

Mr. Justice Richmond: I concur with the judgments of the Chief Justice and my brother Johnston. The Act of 1863 was passed with a view to authorize the deportation of persons charged with indictable misdemeanours, committed in other parts of the Australasian group, and their surrender to the authorities of the colony in which the offence was committed. That such was the purpose of the Act fully appears on the face of the Act itself. It does not perhaps purport expressly to authorize the detention of the supposed offender during his passage from this colony to the colony to which he is to be sent, but it plainly contemplates such detention. Unless he can be lawfully so detained the purpose of the Act fails entirely. But this Court must take judicial notice of the fact that he cannot lawfully be so detained, because, during the transit, the supposed offender must pass the high seas. No Imperial law warrants such detention, and no colonial law can warrant such detention. It follows that this Court has judicial notice that the purpose of the Act must fail as being *ultra vires*. It is argued that the Act is valid inasmuch as it only purports to authorize detention within the colony. Supposing that to be the case, which is far from clear, detention within the colony is not the purpose of the Act, but is only instrumental to the purpose. It is certain that the Colonial Legislature would never have authorized detention within the colony for a period of two months, except with a view to that ulterior action which this Court sees, and must declare, to be illegal. The purpose is indivisible; failing in part, it fails altogether.

Mr. Justice Williams said: I concur in the opinion of the majority of the Court. I agree in thinking that this branch of our jurisdiction should be exercised with great care and caution, but I see no reason why we should consider the question of whether or no an Act of the Legislature is *ultra vires* from any other point of view than we should consider whether the by-law of a Corporation is *ultra vires*. What we have to consider is the view that may ultimately be taken of our decision by the Privy Council, and that tribunal would not have any special leaning in favour of the validity of the Acts of the Colonial Legislature. The 5th section of "The Foreign Offenders Apprehension Act, 1863," enables the Justice, before whom an offender, charged with having committed a treason, felony, or indictable misdemeanour in any of the Australasian Colonies, shall have been brought, to commit such offender to prison, "there to remain until he can be sent back to the colony in which the offence is alleged to have been committed, and delivered to the proper authorities there," in the manner mentioned in the Acts of the Imperial Legislature 6 and 7 Vict., c. 34, and 16 and 17 Vict., c. 118. The 5th section of the former Act provides that it shall be lawful for the Governor, by warrant under his hand and seal, to order any person who shall have been apprehended and committed to gaol under that Act "to be delivered into the custody of some person or persons, to be named in the said warrant, for the purpose of being conveyed into that part of Her Majesty's dominions in which he is charged with having committed the offence, and, being delivered into the custody of the proper authorities, there to be dealt with in due course of law as if he had been there apprehended, and to order that the person so committed to gaol be so conveyed accordingly." Then follows a proviso that if any person so apprehended shall escape out of any custody to which he shall have been committed he may be retaken. If our Act of 1863 is to carry out the object for which it is plainly enacted, it must be assumed that it confers upon the Governor, in the case of a misdemeanour committed in any of the Australasian Colonies, the same power to issue a warrant for the removal of the alleged offender as by the 5th section of the 6 and 7 Vict., c. 34, is conferred upon him when the alleged offence is a felony. So far as the Justice is concerned our Act only authorizes a committal to prison, but the removal from the prison and all subsequent proceedings must be done under the Governor's warrant, and what that warrant is to authorize is found in the 5th section of the Imperial Act, and there only. Now the warrant is to order that the accused shall be delivered into the custody of some person named in it, shall be conveyed to the colony where the alleged offence was committed, and be delivered into the custody of the proper authorities there. Has, then, the Legislature of this colony any power to authorize the conveyance on the high seas to another part of the world, and the detention outside its jurisdiction, of any person whatever? I know of no authority by which the Legislature can do so. Had provision been made simply for putting the accused beyond the jurisdiction, that would probably have been within the powers of the Legislature; but the Legislature purports to authorize his conveyance to another colony, and to constitute a lawful custody during his passage on the high seas from one colony to another. Had this colony and South Australia been contiguous, the difficulty might not have arisen; he could have been put across the border in charge of a South Australian constable, and, being then in South Australia, could be properly detained under the law of that colony. Even then, however, there might have been a question as to the authority of the Legislature to direct the issue of a warrant purporting to authorize detention of a person in South Australia till he could be delivered to the proper authorities there. If then the Act of the Legislature in directing the removal of offenders is *ultra vires*, and the intention of the Legislature as evidenced by the provisions of the Act of 1863 cannot be carried into effect, it seems to follow that the Court should not give effect to those minor provisions, which it was within the power of the Legislature to enact, but which are merely subsidiary to the main object of the Statute, and which apart from such an object are insensible. For these reasons I think the rule must be made absolute.

(New Zealand Times, 2nd June, 1879.)

The following is the judgment of Mr. Justice Gillies in the above case, which was omitted from our report on Saturday last. It will be perceived that his Honor does not concur in the ruling of the Court:—

Judge Gillies said: I regret that the time and opportunities which I have had for consideration of this question have not enabled me to come to the same conclusion as the other members of the Court. I wish it to be understood that I express no very strong opinion, and it is with some diffidence that I venture to differ from my brother Judges. The Court is here called upon to exercise one of its highest powers, that of declaring that the Legislature of this colony has exceeded its powers in passing an Act which has been assented to by the Governor on behalf of Her Majesty, and has been left to its operation by Her Majesty on the advice of the English Law Officers. After attention had been called to doubts which existed as to its validity, such a power ought, I think, to be exercised with the utmost