In the Supreme Court

Before: Smith, C.J., Willkie & White, JJ.

Suits Nos. M. 41 & 42 of 1977

R. v. Commissioner of Correctional Services
Ex parte Raphael Constantine Dillon and
Errol Williams.

Ian Ramsay and Enos Grant for Applicants

Patrick Robinson and Karl Harrison for Respondent

Horace Edwards, Q.C. for Government of Bermuda

Velma Gayle amicus curiae

1978 - July 17

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Smith, C.J.

By an order made on August 12, 1977 by His Honour Mr. U.D. Gordon, Resident Magistrate for Saint Andrew, the applicants were committed to prison to await their return to the Islands of Bermuda to be tried there for offences which it was alleged they had committed in those Islands. The order was made under the provisions of the Fugitive Offenders Act, 1881. They subsequently applied to this Court for writs of habeas corpus to issue for their release from custody. By a majority decision of the Court, their applications were refused. I set out below my reasons for deciding that the applications should be refused.

The applicants are Jamaican citizens. They were each arrested on August 4, 1977, on four warrants issued in Bermuda. Three warrants, in each case, charged them with conspiring together, and with named Bermudan citizens, to import a controlled drug, cannabis, into the Islands of Bermuda in

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breach of the provisions of the Misuse of Drugs Act, 1972. The fourth warrant, in each case, charged the applicants with being concerned together, and with three named Bermudan citizens, in importing a controlled drug, cannabis, into the Islands, in breach of the Act of 1972. The warrants were duly endorsed by Allen, J., a judge of this Court, under the provisions of s. 3 of the Act of 1881.

At the hearing of the applications, the validity of the learned Resident Magistrate's order was challenged on several grounds. The first questioned his jurisdiction and was in two parts. Firstly, as set out in the applicants' affidavits in support of their applications, it was contended that he had no jurisdiction to make the order as the Act of 1881, under which it was made, was repealed by the United Kingdom parliament and replaced by the Fugitive Offenders Act 1967. What was being contended here was that the repeal in the United Kingdom effected a repeal of the Act in Jamaica, if it was part of our law. This contention was abandoned by counsel for the appellants in his reply. But it was argued and maintained that the Act of 1881 was never at any time adopted in Jamaica, either by the colonial or by the post-independence legislature either expressly or by reference in any legislative enactment, so as to make it a law of this Country. It was submitted that the Act of 1881 never did apply to Jamaica because it was never adopted nor was it extended by Order in Council. Reliance for this submission was placed on Re Government of India and Mubarak Ali Ahmed (1952) 1 All E.R. 1060.

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In the Ali Ahmed case the substantial question, on an application for a writ of habeas corpus, was whether or not the Act of 1881 still applied as between the United Kingdom and India, which had become a republic in January, 1950. In giving the judgment of the Divisional Court Lord Goddard, C.J., is reported as saying, at p. 1061:

> " By s. 12 of the Fugitive Offenders Act, 1881, that Act could be applied to any of Her Majesty's dominions by an Order in Council, and we were told that an Order in Council was made in 1904 (S.R. & O., 1904, No. 318), applying the Act to India which was then a part of the sovereign's dominions."

This is the passage relied on by counsel for the applicants. The case is reported as well at (1952) 1 T.L.R. 964 and (1952) W.N. 217. In the former, at p. 965, Lord Goddard, C.J., is reported as saying: " ..... we were told that an Order in Council was made in 1903, applying the Act of 1881 to India ....." In the latter report, at p. 218, he is reported as saying:"The Act of 1881 could be applied to any of Her Majesty's dominions by an Order in Council, and an order was made in 1903 applying the Act to India." In spite of this passage from the Weekly Notes, it seems clear that Lord Goddard, C.J. did not see the Order in Council to which he referred. Intensive research has not turned up any Order in Council made in 1903 under the Act of 1881 in respect of India or at all. The Numerical Table of Instruments in Vol. 25 S.R. & O. (Revised) does not list any Order in Council made in 1903 under the Act of 1881. The All England Reports report the Lord Chief Justice as saying that they were told that the Order in Council was made in 1904. The chances are that he said 1903, as the other reports indicate, but the editor of the All England Reports, wishing to insert a

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specific reference to the Order in Council, did not find it in 1903 but found one in 1904 which applied to India and so altered "1903" to "1904" and inserted the specific reference.

Reference to the Act of 1881 will show that its sections are divided into four parts. Part I has the title "Return of Fugitives" and contains ss. 2 to 11. Part II is entitled "Inter-Colonial Backing of Warrants, and Offences" and contains ss. 12 to 19. It is not necessary to refer here to Part III. Part IV contains supplemental provisions and s. 32 is included in that part. There can be no doubt that the order made by the metropolitan magistrate for the return of Ali Ahmed to India to take his trial was made under s. 5, and thus under Part I, of the Act of 1881. The provisions of Part II were inapplicable to Ali Ahmed's case. That part of the Act is completely independent of the other parts. It provides for the summary and less formal, removal of fugitives from one British possession to another where those possessions are part of a group of British possessions "to which, by reason of their contiguity or otherwise," Her Majesty has, by Order in Council, applied Part II of the Act (see s. 12). Thus s. 13 provides for the backing of warrants between members of the same group, adopting the practice which existed at the time between component parts of the United Kingdom. A fugitive could be returned by order of a magistrate once he was satisfied that the endorsed warrant was lawfully issued and that the prisoner before him was the person named in the warrant (s.14). It was not necessary in such cases to follow the formal procedure laid down in s. 5.

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The Order in Council to which reference is made in the Ali Ahmed case, at (1952) 1 All. E.R. 1061, was not made under s. 12 of the Act of 1881 as is there stated. Reference to it will show that it was made under s. 32 of the Act. That section was not relevant to the case. Its limited purpose was that it enabled Her Majesty, by Order in Council, to direct that a law passed by the legislature of a British possession shall be recognised and given effect to throughout her dominions as if it were part of the Act of 1881, if the law was passed by the local legislature for the carrying of the Act, or any part thereof, into effect in that possession. As I have indicated, s. 12 falls under Part II of the Act, so an Order in Council made under that section would also be irrelevant to the Ali Ahmed case. It seems certain that the section was included in the report by the editor and that Lord Goddard, C.J., made no reference to it. The other reports do not report him as doing so. (The Order in Council applicable to India which was made under s. 12 is at S.R. & O., 1918, No. 28). It is plain, from what I have said, that the Divisional Court was misled into thinking that an Order in Council relevant to the case had been made. Since the order made by the Resident Magistrate in the case under consideration, like that in the Ali Ahmed case, was made under s. 5 of the Act of 1881, that case is no authority for the contention put forward on behalf of the applicants.

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What has to be determined in this case, and arose for decision in the Ali Ahmed case, is whether the provisions of Part I of the Act of 1881 and the supplemental provisions in Part IV applied directly to dependent territories, like India and Jamaica, when the Act was passed or required a subsequent Order in Council to make them applicable. The Imperial parliament could, at the time, legislate for a dependency either way. Where a statute, or a part of it, was to be made applicable by Order in Council this was expressly stated in the statute. Examples of this are to be found in ss. 12 and 36 of the Act of 1881, the former confined to Part II and the latter enabling the Act to be applied to places out of Her Majesty's dominions. There is no such provision in respect either of Part I or Parts III and IV. It was argued that an Order in Council under s. 32 was necessary to extend the Act to Jamaica but, as I have endeavoured to show above, that section is irrelevant for the purposes of this case. In my opinion, there is an error in para. 1228 of Vol. 16 of Halsbury's Laws of England (3rd edn.), to which reference was made, insofar as it implies that an Order in Council was required to apply Part I of the Act to British possessions. Reference to note (s) to that paragraph and a comparison with para. 1211 will show that "Part I" in para. 1228 is an error and should read "Part II."

An Imperial Act applied directly to a dependency when passed if it so appeared from the use of express words or from the necessary intendment of the Act. A cursory glance at the Act of 1881 is sufficient to establish that,

by its provisions, the Imperial parliament legislated directly for the United Kingdom and dependent territories of the Crown. The provisions of Parts I, III and IV were, therefore, in force in Jamaica from the Act was passed. Part II was applied to West Indian Colonies, including Jamaica, as a group by an Order in Council dated 29 November, 1884. The Act was in force when Jamaica became fully independent in 1962. It has continued in force since then by virtue of s. 4(1) of the Jamaica (Constitution) Order in Council 1962. It is still in force and will remain so until repealed by the Jamaican parliament.

The second contention in respect of jurisdiction was that, assuming the Act of 1881 is still a law of Jamaica, the Resident Magistrate had no jurisdiction to make an order at the instance of Bermuda as that country "has opted out of the reciprocal provisions" of the Act of 1881 by the repeal of that Act in respect of Bermuda and replacing it with fresh statutory provisions, which "involve no mutuality" with Jamaica and, in any event, have not been adopted by the legislature expressly or by reference. It was argued that a Country with the provisions of the Act of 1967 cannot support a request to a Country that has the Act of 1881 as the latter Act must be viewed "as a scheme of multi-lateral relations" with reciprocal rights and duties under it available only to participants under the Act. So, it was said, when a Country becomes a republic or "opts out of the 1881 scheme", the rights and obligations under that scheme are not applicable to that Country.

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As I have indicated, in my opinion no such proof was necessary. The Resident Magistrate needed to be satisfied that the offences for which the surrender of the applicants was sought were offences to which Part I of the Act of 1881 applied (see s. 9) and there was adequate proof of the law of Bermuda before him in this respect.

The second ground upon which the validity of the order of the Resident Magistrate was challenged was concerned with the warrants upon which the applicants were apprehended and the endorsement of them by Allen, J. As regards the warrants, the contention was that they were issued in Bermuda without lawful authority under the Act of 1881 as no "Bermudan Municipal Authority" could act under the provisions of what, for them, was a repealed law. This contention was abandoned during the appellants' counsel's reply. As regards the endorsement of the warrants, the point developed during the argument was that the provisions of s. 26 of the Act of 1881 require that at least one person be named in the endorsement and this was not done. It was submitted that the terms of the endorsement set out in the section are mandatory, cannot be waived and a warrant has no validity unless the endorsement is good.

Section 3 of the Act of 1881, so far as is relevant, provides as follows :

> " 3. Endorsing of warrant for apprehension of fugitive - Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be ....., if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive..... and bring him before a magistrate. "

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Section 26 is in the following terms :

> " 26. Endorsement of warrant. - An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.
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> For the purposes of this Act every warrant, summons, subpoena, and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office. "

Each warrant was endorsed by Allen, J. as follows :

> " To each and all of the constables of the parish of St. Andrew and to all other Police officers of Jamaica and to all the members of the Bermuda Police Force, these are therefore to command you in Her Majesty's name forthwith to apprehend ..... and to bring him before one of the Resident Magistrates of the said parish of St. Andrew to be further dealt with according to law. "

The names of the applicants were inserted in the endorsement of the respective warrants, the endorsements were each dated and signed by the Judge.

In King v R., (1968)12 W.I.R. 268 the Privy Council held that a search warrant was defective where it was directed "To any lawful constable ....." but the statute authorising its issue provided for the grant of the warrant "authorising any constable named in the warrant" to enter and search premises. Their Lordships said, at p. 271, that :

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> " The word "named" is to be taken literally and not to be given a wider meaning, such as "designated", "specified", or "identified", which it may often bear in an appropriate context. "

It was held that there were no considerations in that case which lead to any expanded meaning of the word "named". Learned counsel for the respondent in the case under consideration submitted that a statutory requirement that a warrant be executed by "persons named" as distinct from a specifically identified functionary, such as a constable, may be given an expansive interpretation. It was argued that the requirement that the authority be given to "any person named" is sufficiently met by referring to a class of functionaries such as "constables" as "constable" is as much the name of a person as "John Brown". This argument is plausible enough but doubt is cast on its validity when comparison is made with s. 14 of the Act in which the words "the prisoner is the person named or otherwise described" are used. Also, in s. 26 itself the words "every constable" are used in contradistinction to the words in question. The balance is in favour of the view that the word "named" in s. 26 is to be taken literally and I rest my decision on this ground on the basis that this is the right interpretation.

It was submitted by learned counsel for the applicants that the purpose for the requirement that the endorsement be in the terms set out in s. 26 is to enable the person named to call for assistance from the others; that the person named has the primary authority and the others are assistants. I do not agree. Clearly, there are three categories of persons who may be authorised and,

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in my view, they all would have equal authority. The obvious intention was to spread the net of authorised persons wide enough to ensure prompt apprehension of the fugitive.

It will be seen, from the endorsement on the warrants quoted above, that no person was named literally in the endorsements. Instead, the authority was given "to each and all the constables of the parish of Saint Andrew." This was intended to satisfy the requirement for the first category of persons. On the view I have accepted, the endorsements are to this extent defective. It is not contended that the endorsements did not comply with the requirements of the section for the other two categories, though it would have been better had the words used in the section been repeated in the endorsements - e.g. "to every constable of Jamaica" instead of "to all other police officers of Jamaica." Does the defect in the endorsements make the warrants invalid as contended ? In my judgment it does not. The only effect it could have is to make apprehension of the applicants unlawful if it turned out that they were apprehended by a person who was not authorised. An endorsement on each warrant shows that they were executed by a detective corporal. No complaint is made of any lack of authority on his part. The applicants' affidavits describe him as "one Corporal Williams from Police Headquarters, Hope Road in the parish of Saint Andrew." He, clearly, would fall within the second category of persons authorised in Allen, J's. endorsements.

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The apprehension of the applicants was, therefore, lawful and they were properly before the learned Resident Magistrate.

There was no jurisdiction to make the order for the return of the applicants unless Bermuda was a part of Her Majesty's dominions on the day that the order was made. It was contended, as the fourth ground, that no proof was tendered of the status in law of Bermuda for the purposes of the Act of 1881; that there was no evidence on this point nor did the Resident Magistrate invoke the doctrine of judicial notice, assuming this to be possible. This point was taken before the learned Resident Magistrate and his notes show that he <u>did</u> take judicial notice. In the notes of his findings this statement appears :

> " Court takes judicial notice of the seal of Bermuda on the certification and accepts that Bermuda is a Country to which the Fugitive Offenders Act 1881 applies. "

" The term 'Her Majesty's dominions' signifies the territories under the sovereignty of the Crown." (Hals. Laws of England (4th edn.) Vol. 6 para. 803).

In <u>R. v The Earle of Crewe - Ex parte Sekgome</u>, (1910) 2 K.B. 576, speaking of the meaning of "His Majesty's dominions", Kennedy, L.J. said, at p. 622 :

> " I think that in its ordinary force - the force which it must be taken to have unless the context or other circumstances necessarily involve a different interpretation - 'His Majesty's dominions' means regions over and in which His Majesty has and exercises the whole collection or bundle of separable powers (to borrow the phraseology of Sir Henry Maine)which constitute territorial sovereignty. "

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There must, therefore, be proof that on the relevant date Bermuda was under the sovereignty of the Crown.

We were invited, on behalf of the respondent and in considering whether or not the evidence was sufficient, the government of Bermuda, to do as the Resident Magistrate did and take judicial notice of the public seal of Bermuda, which was affixed by the acting Governor to an authenticating document which was signed by him and which formed part of the record in the case. It was submitted that there was material on the seal from which it could be inferred that Bermuda is a British Possession. This, it was said, together with the fact that the document was signed by the acting Governor, is indicative of the constitutional relationship between Elizabeth R. and Bermuda. It was submitted that the nature of that relationship is a notorious fact. In Halsbury's Laws of England (4th edn.) Vol. 6 para. 1033 it is stated that "the term 'Governor' usually means any officer appointed by the Crown to administer the government of a dependent territory." If an inference could properly be drawn from what appears on the seal then, taken with the fact that the authenticating document was signed by the acting Governor, there would be ample evidence of the status of Bermuda. I was, however, not satisfied that the inference could properly be drawn.

In my opinion, in interpreting the provisions of the Act of 1881, the words and the terms used in it must be given the same meaning today as they bore at the time when the Act was passed. At that time, apart from the United Kingdom itself, the term "Her Majesty's dominions" in the Act meant dependent territories of the Crown i.e. territories in the ownership of the Crown and for which the United Kingdom parliament had

the power to legislate. It is in this sense that I have used the word "sovereignty" in relation to Bermuda. Former dependent territories of the Crown, like our Country, which gained their independence but retained Her Majesty as head of state are referred to in Halsbury's Laws of England as "remaining within Her Majesty's dominions" (see 4th edn. Vol. 6 para. 817 et seq.). I do not think that those territories are within "Her Majesty's dominions" for the purposes of the Act of 1881. When the public or broad seal of Bermuda and of Jamaica are compared the only difference one sees is in the name of the Country and their insignia, which appear below the insignia of the Sovereign. One cannot, therefore, tell by looking at the seal of Bermuda whether it is an independent or a dependent territory. I, also, do not think that an inference can be drawn that it is dependent merely from the fact that it has a Governor.

The Order in Council extending the (U.K.) Fugitive Offenders Act 1967 to Bermuda, made under s. 17 of that Act, was shown to us and we were invited to infer from this that that Country is a colony or a possession of the Crown and is in the ownership of the Crown. I did not think that we could use the Order in Council as evidence merely by its being passed up to us. It was in the nature of foreign law and had to be properly proved. Nor, as we were invited to do, could we properly accept the statement in para. 1114 of Halsbury's (op. cit.) that "Bermuda is a colony." In any event, its status may have been changed since the publication of Vol. 6 of the 4th edn. in 1974

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Learned counsel for the government of Bermuda applied during the hearing for leave to adduce further evidence before us in respect of the status of Bermuda. The application was resisted on behalf of the applicants on the ground that those appearing for the government of Bermuda before the Resident Magistrate had time in that court to "put their case in order" as the point was taken there and it was now too late for them to be allowed to introduce additional evidence. It was not suggested that we did not have the power to grant the application (see R. v. Governor of Brixton Prison. Ex parte Percival, (1907) 1 K.B. 669 at 707, 708). I regarded proof of the status of Bermuda to be, in all the circumstances, a mere formality and I agreed that the application should be granted. On the grant of the application, affidavits were filed, one from the chief of protocol of the Jamaican Ministry of Foreign Affairs and the other from an officer of the British High Commission in Jamaica.

It was submitted for the applicants that the affidavits were not receivable unless duly authenticated as provided by s. 29 of the Act of 1881. There was no merit in this submission. The affidavits were admissible once they complied with the general rules for the admission of affidavit evidence in this Court and they did. Then, it was submitted that evidence contained in them was opinion evidence, that the deponents cannot be accepted as experts and that there was no statutory provision authorising the giving of expert evidence. It was submitted, further, that, in any event, the substance of the affidavits is inadequate and does not meet the

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issue for which they were tendered. It is not correct that the affidavits contained opinion evidence. The chief of protocol said that he verily believed that the Islands of Bermuda is a colony of the government of the United Kingdom. The officer of the British High Commission refers to "the colony of the islands of Bermuda", and said that in his capacity as passport officer it was within his knowledge "that the islands of Bermuda were a part of Her Majesty's dominions and now enjoy the status of a British possession in the Commonwealth"; that it is part of his functions as a member of the staff of the British High Commission to protect the people of Her Majesty's colonies and associated states and, as such, it is his duty to protect the people of the Islands of Bermuda in Jamaica; and that it is within his knowledge that the people of the colony of Bermuda still possess British passports and are in fact still British subjects. The evidence from the affidavits, when taken with what is disclosed on the seal of Bermuda, was clearly sufficient, prima facie, to establish that Bermuda is a colony of the government of the United Kingdom. In view of the colonial background of this Country, it was permissible for us to take judicial notice of the fact that, as a colony, Bermuda is a dependent territory of the Crown and, thus, a part of Her Majesty's dominions within the meaning of the Act of 1881.

Learned counsel for the applicants applied for, and was granted, leave to call evidence in rebuttal of the prima facie evidence. He subsequently filed, and

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relied on, an affidavit by a practising barrister and attorney-at-law of Bermuda. The affidavit (in paragraph 2) established, firstly, that the Fugitive Offenders (Bermuda) Order 1967 forms part of the laws of Bermuda and was in force from January 1, 1968; that the Order "was modified and adapted from the Fugitive Offenders Act 1967 of the United Kingdom"; and that the Order was "applied to Bermuda by Order in Council No. 1905 of 1967, made by Her Majesty in Council under the Fugitive Offenders Act 1967 Chapter 68 of the United Kingdom." I pause to observe that this part of the affidavit provided the strongest evidence in the case that Bermuda is a dependent territory of Her Majesty. To continue, the affidavit went on to refer to the fact that the Act of 1881 formerly applied to Bermuda but was replaced by the provisions of the Order of 1967. It referred to schedule 2 of the Order, listing the enactments which were repealed as respects Bermuda, and went on to give an opinion regarding the significance of the repeals.

Appearing in the list are the Fugitive Offenders Act 1881, the Foreign Jurisdiction Act 1890 and the Fugitive Offenders (Protected States)Act 1915. The whole of the first and last named were repealed while the extent of the repeal of the second was the entry in schedule 1 of that Act "relating to the Fugitive Offenders Act 1881." The affidavit said that "the significance of these repeals is that they show the completeness and extent to which Bermuda broke off statutory relations

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arising from the scheme of the 1881 Imperial Act" and that the repeals in respect of the Acts of 1890 and 1915 "were required to sever any connection between Bermuda and any other countries which had been brought within the ambit of the operation of the 1881 Act by virtue of Orders in Council made under and by virtue of those two said Acts."

With respect, the repeals show nothing of the sort and the repeals in respect of the Acts of 1890 and 1915 were not required for the purpose stated. Schedule 2 of the (U.K.) Act of 1967 is identical in content to schedule 2 of the (Bermuda) Order of 1967. The former schedule showed the enactments repealed "as respects the United Kingdom" (s. 21). These were merely consequential repeals resulting from the enactment of the (U.K.) Act of 1967. The Act of 1881 had to be repealed. Section 5 of the Act of 1890 invested power in Her Majesty in Council by order "to direct that all or any of the enactments described in the First Schedule to this Act ..... shall extend ..... to any foreign country in which for the time being Her Majesty has jurisdiction." The Act of 1881 is one of several Acts listed in the schedule and the whole Act was to be extended. The Act of 1915 is a short Act of two sections and, as stated in the preamble, was passed "to enable the Fugitive Offenders Act, 1881, to be extended to Protected States." Section 2 provided that the Act shall be construed as one with the Act of 1881. As the Act of 1881 was repealed, the Act of 1915 and the relevant provisions of the Act of

1890 had to go also.

The affidavit of the Bermudan lawyer went on to state that, except for transitional provisions "providing a bridge between countries retaining the 1881 Act and Bermuda, there are no provisions for the return of or machinery for the request for fugitive offenders from and to Bermuda, save as provided by the aforesaid Bermuda Order 1967." It said that the Order does not provide for a request to Jamaica for the return of Bermuda's fugitive offenders. No statutory authority is required in Bermuda for a request to be made by the government of that Country for the return of a fugitive offender (see Barton v Commonwealth of Australia (supra)). One does not look to the law of Bermuda to find authority for the return of a fugitive by Jamaica on a request by Bermuda. As I said earlier in this judgment, Jamaican law must provide that authority, and it does in the Act of 1881. The affidavit ended with the expressed opinion that, for reasons given earlier in the affidavit and the inferences to be drawn from the schedule of repeals in the Order of 1967, "Bermuda is no longer part of Her Majesty's Dominions for the purposes of the 1881 Fugitive Offenders Act, or in any way a country to which that Act has reference in any capacity." As I have indicated, paragraph 2 of the affidavit showed the contrary. The prima facie evidence in respect of the status of Bermuda was not rebutted by the evidence adduced by the applicants. Rather, that evidence confirmed the fact that Bermuda is part of Her Majesty's dominions for the purposes of the Act of 1881 as that Act exists in Jamaica.

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There was no merit in the third ground, which sought to question the validity of the authentication of the documents. Nor was there in the fifth ground, in which it was contended that written statements by the applicants were not admissible under s. 29 of the Act of 1881. The statements were exhibited to the affidavit of Detective Chief Inspector Clive Donald of Bermuda and so formed part of that affidavit. It was not contended that the affidavit was not admissible as a deposition under s. 29.

The sixth ground raised the question of the sufficiency of the evidence before the Resident Magistrate to raise a strong or probable presumption that the applicants committed the offences charged in the warrants, as required by s. 5 of the Act of 1881. The affidavits which were before the Resident Magistrate disclosed that in the first week of April, 1977 two boxes consigned to "Winter Bermuda" were imported into Bermuda in a container which was discharged at the Hamilton docks from the motor vessel "Sol Michel". The boxes were seized by the police after an attempt to have them removed from the docks by bribery of a guard had failed. When opened at Police headquarters, they were found to contain a number of plastic bags which, in turn, together contained numerous packages with "leafy plant material", as the Deputy Collector of Customs described their contents in his affidavit. A sample was taken from each package by the Government Analyst, who was an authorised analyst for the purposes of the (Bermuda) Misuse of Drugs Act, 1972, and based on a subsequent analysis by him of the samples he certified that the plastic

bags contained the controlled drug, cannabis. He certified the total weight in the bags to be 392¼ lbs. or 178.3 kilogrammes.

Subsequent police investigations resulted in the arrest of three Bermudans, including Arthur William Madeiros, who were subsequently charged jointly with the two applicants. The four informations laid, on which the warrants were issued, charged : (1) Madeiros and the applicants with conspiring together to import cannabis into the Islands of Bermuda between October 1, 1973 and August 1975; (2) the three Bermudans and the applicants with a similar offence allegedly committed on divers dates between October, 1975 and May, 1976; (3) the three Bermudans and the applicants with a similar offence allegedly committed on divers dates between November, 1976 and April 7, 1977; and (4) the three Bermudans and the applicants with being concerned together at a time unknown between April 5 and 6, 1977 in importing cannabis into the Islands of Bermuda. The four charges were laid as breaches of the Act of 1972.

The charges depended, for their proof, almost entirely on oral and written statements allegedly made to the Bermudan police by the five persons accused. All these statements were properly before the learned Resident Magistrate. In a written statement which Detective Chief Inspector Donald swore was given to him on April 16, 1977, Madeiros, a former employee on the Hamilton docks, admitted being involved with the applicant Dillon in the importation of the boxes which arrived on the 'Sol Michel'; Dillon had been to see him in Bermuda and had

the disposal of the shipments on his behalf by one "Ma Cha Chas" Mills and the money he received and disbursed; a shipment fell into the sea, while being taken from the docks, and fetched less than Dillon expected to receive "because the marijuana went rotten" so Dillon ceased dealing with Williams as the former thought the latter had "ripped him off"; early in 1976 Williams sent $10,000 to Dillon by the latter's son for "a load of marijuana" but this was not supplied. There was an affidavit by Randolph Eugene Mills of Bermuda who said that he was called "Ma Cha Chas" and that during the period 1973 to early 1976 he sold marijuana from time to time for the applicant Williams. He said that he must have sold from 10,000 to 13,000 bags of marijuana for him altogether.

Chief Inspector Donald's affidavit disclosed that he interviewed the applicant Dillon on May 9, when Dillon admitted being in Bermuda during the first week of April, 1977 and visiting Madeiros at his shop; when asked why he paid that visit he replied: "Smokie (i.e. Madeiros) must have squealed. I'll tell you. I go and tell him about shipment of 'herb' on the 'Sol Michel'. I tell him two crates marked 'Winter' in a container." It was stated in the affidavit that he later admitted that "the two Winter crates" belonged to "me, Smokie and Errol (Williams)." A signed statement by Dillon, which the Chief Inspector swore was given to him after caution, was also exhibited. In it, Dillon complemented the account given in Williams' statement of his involvement with Williams and Madeiros in importing "herb" into Bermuda; he was responsible for procuring the "herb"

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in Jamaica, which he did in the parish of Saint Ann, and arranging for shipments to Bermuda; a more detailed account was given of the shipment on the 'Sol Michel'.

In the sixth of the formal grounds upon which the applicants relied in their affidavits grounding their applications, they contended that if the questions and answers and signed statements exhibited to the affidavit of Chief Inspector Donald were excluded from consideration "then there would have been no prima facie case or strong and probable presumption of guilt raised against your applicant(s)." This part of the sixth ground depended on the result of the argument on ground five, which was held to be without merit. It was, however, contended in the alternative that the charges for conspiring before 1977 could not stand as those charges related to a conspiracy to import cannabis and "nowhere is it shown in the 'evidence' that anything conspired about before 1977 was the botanically designated plant cannabis as defined in the Misuse of Drugs Act." In my opinion, there was material before the Resident Magistrate from which this 'evidence' could properly be inferred. In the affidavit of the Attorney General it was stated that "cannabis" is defined in the Act of 1972 as "any plant or part thereof within the botanically designated genus cannabis, but does not include any fibre produced from the stalk of the plant." In the oral and written statements of Williams and Dillon, to which reference has been made, the 'thing' with which they dealt was referred to variously as "herb", "ganga" and "marijuana". In written and signed questions and

answers exhibited to Chief Inspector Donald's affidavit, as having been obtained by him from Dillon in an interview on May 10, 1977, the following question and answer appear":

> "D. By herb do you mean Cannabis Sativa, Ganga or Marijuana. It is called by different names.
>
> Dillon. Yes. "

In any event, according to the affidavit of the Chief Inspector, Dillon admitted full responsibility for procuring and shipping to Bermuda the vegetable matter which the analyst said in his certificate that he saw in the two boxes and which he found to be cannabis. Dillon allegedly referred specifically to that shipment as a shipment of "herb". So, it is clear that what he called "herb" was in fact cannabis and "herb" was the term he allegedly used in referring to the transactions before 1977 between Williams, Madeiros and himself. Further than this, in the statement which the Chief Inspector swore that he gave, in referring to the matter with which they dealt, Williams used the terms "herb", "Ganga" and "marijuana" interchangeably. The inescapable inference from all of this is that these terms are colloquial references to cannabis.

As regards charges (3) and (4), the two charges arising from the shipment on the 'Sol Michel', it was contended, firstly, that there was no, or no sufficient, evidence that there was an importation of the drug cannabis, as defined. Secondly, that the export of cannabis from Jamaica together with acts

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imprisonment "with hard labour for a term of twelve months or more or by any greater punishment"; that as the Bermudan law has abolished hard labour and replaced it with "useful work" the requirement of the Act has not been complied with. In his affidavit, the Attorney General referred to the requirement of s. 9 of the Act of 1881 and went on to quote s. 54 of the (Bermuda) Young Offenders Act 1950 and rule 47 of the Prison Rules 1951. Section 54 stated that any person who has been sentenced to a term of imprisonment shall "be received in a prison and may, subject to the provisions of this or any other Act, be detained in custody therein." Rule 47 provides as follows :

> " Every prisoner shall be required to engage in useful work for not more than ten hours on each weekday of which so far as practicable at least eight hours shall be spent in associated or other work outside the cell. "

There is a proviso which is not relevant. Section 9 of the Act of 1881 provides that Part I of the Act shall apply to every offence, by whatever name called :

> " which is for the time being punishable in the part of Her Majesty's dominions in which it was committed ..... by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour. "

Learned counsel for the applicants submitted that no authority has decided that useful work is hard labour and that there is a conceptual difference between useful work and hard labour, as defined. It is pl[illegible]

that this submission lacks merit. No authority is needed to decide that "work" and "labour" are, in this sense, synonymous; for the purposes of s. 9 this is sufficient.

On the last day of the hearing, application was made, and granted, to amend the seventh ground by the addition of a further contention, namely, that as the offences, the subject matter of the proceedings, are punishable for periods of imprisonment less than twelve months and/or by fine, then the statutory requirement (of s. 9) has not been complied with. Expert evidence was produced to establish that the offences are punishable in Bermuda as stated in the contention. The affidavit containing this evidence, as well as that of the Attorney General, also show that the offences are punishable by imprisonment for terms in excess of twelve months. It was submitted for the applicants that s. 9 of the Act of 1881 creates a minimum level of sentence above which a fugitive is liable to be returned and that the section means: punishable by a minimum of twelve months. The submission on behalf of the respondent was clearly right, that the section means "capable of attracting" a sentence of twelve months or more and is satisfied if such a sentence may be imposed. An offence is within the section if an offender is liable to be imprisoned for twelve months or more, whether or not he is also liable to a lesser punishment.

In my judgment, for the reasons I have endeavoured to give, the applicants were not entitled to succeed on any of the grounds upon which they relied to secure their release. Before parting with the case,

I should like to repeat a comment which I made in R. v Director of Prisons and anor. Exparte Morally (24.10.75, as yet unreported), that after almost sixteen years of independent status the Act of 1881 is still the statute which governs proceedings of this nature in this Country. Much of the time spent during the argument was due to the antiquity of the legislation. We were told by learned counsel for the respondent that at a meeting of Commonwealth Law Ministers held in 1966 a model scheme of legislation for the surrender of fugitives as between members of the Commonwealth was considered and adopted. Several countries, we were told, have since enacted legislation to give effect to the scheme. After twelve years, the only steps we have taken, as counsel for the respondent said, is that "we are in the process of considering enactment." I find it difficult to understand the reason for the delay. With more and more of the former dependent territories gaining independence, some becoming republics, we may soon find, if the delay continues much longer, that we shall be without power to return fugitives, who are in this Country, from other parts of the Commonwealth, except the United Kingdom.

WILLKIE, J:

I am in full accord with the opinions expressed by the learned Chief Justice and White J. that the Fugitive Offenders Act, 1881 was and is still a part of the laws of Jamaica. Enactment of the 1881 Act in the United Kingdom was at a time when Jamaica was a British Colony and thus a part of Her Majesty's dominions. The Imperial Parliament had the power to legislate for the United Kingdom and its dependent territories. An examination of the Act of 1881 shows by its objects and purpose a clear intendment by the Imperial Parliament that those parts of the Act not reserved for specific and express application, should apply directly to Her Majesty's dependencies among which Jamaica was numbered at that time. The Act of 1881 thereby became part of the laws of Jamaica. Jamaica in 1962 became an independent Dominion and by virtue of Section 4(1) The Jamaica (Constitution) Order in Council 1962 which reads:

> "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day,"

the Act of 1881 was one of those laws caught up and preserved by the above provisions of Section 4 as part of the laws of Jamaica and continued as such to the present day. The repeal of the 1881 Act by the British Parliament and the enactment of The Fugitive Offenders Act, 1967 (1967 Act) does not affect the 1881 Act as part of the existing laws of Jamaica, as the authority of the British Parliament to enact legislation binding on Jamaica ceased on the 6th August, 1962 and the 1881 Act has not been repealed by the Jamaica Parliament and so is still part of the laws of Jamaica. Assuming that the 1967 Act is applicable to Bermuda the fact that that country functions under the 1967 Act and Jamaica functions under the 1881 Act would not affect the issue. The important

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questic whether or not Jamaica has a law under which a fugitive offender, as defined by the Jamaican Law, can be extradited and which lays down the procedure for such extradition.

I am therefore satisfied that an application for extradition could be entertained in these Courts provided the requirements of the 1881 Act are complied with.

It is in the compliance with the 1881 Act that my views are contrary to that of the learned Chief Justice and White J.

Part 1 of the 1881 Act lays down the procedure to be adopted for the apprehension and return of a fugitive.

Section 2 reads:

> "Liability of fugitive to be apprehended and returned. Where a person accused of having committed an offence (to which this part of the Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.
>
> A fugitive may be so apprehended under an endorsed warrant or a provisional warrant."

Section 2 clearly is declamtory of who is a fugitive and the liability of such fugitive to be apprehended and returned. It further stipulates the authority by which the fugitive may be apprehended **i.e.** endorsed or provisional warrant.

Section 3 reads:

> "Endorsing of warrant for apprehension of fugitive - Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part; any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive was or is suspected to be: (that is to say):
>
> (1) A judge of a superior Court in such part and;
>
> (2) In the United Kingdom a Secretary of State and one of the Magistrates of

(c) the persons to whom the warrant was originally directed and also;

(d) to every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement was by this Act made a sufficient authority etc.

I am of the view that this section is mandatory and not directory. This is clear as the section makes a distinction where it deals disjunctively with the authority in "all of the persons named in the endorsement or any of the persons named in the endorsement" thereafter the section directs that along with one or other of the persons so named above, to comply with the act must also be persons (named) to whom the warrant was originally directed and also every Constable etc.

The section is explicit that a person must be named in the endorsement, and in my view the effect of non-compliance with the section is to invalidate the endorsement and hence the warrant is without effect.

The warrants were endorsed by Allen J. as follows:-

"To each and all of the constables of the parish of St. Andrew and to all other police officers of Jamaica and to all the members of the Bermuda Police Force, these are therefore to command you in Her Majesty's name forthwith to apprehend..... and to bring him before one of the Resident Magistrates of the said parish of St. Andrew to be further dealt with according to Law".

The names of the applicants were written in the endorsement of the respective warrants. The warrants were all signed by Allen J.

It will be seen that the endorsement does not authorise "any named person" as required by the Act. The endorsement is therefore defective in this regard, would this be fatal to the validity of the warrant?

In King V. R. (1968) 12 W I R, 268 the Privy Council held that a search warrant was invalidated where it was directed to any lawful constable while the terms of the section of the statute authorising the search were directed to any constable named in the warrant.

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Lord Hodson in his speech at page 271 said:-

> "The warrant is defective not only for the reason stated but because the terms of the section were not complied with since no constable was named in the warrant. This in their Lordships' opinion is sufficient to invalidate the warrant since the legislature has been at pains to authorise entry and search only by a constable named".

So in this matter under consideration, it is by the endorsement on the warrant that authority is given to apprehend. The legislature is at pains to set out in the act what must be done for there to be a sufficient endorsement; as without such a sufficient endorsement there is no legal authority to apprehend. I respectfully disagree with the view that the endorsement under the Act merely stipulate different categories of persons authorised to apprehend and so will comply with the section even if one or more categories are omitted from the endorsement. In my view, the endorsement, to comply with the Act must set out all the requirements stipulated and it is not in the discretion of the endorsing authority to create a particular category and give that category authority to apprehend.

The view has been expressed that the language of the section may be interpreted disjunctively. I do not agree. The endorsement is authority to deprive the subject of his liberty; a fundamental right protected under the Constitution. The right may be abridged only by due process of law. For this right to be abridged by any law such law should expressly so stipulate and must be strictly construed. It is my view therefore that however the matter is viewed the endorsement in the warrant which is the font of the authority to apprehend the applicant and thereby deprive him of his liberty was bad and has no force as it does not comply with the 1881 Act. Non-compliance robs it of any validity. The applicant is as a consequence illegally in custody. I am of the view that the Writ should run and the applicant be discharged from custody.

There is yet another point that my learned brothers views and mine diverge and it is in relation to the Juridical Status of

Bermuda.

As I understand the substance of Mr. Edwards' and Mr. Robinson's submission is that judicial notice should be taken of the status of Bermuda for the purpose of ascertaining whether Bermuda was part of Her Majesty's dominions for the purpose of the 1881 Act at the time the proceedings were before the magistrate. Mr. Ramsay submitted that such a contention does not admit of judicial notice and strict proof was necessary in this particular case. My brothers are of the view that judicial notice can be taken of the juridical status of a country but there was not enough material before the Magistrate in this case to permit this. Indeed the Magistrate stated that he did take judicial notice of the juridical status of Bermuda. I hold the contrary view that such a situation does not admit of judicial notice and strict proof is required. Mr. Edwards applied for leave to put in additional affidavits in an attempt to resolve the issue. It was agreed by all that this Court, if it is so minded, has a discretion to grant leave to allow additional evidence for its consideration on this point, and my brothers so held and granted leave for this purpose. I take the contrary view and hold that leave should be refused. It is fundamental to the jurisdiction of the magistrate that the juridical status of Bermuda should be a settled issue before him when he presided over those proceedings, if not so, then he would have had no jurisdiction to entertain the proceedings before him. The point was taken at the very inception of the proceedings before the Resident Magistrate and the requisitioning state did nothing to put their house in order. The application before this Court reveal the same insistance on the part of the requisitioning state yet nothing was done by them; and it is only at this very late hour leave is prayed to put their house in order. It follows, therefore, that when the Resident Magistrate made his order he had no sufficient evidence before him of the juridical status of Bermuda. The commital of the applicant was therefore without

jurisdiction and cannot stand. I hold that for this reason the writ should run and the applicant discharged.

Because of these contrary views to that of my brethren I give no opinion as to the adequacy or not of the additional affidavits filed and their effect, if any; neither do I give any opinion as to the necessity or not for authentication of these affidavits by the requisitioning state.

White, J. :

I have had an opportunity of reading the written judgment of my Lord, the Chief Justice, in which he gives his reasons for deciding that the applications in this matter should be refused. I am in complete agreement with the views expressed therein and I have nothing to add.

In my view, it is inappropriate to refer to the Act of 1881 as embodying a scheme with reciprocal rights and obligations available only to participants under the Act. The essentials of reciprocity are absent from its provisions. This was an Act which was imposed upon dependent territories by an Imperial parliament, albeit it was for their benefit inter se as well as for the benefit of the sovereign United Kingdom in the field of the administration of criminal justice. Compare the provisions of the Extradition Act, 1870, where the Act was not applied to a foreign State in the absence of an extradition treaty with that State which, no doubt, ensured reciprocity.

In Jamaica, as in other common law countries, there is no power to surrender a fugitive offender apart from statute (see Barton v Commonwealth of Australia (1974) 131 C.L.R. 477 at 484, 485). Where there is statutory authority, the power to surrender is not affected by the existence, or not, of reciprocal legislation in respect of fugitive offenders in the State from which the request for surrender comes, unless that is a requirement of the statute authorising the surrender. There is no such requirement in the Act of 1881. This second contention in respect of jurisdiction, therefore, fails. There was a subsidiary alternative submission under the heading of jurisdiction. This was that there was no proof as a fact of what the law of Bermuda is in regard to fugitive offenders.

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arranged to ship two packages of marijuana from Jamaica to Bermuda consigned to "Winter Bermuda"; after long distance telephone conversations with Dillon, the latter arrived in Madeiros' shop in Bermuda on April 4, 1977, and told Madeiros that the boxes were in a container, giving the number, on the 'Sol Michel'; Madeiros was to be paid $75,000 by Dillon for arranging to have the boxes removed from the docks. On the following day, April 17, in answer to questions by the Chief Inspector, Madeiros allegedly confessed to being involved with the applicant Williams, then a resident of Bermuda, on two occasions, in 1973 and either 1974 or 1975, in importing into Bermuda marijuana which arrived by boat from Jamaica; he received some $49,000 in all for getting the shipments off the docks.

The affidavit of Detective Chief Inspector Donald disclosed that he came to Jamaica on May 7, 1977. In the course of his investigations he interviewed the two applicants. He swore that on May 8 he interviewed the applicant Williams, who told him that he had nothing to do with the 'marijuana' which was shipped on board the 'Sol Michel' but admitted that while he (Williams) was a resident of Bermuda he met the applicant Dillon and was concerned with Dillon and Madeiros over a period in importing into Bermuda "ganga" shipped to him by Dillon from Jamaica. The Chief Inspector exhibited a written, signed statement to his affidavit which he swore Williams gave to him after caution. The statement gave a detailed account of Williams' involvement with Dillon and Madeiros during 1973, 1974 and 1975 in importing 'marijuana' shipped from Jamaica into Bermuda,

preparatory for its reception by others in another country, do not constitute a conspiracy to import, or the crime of importing, within that country either at common law or by Bermudan law. At the highest, it was said, any offence allegedly committed by the applicants amounted to exportation from Jamaica of "something". In my opinion, there was no substance in either of these contentions. The first questioned the sufficiency of the analyst's certificate. It was submitted that the analyst did not go far enough in his certificate in that he did not exclude "fibres". It was said that his business was to say what the definition of cannabis in the Act required; that the definition must be fully satisfied in the proof offered. The "fibre" referred to in the definition is, as stated, fibre produced from the stalk of the plant. What one deponent called "leafy plant material" and the analyst called "vegetable material" in his certificate could hardly be confused with the fibre referred to in the definition. As regards the second contention, in the Attorney General's affidavit, it was stated that "importation" is defined in the Act of 1972 as meaning "to bring or to cause to be brought into Bermuda by land, air or water". If the several statements to which I have referred are admitted at a trial of the applicants, there would be the strongest possible evidence that they had committed the two offences charged in respect of the 'Sol Michel' shipment.

The seventh, and last, ground was stated in each of the applicants' affidavits thus: that under s. 9 of the Act of 1881, the Act only applies to offences which are punishable in the requisitioning country by

the metropolitan police Court in Bow Street; and

(3) In a British Possession, the Governor of that possession if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate."

It will be seen that the authority to apprehend the fugitive where found resides in the "endorsement of the warrant in manner provided by the Act" by one of the designated persons as provided by the Act.

Section 26 deals with the Endorsement of the warrant and reads:

"Endorsement of Warrant - An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the Magistrate named in the endorsement or some other.

For the purposes of this Act every warrant, summons, subpoena and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office."

To comply with the Act the following is required in this endorsement:

-(1) The endorsement must be signed by the authority endorsing it.

(2) The endorsement must authorise -

(a) all of the persons named in the endorsement or;

(b) any of the persons named in the endorsement and;

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