III. PRACTICE OF THE INDIVIDUAL STATES AND TERRITORIES OF THE COMMONWEALTH

It is only occasionally that matters of international concern are raised at State level, and the amount of material available is therefore limited.

A. Territory

Self-Determination and the Status of Papua and of New Guinea*

On 8 March 1967 the member for South Markham, in the Territory's House of Assembly, Mr. Gilmore, asked if it was intended to retain the status of Papua as a "Possession of the Crown" in the light of recent Ministerial statements on self-determination.[1] The reply of Assistant Administrator Johnson was to read the Minister for Territories' statement to the House of Representatives on 21 April 1966, without comment. This statement was to the effect that the constitutional distinctions between the Trust Territory of New Guinea and the Territory of Papua were of little practical importance and that it was not intended to vary the Trusteeship Agreement governing Australian jurisdiction in the Trust Territory, prior to its eventual discharge. Nor was there any intention of changing the status of either Territory except in accordance with the wishes of the people of the respective Territories.

Later in the year, the Select Committee of the House of Assembly on Constitutional Development tabled its report, which re-affirmed the principle of self-determination in its application to the peoples of both Territories.[2]

At the same time the Administration was not prepared to affirm the principle of self-determination in its application to particular regions of the Trust Territory. On 9 March 1967 the member for the Bougainville Open Electorate Mr. Paul Lapun asked Assistant Administrator Henderson, *inter alia,*

> "Should the Bougainville people decide to join the British Solomon Islands, what would be their obligations to the Australian Government?"[3]

The Honourable member was not given an answer to this question.

While it is likely that a number of problems associated with the doctrine of self-determination will eventually be explored in the context of national and regional politics in Papua and New Guinea, in 1967 there was little more than a hint of their existence.

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* Contributed by J. F. Hookey.

1 House of Assembly Hansard, vol. 1, No. 12, pp. 2243, 2244.

2 Ibid., vol. 1, No. 13, pp. 2340-4.

3 Ibid., vol. 1, No. 12, p. 2280.

B. Jurisdiction

1. Extradition*

Although federal Parliament has passed new legislation dealing with extradition to and from foreign countries, a number of the provisions of the Extradition (Foreign States) Act[4] are similar to those of the Extradition Act passed by the Imperial Parliament in 1870 and formerly in force in Australia. Because of this similarity, the decision of the New South Wales Court of Appeal in *Ex parte Bennett*,[5] although dealing with the interpretation of the 1870 Act, is still of interest in the context of the new legislation. In addition, of course, the case may be a useful authority in the United Kingdom where the 1870 Act is still in force.

Bennett and two others had been detained under s. 10 of the 1870 Act for allegedly conspiring to import narcotics into the United States.[6] This section provides that not only should there be sufficient evidence to establish a prima facie case against the fugitive criminal concerned, but also there should be an authenticated arrest warrant issued by the appropriate authorities in the requesting State. It was argued on behalf of the prisoners that neither the arrest warrants, nor one of the depositions produced to establish the case against them, had been "duly authenticated" in accordance with s. 15. Under this provision, a foreign warrant shall be deemed duly authenticated, *inter alia*, if it "purports to be signed by a judge, magistrate or officer of the foreign State where the same was issued", or, in the case of a deposition, if it or a copy of it purports to be certified under the hand of a judge, magistrate or officer of the foreign State where the deposition was taken; provided that such warrant or deposition has been authenticated by the oath of some witness, or by the seal of the Minister of Justice or other Minister of State.

The first submission on behalf of the prisoners was that, in addition to appearing to be signed by a judge, magistrate or other officer, there must also be independent proof that the person signing *was* such a judge or officer. The Court rejected this argument. The use of the word "purports" showed that it was sufficient if the signatory signed in the apparent capacity of judge or officer. This construction was "supported by the unlikelihood that in an Act of this sort the legislature intended that the signatory should be shown by independent evidence to be a judge or officer".[7]

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* Contributed by D. W. Greig. The writer is grateful to Mr. Brian Parker, Research Assistant of the Sydney Law Faculty, for the preliminary work carried out in the preparation of this case note.

4 No. 76 of 1966; there was also passed the Extradition (Commonwealth Countries) Act, No. 75 of 1966.

5 [1967] 2 N.S.W.R. 597.

6 Drug offences were included in the list of extradition crimes set out in the 1870 Act by the U.K. Extradition Act of 1932. It was claimed that the offence became an extradition crime as far as Australia was concerned *vis-à-vis* the United States by virtue of an Order in Council of 1935, giving effect to the new U.K.-U.S.A. Extradition Treaty of 1931. The issues thus raised in relation to the Statute of Westminster, which fall outside the scope of this paper, are fully explored by Hanks in 42 A.L.J. 286.

7 [1967] 2 N.S.W.R., at p. 603.

The second argument put forward was that the warrant had not satisfied the additional requirement of s. 15 that it should be authenticated by the seal of an appropriate Minister. Taking the bundle of documents relating to the request in respect of the prisoner Stanton, the Court gave details of how, although only the front document bore the seal of the Department of Justice, all the documents were held together by tapes. In the Court's view the seal affixed to the front document of a set which was held together in this way was sufficient to satisfy s. 15.

> "It is to be observed", said the Court, "that no technique is laid down by which the seal of the Minister must be affixed and furthermore there is no requirement otherwise that a seal in these circumstances must be physically placed on the document itself which constitutes the warrant. Indeed, as is well known, seals on documents in former times were customarily appended or hung to the formal document by tape or other means. In the present case the requisite seal duly appears on the first or covering document of a bundle which are physically integrated and we think this is sufficient to satisfy the requirements of s. 15."[8]

The third ground of the prisoners' application was that one of the depositions, which was described as "of much importance in establishing a case for the committal,"[9] was similarly not duly authenticated. This contention was rejected for the same reasons as the Court gave for upholding the validity of the warrants.

The validity of this particular deposition was then impugned on the ground that the witness in question was a co-accused, who was neither compellable nor competent to give evidence against the prisoners. The Court was of opinion that no such rule existed,[10] but in any case it was arguable that "the combined effect of ss. 10 and 14[11] is that if the statements be duly authenticated and otherwise tend to support a committal, they ought not to be rejected merely because of some local rule". In reaching its decision on this point the Court relied upon the English case of *R. v. Zossenheim.*[12] In that case, Lord Alverstone, C. J., had expressed the opinion that it was contrary to s. 14 to suggest that if the statements in the depositions did establish the facts, the magistrate should then inquire whether certain formalities according to English law had been complied with in the taking of such evidence.

> "Though the magistrate ought to scrutinize the depositions and see that they afforded substantial evidence of facts going to prove the offence, his Lordship knew of no authority that, because they might be criticized subsequently and cross-examined to subsequently, or because possibly they had not been taken according to the English rules of evidence, they ought not to be acted upon."[13]

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8 [1967] 2 N.S.W.R., at p. 604.

9 Ibid.

10 Relying upon *Winsor* v. *R.* (1866), L.R. 1 Q.B. 289, 390; and *R.* v. *Norfolk Quarter Sessions,* [1953] 1 Q.B. 503; [1953] 1 All E.R. 346.

11 Under this section depositions or copies thereof, *inter alia,* "may, if duly authenticated, be received in evidence in proceedings under this Act".

12 (1903), 20 T.L.R. 121.

13 (1903), 20 T.L.R. 121, at p. 122.

As the New South Wales Court of Appeal pointed out, this type of committal proceeding is similar to the ordinary committal proceedings where a magistrate acts in the "executive fashion". He is not required to play a "judicial rôle"; that is, it is not up to him to decide whether the prisoner has in fact committed the crime, but only whether there is prima facie evidence justifying his being tried for the crime.[14]

As the applicants' arguments on the constitutional issues raised by the case were also rejected,[15] the orders *nisi* on their behalf were discharged.

The statements made by the Court in relation to the authentication of foreign warrants are clearly relevant to the interpretation of the 1966 Extradition (Foreign States) Act, the combined effect of ss. 17 (6)(a) and 26 (2) of which is substantially to reproduce ss. 10 and 15 of the 1870 Act. Similarly, s. 26 (1) of the new Act spells out at greater length the admissibility of documents like depositions that could be received as evidence under the former s. 14.

Nor has the new Act affected the rôle of the magistrate in deciding to commit a fugitive offender to prison pending extradition. Section 17 (6)(b)(i) is almost identical with the former s. 15 on this point. The executive nature of the magistrate's rôle in extradition proceedings may be illustrated by reference to the leading American decision, *Collins v. Loisel*,[16] American law being substantially the same in this regard. The British authorities had introduced evidence which tended to show that Collins had obtained a pearl button from jewellers by a number of false representations about his financial and social standing. Collins argued that such evidence could not be sufficient to establish the crime of false pretences. The Supreme Court, however, held that this contention was irrelevant.

> "It was not the function of the committing magistrate to determine whether Collins was guilty, but merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension and commitment for trial if the crime had been committed in that state."[17]

There were clearly grounds upon which Collins could be tried for obtaining by false pretences, even if it was possible that he might be found not guilty on some technical ground. The effect of s. 17 of the new Commonwealth Act is to continue unchanged this function of the magistrate in extradition proceedings.[18]

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14 [1967] 2 N.S.W.R., at p. 605.

15 See note 6, *ante*.

16 259 U.S. 309 (1922).

17 259 U.S., at pp. 314, 315.

18 See also the identical provision in s. 15 (6)(b)(i) of the Extradition (Commonwealth Countries) Act 1966, which, of course, substantially modifies the position under the former Fugitive Offenders Act 1881.