in conformity with the views of *Evatt* J., and indeed was relied on by him. Nor is it contradictory of the recitals in the Orders in Council to say that the Mandated Territory of New Guinea has been placed under the control of the

(1) (1924) 34 C.L.R., at pp. 300, 301.
(2) (1932) 49 C.L.R., at p. 250.
(3) (1933) 49 C.L.R., at p. 256.
(4) (1933) 49 C.L.R., at p. 289.

Commonwealth according to the true intent of sec. 122. It is true that the King took no formal step to place this Territory under the control of the Commonwealth. But His Majesty was a party to the Treaty of Peace and to the allocation of the mandates. The mandate over this Territory was accepted by His Majesty on behalf of the Commonwealth, and thus assigned by him to the Commonwealth. If the transaction is considered as a whole it is possible to say that His Majesty placed New Guinea under the control of the Commonwealth. The words, "or otherwise acquired," do not raise any necessary implication that the phrase, "placed by His Majesty under the control of the Commonwealth," are to be read as meaning that the authority of the Commonwealth to govern a territory under sec. 122 depends upon it passing to the Commonwealth by some method of acquisition which makes it the territorial property of the Commonwealth. "Acquired" is a wide word and extends to the acquisition of the possession enjoyed by the Commonwealth as the dominion entrusted with the fulfilment of the mandate to govern the Territory of New Guinea. The concluding part of sec. 122 does not point to the conclusion that the Mandated Territory of New Guinea is outside the section, for while the Constitution endures it is impossible to deny that an occasion might arise, perhaps in the remote future, even for allowing representation to that Territory in either House of the Parliament.

The second ground upon which the validity of the Orders in Council was attacked was that New Guinea is under the Commonwealth Legislature, and accordingly the territories constituting the Commonwealth of Australia and New Guinea must be regarded as one British possession because of the definition of that expression in sec. 39 of the *Fugitive Offenders Act*. This section says that, unless the context otherwise requires, the expression "British possession" means any part of His Majesty's dominions exclusive of the United Kingdom, the Channel Islands, and the Isle of Man. The section continues "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

H. C. OF A. 1937. FFROST v. STEVENSON. McTiernan J.

well as a central legislature, means the central legislature only." This attack upon the Orders in Council assumes that the definition of British possession embraces not only the territories and places within His Majesty's dominions which are under one central legislature, but also a place outside His Majesty's dominions to which the Act is directed to apply as if it were a British possession. In my opinion, the definition of a British possession in sec. 39 has no application, and indeed the context of the Act requires that it should have no application, to the identification of that place outside His Majesty's dominions, which is only deemed to be a British possession for the purposes of the Act.

The provisions of the *Fugitive Offenders Act*, including Part II., were validly applied by the Orders in Council to the return of fugitive offenders from Australia to the Mandated Territory of New Guinea, and the repugnant provisions of the *Service and Execution of Process Regulations* are, by force of sec. 2 of the *Colonial Laws Validity Act* 1865, void and inoperative.

The magistrate acted under the repugnant provisions of the Commonwealth regulations and assumed to exercise a power which he did not possess. It is true that under the *Fugitive Offenders Act* he had the power to make an order for the return of the appellant to New Guinea, and that had he professed to act under that power he might still have made an order that the appellant be returned to New Guinea and have refused to discharge him. But the order which he made must remain as one made without authority, for he did not profess to fufil the conditions of the power conferred by the Imperial provisions.

The conclusion that the appellant cannot be lawfully returned to the Mandated Territory of New Guinea except under the authority of the *Fugitive Offenders Act* is based not on the absence of power under the Constitution for the Commonwealth to make a law for the return of offenders from Australia to New Guinea, but upon the repugnancy of the regulations which it has made to the Imperial provisions. It is unnecessary to enter into what is the specific source of the power of the Commonwealth to make such a law.

In my opinion the rule nisi for certiorari should be made absolute.

LATHAM C.J. All the members of the court are of opinion that in the proceedings before the Supreme Court a question of the limits *inter se* of the constitutional powers of the Commonwealth and the States was raised and that, under sec. 40A of the *Judiciary Act* 1903-1934, that court should have proceeded no further in the cause.

The order of the Supreme Court is therefore set aside. The order nisi is discharged. No order will be made as to costs.

Order of the Supreme Court set aside. Order nisi discharged.

Solicitors for the appellant, *McMaster, Holland & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.