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In the Supreme Court of Judicature of Jamaica

Suit No. M. 16 of 1976

Before : The Full Court

Parnell, Melville & Carey, JJ.

Regina v. Commissioner of Correctional Services

Ex parte Fitz Henry

(Application for writ of habeas corpus)

July 5, 6 & 7, 1976

Muirhead, Q.C. and with him Enos Grant and Winston Spaulding for the applicant.

Patrick Robinson for respondent .

Glen Andrade, Deputy Director of Public Prosecutions watching for the Director of Public Prosecutions.

OCT. 1, 1976

Parnell, J. :

On the 7th July, the application for a writ of habeas corpus was unanimously refused. We promised to put our reasons in writing. This we now do.

The applicant was committed in custody on May 5, 1976, by the Resident Magistrate, Saint Andrew, to await his return to the United States to answer a federal charge relating to "the purchase and sale of counterfeit obligations of the United States." The history of the case may be briefly put as follows:

Outline of case

On the 9th September, 1971, a Grand Jury in the District of New Jersey, filed an indictment charging the applicant with a violation of a statute, to wit, section 473 of Title 18 of the United States Code, in that "on or about July 22, 1971, at Paterson, New Jersey, he did knowingly and wilfully sell, transfer and deliver counterfeit obligations of the United States, to wit, 80 counterfeited ten dollar Federal Reserve Notes, with the intent that the same be passed, published, and used as true and genuine."

On March 30, 1972, the applicant entered a plea of guilty to the indictment. He had previously entered a plea of not guilty. Bail was offered to the applicant to appear for sentence. Notice having been

sent to the applicant directing him to appear, he failed to answer. And on August 11, 1972, a bench warrant was issued for his arrest.

The applicant is a Jamaican. He escaped to Jamaica and thereafter extradition proceedings were instituted in the United States for his return. And on August 27, 1975, a formal request for his extradition was received by the then Ministry of External Affairs. On the 15th October, 1975, the formal request was approved by the Minister of National Security and Justice.

After a hearing lasting for five days before His Honour, Mr. B. L. Myrie, Resident Magistrate, Saint Andrew, during which he listened to lengthy legal arguments, on behalf of the interested parties, he committed the applicant to await his return to the United States. The findings of the learned Resident Magistrate, are outlined as follows:

> " The Court is satisfied -
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> (a) that there is in existence a Treaty between the United States of America and Jamaica;
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> (b) that the crime is an extraditable one;
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> (c) as to the identity of Fitz Henry, as the person who was convicted by a Court of competent jurisdiction in the United States of America, of the crime;
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> (d) that the evidence before it is sufficient to justify committal of the said Fitz Henry to await his return to the United States of America. "

It was proposed to launch an attack against the order of the Resident Magistrate on several grounds. When the matter came before us, however, Mr. Grant who carried the burden of maintaining the arguments in the absence of his leader, abandoned several of the grounds and rested the applicant's complaint on two main points which were argued together. I have tried to simplify the points. They may be shortly put as follows:

(1) There is no valid or binding treaty arrangement between Jamaica and the United States with regard to extradition.

(2) That if consequent on the independence of Jamaica, a new treaty arrangement concerning extradition was concluded between Jamaica and the United States, no statute, law or other legislative reference since independence can be found which makes the concluded treaty effective in law.

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Before I deal with the main arguments of Mr. Grant, which I shall outline hereafter, it would be better if the evidence before the Resident Magistrate touching the two points were to be outlined.

Evidence before the Court

The Resident Magistrate heard the evidence of Mr. Louis Boothe, the Director of Protocol in the then Ministry of External Affairs now named Ministry of Foreign Affairs. Mr. Boothe was speaking for the Executive Arm of the Government of Jamaica and must be deemed to be airing the views of the appropriate Minister for Foreign Affairs. He told the learned Resident Magistrate:

> " There is a treaty between the United States of America and the United Kingdom relating to Extradition. That treaty is still in force. The treaty is applicable to Jamaica. "

Mr. Boothe referred to the Jamaica Gazette of August 15, 1935. The Order in Council making applicable to Jamaica, an Extradition Treaty between the United Kingdom and the United States was published for general information. He also referred to the Order in Council dated June 11, 1942, which directed that the Extradition Law of the Jamaica Legislature "shall have effect in the Colony of Jamaica as if it were part of the Extradition Act, 1870

The Jamaica Gazette of April 25, 1963, shows that on August 7, 1962, (the day after independence) there was an Exchange of Letters between the Prime Minister of Jamaica (who was also Minister of External Affairs and Defence) and the British High Commissioner in Jamaica in which it was declared that as from August 6, 1962, Jamaica agreed to the following:

(a) to assume all obligations and responsibilities of the Government of the United Kingdom which arose from any valid international instrument by virtue of authority entrusted in the United Kingdom Government and made applicable to Jamaica;

(b) to enjoy all rights and benefits heretofore enjoyed by the United Kingdom Government in virtue of the application of any such international instrument to Jamaica.

An independent Jamaica assumed all responsibilities and enjoyed the rights under all international agreements (including treaties) which the United

Kingdom Government had made with a foreign Government and subsequently made applicable to the former Colony of Jamaica.

The Court can take judicial notice of the fact that before and after independence extradition orders have been made by the Jamaican Courts pursuant to the Extradition Treaty. It has been argued, however, that there is no valid and binding extradition treaty arrangement between Jamaica and the United States. In the alternative, Mr. Grant argued with force, persistency and with apparent seriousness that if Jamaica did indicate that it wished to conclude a treaty arrangement with the United States by the Exchange of Letters on August 7, 1962, the intention would only have legal effect, if the new treaty is given legislative sanction in the form of ratification.

Legal arguments advanced by Mr. Grant

For nearly two days, the Court listened to an interesting argument marked more with academic fragrance than with reality. If I did not hear it, I would have been prepared to say that some, if not most of the points debated were not capable of being propounded at all. I hope that I shall not be doing any violence to the submissions of Mr. Grant, if I am allowed to summarise them as follows:

(a) The requesting State (U.S.A.) has failed to adduce any evidence of the existence of an extradition treaty between itself and Jamaica. No Order in Council, pursuant to sec. 2 of the Extradition Act of 1870 and Article 18 of the alleged treaty has been produced or proved and this is essential in order to bring the treaty into existence. The "tackle" of the requesting State was not put in order.

(b) On the basis of the evidence before him, the learned Resident Magistrate erred in law in concluding that a treaty existed between independent Jamaica and the United States.

(c) The 1935 Order in Council, even if preserved by sec. 4 of the Second Schedule of the Constitution of Jamaica, has no effect since the date of independence, i.e. as from mid-night of August 5, 1962. The treaty which the Order in

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Council brought into force, ceased to have any effect as far as it previously applied to Jamaica, at the very moment that independence became a reality.

(d) Even if the formal exchange of notes on August 7, 1962, between the Governments of Jamaica and the United Kingdom may be regarded in international law as an intention on the part of Jamaica to continue the terms of the extradition treaty between the United Kingdom and the United States that was as far as it went. No initial rights and obligations were conferred and assumed as between Jamaica and the United States.

(e) There is no evidence of any conduct, since independence, as between Jamaica and the United States from which it may be concluded, that there is in existence an extradition Treaty between them. And the case of Clarence Duke McGann (decided by the Full Court in September 1971) which proceeded on the premise that there is an extradition treaty between Jamaica and the United States was wrongly decided on account of its assumed and false premise.

In the course of his submissions, Mr. Grant referred the Court to certain commentaries and passages in the work of the International Law Commission, This body was set up in 1947 pursuant to a resolution of the General Assembly of the United Nations. The Commission is made up of persons "of recognised competence in International Law." See p. 141 of Manual of Public International Law by Sorensen. A copy of the relevant work and commentaries was supplied to the Court. Reference was made to Article 15 which deals with the position of a newly independent State with regard to the treaties of the predecessor State. In this context, Jamaica after August 5, 1962, would be regarded as the "newly independent State" and the United Kingdom, the "predecessor State." The article states as follows:

> " A newly independent State is not bound to maintain in force, or to become a party to any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates. "

Mr. Grant adopted this article as sound but proceeded to deal with a "theory" which forms part of the general commentary on the article aforementioned. The theory is put thus:

> " The majority of writers take the view, supported by state practice, that a newly independent state begins its life with a clean slate, except in regard to "local" or "real" obligations, The clean slate is generally recognised to be the traditional view on the matter. "

The commentary continues:

> " The metaphor of the 'clean slate' is a convenient way of expressing the basic concept that a newly independent State begins its international life free from any obligation to continue in force treaties previously applicable with respect to its territory simply by reason of that fact. "

It is this "clean slate theory" which inspired Mr. Grant to argue in effect that as from the very moment of independence, the Extradition Treaty between the United Kingdom and the United States and which was applicable to Jamaica, went overboard and was unceremoniously dumped into Kingston Harbour. And according to his argument all other treaties and conventions made applicable to Jamaica before independence some of which brought economic benefits to the Island would be similarly treated. By some strange ritual - which is difficult to understand - an international agreement is put to sleep by the ushering in of independence.

What I understand the "clean slate theory" to mean is this. A State which is independent, possesses unlimited power to conclude treaties. And a newly independent State is not bound to maintain in force any treaty which its predecessor State may have made applicable to it nor is the newly independent State [redacted] bound to become a party to any former treaty made by its predecessor. But if the newly independent State should take the view that it would be in its interest to continue the treaty made by its predecessor then there cannot be anything in the " clean slate principle" to disentitle the newly independent State from becoming a party to it. If this were not so then independence would carry in its train the Utopian luxury which that concept entertains together with unwanted and uninvited chaos, undertainty and economic debility. Air traffic, telecommunications, movement of goods and services within certain limits and areas, fishing rights, postal services and control of dangerous drugs, are among others, certain subjects which a treaty or convention may have been entered into

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between a given State and a predecessor State. The newly independent State would find it almost impossible to start its existence if the "clean slate principle" as adumbrated by Mr. Grant was to be accepted.

It was in order to avoid any uncertainty or chaos and for the purpose of entering into independence smoothly and effectively that the Founding Fathers of the Constitution wisely followed the practice which other Constitutions established before 1962 adopted. Section 4(1) of the Second Schedule to the Constitution provides, in so far as it is material:

> " 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 English Extradition Acts 1870-1932, and the Order in Council of 1935 and 1942 are "laws" within the meaning of the Constitution. The Extradition Treaty, therefore, which was in force on August 5, 1962, was saved from extinction - if there is anything mysterious in the "clean slate principle" - by the Constitution itself which is the Supreme Law. And how this saving device works in principle, may be illustrated by the case of Government of India and Ahmed, [1952] 1 A.E.R. 1060.

In the case abovementioned, the applicant moved for a writ of habeas corpus. He was a native of Pakistan who was being tried in India for forgery and fraud. He jumped his bail and fled to Pakistan. From his native State, he escaped to England where he was arrested on a provisional warrant issued by a Metropolitan Magistrate. The Government of India applied for the warrant. In due course, the applicant was remanded in custody to await his return to India. In support of the motion for habeas corpus, it was argued that the Fugitive Offenders Act of 1881 no longer applied as between the United Kingdom and India, and therefore if a fugitive offender was found in the United Kingdom, he could not be handed over to India. The argument was based on the following:

(a) In 1949, Dominion Status was conferred on India;

(b) On January 26, 1950, India became an independent republic within the Commonwealth and the 1947 Constitution no longer applied on and after the date of independence.

The India (Consequential Provisions) Act of 1949, had a provision preserving "all laws in force" immediately before India became independent.

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It was held by the Q.B.D. (Goddard, C.J. and Parker, J.) that the saving section preserved in force all laws of the United Kingdom relating to India which were in force at the date of the republic coming into force. The 1881 Act, therefore, applied with full force and effect.

I am unable to see any distinction in principle between the case before us and that before the English Queen's BENCH Division. In both cases, the laws in force immediately before independence are preserved after independence. As I have already pointed out, the Order in Council applying the treaty to Jamaica has as much force of law as the 1881 Fugitive Offenders Act had in the case of Ahmed.

Mr. Grant maintains that sec. 2 of the Extradition Act of 1870 has not been complied with. In order to follow his argument, I shall set out, so far as it is material, what sec. 2 says:

> " Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this act shall apply in the case of such foreign State .... Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the London Gazette. "

As I understand Mr. Grant, in this part of his submissions, he has contended that:

(a) the "arrangement" in sec. 2 means an arrangement between Jamaica and the United States;

(b) there must be a ratification of the arrangement;

(c) in any event, the Order in Council must be made to bring the arrangement into force.

Some authorities were cited to show that the Order in Council must have been made, in any given treaty, made pursuant to the Extradition Act with the foreign State. In the case of Governor of Brixton Prison, Ex parte Sevini [1914] 1 K.B. 77, an Order in Council applying the Extradition Act to Italy was made and gazetted but it was not formally proved before the committing magistrate. This did not affect the validity of the extradition order.

I found that the argument of Mr. Grant, interesting as it sounded, untenable. He found himself in great difficulty from which he did not escape when the Bench tested the strength of his base, as he went along on

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this aspect of the case. For example, what is "an Order in Council" in so far as independent Jamaica is concerned? Who makes it and by what authority? Where is "ratification" of the arrangement to take place - in Washington, London or Paris where Jamaica and the United States have diplomatic representatives or where else? The simple answer to all this seems to be that what Jamaica and the United States have done by their conduct express or implied since the exchange of notes on August 7, 1962 - and the United States must be deemed to have been aware of the move between Jamaica and the United Kingdom - is to adopt a treaty already in force and which had already satisfied the terms of sec. 2 of the 1870 Act. There was no need to ratify what already had been ratified and for the President of the United States in 1962, to seek a two thirds majority in the Senate as is required under sec. 2(2) of Article II of the American Constitution after Jamaica by virtue of its sovereign power had made a fresh and new treaty for consideration or had indicated in a solemn document an intention to enter into a treaty in terms of the old. With respect, the underlying fallacy in the argument lies in this wise; and Mr. Robinson, in his effective reply to this aspect of the case - and to which only, he was confined by the Court - showed the weakness in it. A bilateral treaty which is proved to have been in existence at the date of independence in respect of the territory which has emerged as independent, is deemed to be in force between the newly independent State and the other State party when they expressly agree or by reason of their conduct, are considered as having so agreed. There need not to be any other ceremony other than an act showing an express agreement or some other act, i.e. exchange of notes followed by conduct which points to an intention to carry out the terms of the treaty. Mr. Robinson was adopting Article 23(1) of the International Law Commission which attracted Mr. Grant.

Mr. Robinson pointed out further in his very able argument that since independence, there have been three known cases where the extradition treaty between Jamaica and the United States, has been acted upon. In each case, there was a request by the United States Government pursuant to the Extradition Act and a response by the appropriate Minister in Jamaica in his issuing his order to the Resident Magistrate to proceed in conformity with the treaty.

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And we were informed that Jamaica has been listed in the Year Book of International Law 1970, as one of the Countries in which the United Kingdom - United States Extradition Treaty of 1931, remains in force.

Mr. Muirhead repeated the "clean slate theory" as propounded by Mr. Grant and adverted to Article 23(1) of the International Law Commission to which I have already referred.

The article states as follows:

> " A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:
>
> (a) they expressly so agree; or
> (b) by reason of their conduct they are to be considered as having so agreed. "

Asking the rhetorical question, "What is the conduct relied on?" Mr. Muirhead was not prepared to concede that a response by the Minister of National Security and Justice to the request of the United States was "conduct" within the meaning of Article 23. According to him, dealing with treaties is the province of the Minister of Foreign Affairs. Probably if the latter had responded to the request instead of the former, in the case before us, there would have been evidence of the necessary conduct sufficient to put the treaty in force. When an argument like this is supported with such thin edges and hair-breadth distinctions, it must be an indication that it is not firmly grounded.

At the end of the submissions of Mr. Grant, we called on Mr. Robinson to deal with one point only, that is the question of a fresh ratification. And when all the arguments were completed we dismissed the application. I shall now summarise why I agree with the Court's decision.

(1) The making of a treaty in Jamaica, since independence, is the preserve of the Executive Government acting through its appropriate Minister. With regard to the Extradition Treaty between the United Kingdom and the United States which was in force immediately before independence, it was kept alive by the Constitution after independence.

(2) On the day after independence, the appropriate Minister expressly agreed with the predecessor State that the treaty with the

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would
United States continue intact and relying on that declaration of intent, both Jamaica and the United States have behaved as if the treaty is in force.

(3) It is the duty of the contracting parties to an international agreement to carry out its terms according to its tenor. It is not the duty of the Court to interfere with a mutually agreed treaty between Jamaica and a foreign State unless there is some compelling reason which is in unison either with international law or some municipal law.

(4) This Court heard the case of Clarence McGann in 1971 on the basis that there is an existing extradition treaty between Jamaica and the United States. Nothing has been shown to indicate that the basis was wrongly assumed.

(5) The "clean slate" metaphor only relates to a basic concept. A concept does not rule the Court and in the final analysis it must give way to reality, common sense and international utility.

Melville, J. :

The substantial point raised in this matter is that there is no valid Extradition Treaty in force between this Country and the United States of America.

Having once again heard the same arguments that were advanced in Regina v. the Director of Public Prosecutions ex parte Schwartz (Supreme Court No. M. 11/76) I remain unmoved that there is any merit in this point. Accordingly, I agreed that this application be dismissed.

Carey, J. :

This was a motion for a writ of habeas corpus to bring up and discharge the applicant, who was then the subject of an order under the Extradition Acts 1870-1932, made by His Honour, Mr. B.L. Myrie, one of the resident magistrates sitting at Half Way Tree, returning him to the United States of America for sentence on a charge of selling counterfeit U.S.A. currency notes. The applicant challenged his detention on the ground that:

> " there are no valid, legal and/or binding current treaty arrangements or provisions between the United States of America and Jamaica and with regard to extradition.
>
> Alternatively, that if consequent on independence of Jamaica new and binding treaty arrangements or provisions with regard to extradition were concluded between Jamaica and the United States of America then such international treaty arrangements would be impotent to effect the domestic law of Jamaica as administered in our local courts and more particularly the rights of Jamaican citizen in Jamaica without subsequent legislation enacted in the Parliament of Jamaica specifically affecting the said rights. That there exists in Jamaica no statute, law, act or legislative reference since Jamaica became independent in 1962 to make applicable any effective or assumed subsequent extradition arrangements between Jamaica and the United States of America. "

But for the interesting and ingenious arguments deployed by Mr. Enos Grant, who appeared on behalf of the applicant, I would have thought that not much was to be said in support of this ground. At the end of the day, although I have not altered my view, I am impelled to commend counsel for his valiant efforts.

Extradition is a matter for domestic or municipal law. That is the law which this court is called upon to apply, and by which it is bound. It is true that while statute will define the grounds of, and the procedure for the surrender of a fugitive, there must be some treaty between the countries involved, creating reciprocal duties for the surrender of a fugitive. But, to be enforced by the courts, that treaty must be incorporated into municipal law, so that the court can conform with the terms of the treaty, and the citizen or fugitive made aware of his rights. Parlemente Belge (1878-79) 4 P.D. 129; A.G. for Canada v. A.G. for Ontario (1937) A.C. 326. When, therefore, the court is dealing with extradition, it is not, in my judgment concerned with international law.

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This country has entered into a host of treaties with other countries, dealing, inter alia, with Double Taxation, Visa Abolition, Banning of Nuclear weapons test, but relatively few of those have been incorporated into municipal law. I am prepared to accept that those treaties which have not been thus incorporated into some Act of Parliament, may be governed by international law principles. Such esoteric formulations as the "clean slate theory," would doubtless be very pertinent and appropriate considerations when treaties of that kind are called in question in a court of law. I confine myself therefore for the moment to the question raised in the ground set out above, viz, whether there are in existence any binding treaty arrangements between our two countries.

Before I consider this question, however, there were some matters canvassed by Mr. Grant in the course of his argument with which I would like to deal, at this juncture. It was said that the Extradition Acts 1870-1932 did not apply to Jamaica prior to 1942, and further that the United States of America (Extradition) Order in Council 1935, in so far as it brought the Extradition Treaty between the United Kingdom and the United States of America signed on 22nd December, 1931, into being, spent itself on the attainment of independence.

The Extradition Acts were imperial statutes and by their very terms applied to all the colonies of Great Britain, numbered among which was our country. In 1942, when the Jamaican Legislature enacted Act 17 of that year, called the Extradition Law, its express purpose was to confer on a Resident Magistrate, the like powers exerciseable in the United Kingdom by police magistrates, now stipendiaries. The process for extradition before the passing of this enactment in 1942, would appear to have been administrative. Thereafter, the judicial process was interposed after arrest. As to the second matter, no cogent reason was advanced for that bold assertion nor was any authority vouchsafed. An Order in Council, like any other piece of legislation does not spend itself unless some provision in the enactment itself so provides. The 1935 Order in Council which embodied the Treaty between the United Kingdom and the United States of America did not so provide nor has it been repealed. Mr. Grant was not able nor did he seek to show any provision which did so. It must be supposed that taking his stand on an international law principle, that as

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newly independent countries are not bound by international treaties which they inherit from the parent country, then it followed, so runs the argument, that the Order in Council which breathed life into the treaty, in other words, brought the treaty within the ambit of municipal law, expired upon independence as would the treaty. As I previously intimated and will return to, hereafter, legislation, in order to cease to have effect must be repealed by some other legislation or by provisions within itself, providing for its demise.

I can now consider what are the subsisting legal binding current treaty arrangements between the United States of America and Jamaica. It was not disputed that in Extradition proceedings there must be:

(a) an Act i.e. an Extradition Act;
(b) a Treaty
(c) an Order in Council incorporating that Treaty into the municipal law.

Prior to independence, the Acts which governed extradition in this country, were the Extradition Acts 1870-1932, Acts of the imperial parliament, legislating in virtue of its sovereignty over this country. The treaty between the United Kingdom and the United States of America was entered into by the United Kingdom and affected this country by virtue of Great Britain's suzerainty. The Order in Council was an order of His Majesty in Council applying the treaty to this country, among others. It provided:

> " (1) From and after the 24th day of June, 1935, the Extradition Acts, 1870-1932, shall apply in respect of the United Kingdom of Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and all British Colonies in the case of the United States of America under and in accordance with the said Treaty of the 22nd December, 1931. "

Up to 1942, there was not as I have already indicated, the intervention of a magistrate who sat to determine whether there was sufficient evidence to commit the fugitive. So the Extradition Law of 1942, was promulgated. In 1962, when this country achieved independence, sec. 4 of the Second Schedule of the Constitution preserved all laws in force before ~~then~~ then. "Law" is defined as including, so far as is material, "any instrument having the force of law." Unless repealed by the Constitutional Instrument, all Orders in Council which clearly are instruments having the force of law, were saved. It may be noted that this Order in Council of 1935 was not among those repealed in the First Schedule to the Constitution. So that by

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the Constitution, not only were the Extradition Acts preserved but so was the Order in Council which incorporated the treaty.

Mr. Grant said that even if the Constitution preserved the Order in Council, it did not preserve the treaty because, "it is established law that treaty between the United Kingdom and the United States of America ceased to have effect upon Jamaica's attainment of independence." The Order in Council which incorporated the treaty, has not been repealed. Until that has been effected, the Order in Council in its entirety necessarily remains in full force and effect. Without the treaty, the Order in Council, would cease to have any raison d'etre. Since the Order in Council is preserved, so then, is the treaty. It is true the treaty has international consequences, but, it remains nonetheless a part of the municipal law, effective unless repealed. It is that law which the courts must apply and not international law save where international law has been accepted as part of the municipal law, If authority is needed for this proposition, I am comforted by the words of Cockburn, C.J. in the Queen v. Keyn (1876) 2 Ex. D. 63 at p. 202:

> " For writers of international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage, - an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. "

So also Lord Alverstone, C.J. in West Rand Central Gold Mining Company v. Rex [1905] 2 K.B. 391 and see the formulation in para. 566 Halsbury (3rd Edit.) 264:

> " The Rules of International Law are not part of the law of (England) except in so far as they have been received into (English) Law by legislation, judicial decision or established usage. "

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which (mutatis mutandis) I respectfully adopt.

In the event, the learned Resident Magistrate had before him the Extradition Acts, the Treaty between the United States of America and the United Kingdom, the Order in Council incorporating that Treaty into the municipal law, the Act of 1942, which conferred jurisdiction on him, and he would, of course, take judicial notice of sec. 4 of the Second Schedule of the Constitution. All the material that he ought to have had before him, was there. No challenge was made as regards the sufficiency of the evidence in other respects before the learned Resident Magistrate, He made an order remanding the applicant into custody for eventual return to the United States of America for sentence. That order was eminently right. I would not disturb it.

Even if contrary to the view, I have expressed, international law principles were properly applicable to these circumstances, in my opinion, the result of this application would remain the same. It was accepted that upon independence all treaties affecting this country ceased to have effect unless the parties concerned signified their agreement whether expressly or by conduct to continue the treaty. Both Mr. Grant for the applicant and Mr. Robinson who represented the Commissioner of Correctional Services, relied on Article 23 of the International Law Commission Draft. It provides as follows:

> " Article 23
> Conditions under which a treaty is considered as being in force in the case of a succession of States
>
> 1. A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which the succession of States relates, is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:
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> (a) they expressly so agree; or
> (b) by reason of their conduct they are to be considered as having so agreed.
>
> 2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established. "

While Mr. Grant maintained that there was no conduct by the respective parties, i.e. Jamaica and the United States of America from which the learned Resident Magistrate or this Court could conclude that a treaty was in existence between the two countries; Mr. Robinson submitted and as I

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think rightly, that such evidence did exist. He regarded the requisition made by the United States Government in the case of McGann and the reaction of the Jamaican Government in that case as also the like conduct in the Schwartz case and the present case as evidencing the respective country's agreement to be bound by the treaty. It was, he argued, the executive action that should be looked at, and not these cases as judicial decisions which amounted to conduct from which the inference could fairly and reasonably be drawn that the parties considered themselves bound. That contention is, in my view, unanswerable.

It is clear that where the Article refers to "couduct," it can only fairly be understood in that context as meaning some Government action that is, some act by the Executive arm of Government from which agreement can be deduced; in the circumstances of this case, the action by the appropriate minister in issuing his order to the Resident Magistrate to proceed. There was also the "devolution agreement", the exchange of letters between the United Kingdom and the Jamaican Governments, which although incapable per se of conferring rights and obligations between both countries, was yet some evidence of conduct demonstrating Jamaica's intention to be bound by the treaty and could properly form part of the evidence of conduct to which the Court could attach weight. There really was no merit in the argument advanced by Mr. Grant that if the same point had been taken in the McGann case, there could be no evidence of "conduct", once it is appreciated that executive action is the conduct contemplated by the Draft Article.

There were other pieces of evidence to which our attention was directed, e.g. the listing of Jamaica by the United States of America among those countries which held themselves out as bound by treaty obligations with the United States of America in respect of Extradition. But I do not think it is necessary to animadvert upon these or rely on them, in as much as the evidence before the Resident Magistrate was a requisition by the United States of America and this country's action in responding to that requisition in a manner which was explicable only on the basis that there was subsisting a treaty between our two countries.

It is for these reasons as well as those clearly set out in the Judgment of Parnell, J. that I agreed that the application must fail and should accordingly be refused.