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High Court has jurisdiction to entertain an appeal from a judgment discharging an accused person, that section does not confer jurisdiction on the High Court to set aside a verdict of "not guilty," so that, when, as in this case, the judgment properly followed the verdict, the granting of special leave to appeal would be futile; and, as to the direction, on the ground that it was not a "judgment" from which under sec. 73 an appeal lies to the High Court;

By *Powers* J., on the ground that, although under sec. 73 the High Court had jurisdiction to entertain an appeal from the judgment of acquittal, to set aside the verdict and to grant a new trial, the discretion to grant special leave to appeal should not in the circumstances be exercised.

Musgrove v. *McDonald*, 3 C.L.R., 132, and *Baume* v. *The Commonwealth*, 4 C.L.R., 97, discussed.

Special leave to appeal from the Supreme Court of South Australia (*Gordon* J.) refused.

APPLICATION for special leave to appeal.

At the Criminal Sessions of the Supreme Court of South Australia before *Gordon* J. and a jury, Francis Hugh Snow was presented on information charging him with attempting to trade with the enemy on a number of specified days both before and after 23rd October 1914, on which date the *Trading with the Enemy Act* 1914 was passed. At the conclusion of the case for the prosecution, counsel for the accused contended that the *Trading with the Enemy Act* 1914 was not retrospective as to attempts to trade with the enemy, and that there was no evidence fit to be submitted to the jury of any attempt to trade with the enemy after the passing of the Act. The learned Judge agreed with these contentions and directed the jury to return a verdict of "not guilty," which they did, and the accused was ordered to be discharged from custody.

The Crown moved for special leave to appeal to the High Court.

Other material facts are stated in the judgments hereunder.

The motion was originally heard on 24th May at Adelaide before *Griffith* C.J. and *Isaacs* J., when *Cleland* K.C. and *F. Villeneuve Smith* appeared in support of the motion. The Court on 16th June suggested that the motion should be renewed before a Full Bench on notice to Snow. The motion was now renewed accordingly.

Blacket K.C. (with him *Bavin*), for the appellant. The application is for special leave to appeal both from the judgment of acquittal and from the decision of the learned Judge upon which he based his direction to the jury to find a verdict of "not guilty." This Court has jurisdiction to entertain an appeal from any judgment of the Supreme Court of a State exercising federal jurisdiction and to grant a new trial in any such case: *Baume* v. *The Commonwealth* (1). That is so both in civil and criminal matters. *Musgrove* v. *McDonald* (2) does not touch the case of a State Court exercising federal jurisdiction, and it goes too far if it decides that the granting of a new trial after a verdict is not included in the power to entertain appeals. The appellate jurisdiction given by sec. 73 of the Constitution is perfectly general, and extends to a judgment of acquittal after a verdict of "not guilty." It also covers an appeal from a direction to a jury to find a verdict of "not guilty," which is an interlocutory judgment in the ordinary sense of that term. Sec. 77 of the Constitution authorizes the Parliament to confer federal jurisdiction upon the Courts of the States subject to conditions, and the Parliament has by the *Judiciary Act* conferred that jurisdiction on the State Courts subject to the condition that the High Court may grant a new trial whether in civil or criminal matters. Sec. 73 of the Constitution does not prevent the Parliament from imposing as a condition that the High Court may entertain an appeal from other matters than judgments, decrees, orders and sentences. Sec. 77 of the *Judiciary Act* prevents the inference which might be drawn from the preceding sections of Part X., that an appeal would not lie in a criminal matter after a verdict of acquittal. There is no reason for excluding such an appeal from the jurisdiction to entertain appeals in civil and criminal matters. There is no essential distinction between a conviction or acquittal by justices and that by a jury, or between an acquittal and a case where after conviction the verdict is set aside and the prisoner is discharged. In such a case as that last mentioned this Court entertained an appeal: *Attorney-General of New South Wales* v. *Jackson* (3). At the time of the institution

(1) 4 C.L.R., 97.

(2) 3 C.L.R., 132.

(3) 3 C.L.R., 730.

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of the Commonwealth there were proceedings by which, after a person had been discharged, he might be tried again on the same charge. See *R.* v. *Drury* (1); *R.* v. *Mowatt* (2); *R.* v. *O'Keefe* (3). [Counsel also referred to *R.* v. *Duncan* (4); *Rules of the Supreme Court* 1883 (Eng.), Order XXXIX., r. 1; Order LVIII., r. 5.]

[GRIFFITH C.J. referred to *George D. Emery Co.* v. *Wells* (5); *Archbold's Criminal Practice*, 22nd ed., p. 157.

ISAACS J. referred to *In re Dillet* (6); *Ex parte Carew* (7); *Falkland Islands Co.* v. *The Queen* (8); *R.* v. *Bertrand* (9); *R.* v. *Yeadon* (10); *R.* v. *Murphy* (11).]

The *Trading with the Enemy Act* 1914 is retrospective as to attempts to trade with the enemy, by the combined effect of sec. 3 of that Act and sec. 8 of the *Acts Interpretation Act* 1904. The intention of the latter section is to avoid the necessity of inserting the word "attempt" wherever a Commonwealth Statute creates an offence. Retrospective effect as to actual trading is expressly given by the *Trading with the Enemy Act.*

[ISAACS J. referred to *Lord Advocate* v. *Mitchell* (12).]

Sir Josiah Symon K.C. and *Piper* K.C. (with them *W. A. Norman*), for the respondent. There can be no appeal from a judgment founded on a verdict of a jury. It is a principle of the criminal law as administered in the British Dominions that there is no appeal, and no power to grant a new trial, after a verdict of "not guilty" in cases of felony or misdemeanour. There may be a few exceptions, but they are immaterial to this case. Under sec. 73 of the Constitution no jurisdiction is given to the High Court to review the verdict of a jury in a criminal case, and the Parliament of the Commonwealth has no power to confer such a jurisdiction upon the High Court in respect of an offence against the law of a State. Admitting that where the offence charged is one against a federal Statute and the Court before which the trial is had is exercising federal

(1) 3 Car. & K., 193; 18 L.J.M.C., 189.
(2) 6 N.S.W.L.R., 289.
(3) 15 N.S.W.L.R., 1.
(4) 7 Q.B.D., 198.
(5) (1906) A.C., 515.
(6) 12 App. Cas., 459.
(7) (1897) A.C., 719.
(8) 1 Moo. P.C.C. (N.S.), 299.
(9) L.R. 1 P.C., 520.
(10) Le. & Ca., 81; 31 L.J.M.C., 70.
(11) L.R. 2 P.C., 535.
(12) 52 Sc. L.R., 275.

jurisdiction the Parliament of the Commonwealth might confer such a jurisdiction, the Parliament has not done so in the case of a verdict of acquittal. In England a new trial has never been granted after a verdict of acquittal. [Counsel referred to *Chitty's Criminal Law*, 2nd ed., vol. I., pp. 636, 641, 648, 653, 656; *R.* v. *Bear* (1); *Archbold's Criminal Practice*, 24th ed., pp. 1346, 1367.]

[HIGGINS J. referred to *Russell* v. *Men of Devon* (2).

ISAACS J. referred to *Vaux's Case* (3); *R.* v. *Aylett* (4).

RICH J. referred to *Short and Mellor's Crown Practice*, 1st ed., p. 281.

GRIFFITH C.J. referred to *Chitty's Criminal Law*, 2nd ed., vol. I., p. 718.]

If an appeal does lie from the judgment of acquittal the verdict of "not guilty" is an answer to the appeal.

The Supreme Court of South Australia has no power to grant a new trial after an acquittal, and this Court cannot make an order that the Supreme Court of South Australia could not make. [Counsel referred to *Criminal Law Consolidation Act* 1876 (S.A.), secs. 397, 398; *Supreme Court Act* 1855 (S.A.), sec. 8.] The authority of *Musgrove* v. *McDonald* (5) is conclusive that the High Court cannot grant a new trial in this case *Baume* v. *The Commonwealth* (6) was wrongly decided. It proceeded on the mistaken assumption that the words "except so far as an appeal may be brought to the High Court" in sec. 39 (2) (*a*) of the *Judiciary Act* were a substantive enactment. Part X. of the *Judiciary Act* is a complete code as to the criminal jurisdiction of the High Court. The only appeal given in a criminal case is where there has been a conviction: sec. 73. Sec. 77 does not itself give any right of appeal, but destroys the possibility of there being any appeal except by special leave. Even if the High Court had a jurisdiction similar to that of a Court of Error it could only set aside the verdict for error appearing on the record, and the direction to the jury would not appear there. [Counsel referred to *R.* v. *Taylor* (7); *Winsor* v. *The Queen* (8).]

(1) 2 Salk., 646.
(2) 2 T.R., 667.
(3) 4 Rep., 44.
(4) 1 T.R., 63, at p. 69.
(5) 3 C.L.R., 132.
(6) 4 C.L.R., 97.
(7) (1915) 2 K.B., 709.
(8) L.R. 1 Q.B., 289.

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[ISAACS J. referred to *Levinger* v. *The Queen* (1); *R.* v. *Gray* (2); *Gibson* v. *Hunter* (3).]

The *Trading with the Enemy Act* is not retrospective as to attempts to trade. Sec. 8 of the *Acts Interpretation Act* 1904 is prospective from the date of the passing of the particular Act to which it is applied. [Counsel referred to *Donohoe* v. *Britz* (4); *Dwarris on Statutes*, p. 540; *Craies on Statutes*, 2nd ed., p. 346; *Reid* v. *Reid* (5); *In re Athlumney*; *Ex parte Wilson* (6).]

Even if an appeal lies, the Court in the exercise of its discretion should refuse to grant special leave: *R.* v. *Joykissen Mookerjee* (7). There is nothing before the Court to show that the accused ought not to have been acquitted. The *Trading with the Enemy Act* is invalid.

The Commonwealth Parliament has no power to make punishable an act done before the passing of the Act, whether the act at the time it was done was innocent or not. The Act is an invasion of the judicial power, for it purports to declare what the law has been: *Cooley's Constitutional Limitations*, 6th ed., p. 113; *Willoughby on the Constitution of the United States*, vol. II., p. 1019.

[GRIFFITH C.J. referred to *R.* v. *Munslow* 8).]

There is no common law of the Commonwealth under which trading with the enemy was an offence: *Wheaton* v. *Peters* (9). The State in which an offence of this kind is committed has full power over it. The Act is an infringement of sec. 108 of the Constitution. The subject matter of the Act is not within the legislative powers of the Commonwealth. It is not within the power conferred by sec. 51 (VI.) of the Constitution as to naval and military defence, nor is it within the incidental powers.

[GRIFFITH C.J. referred to *Brown* v. *Dean* (10).]

Blacket K.C., in reply. The *Trading with the Enemy Act* is within the power to legislate in respect of matters incidental to naval and military defence. As to the matters referred to in sec. 51 the power

(1) L.R. 3 P.C., 282.
(2) 6 Ir. L.R., 259.
(3) 2 H. Bl., 187, at p. 205.
(4) 1 C.L.R., 391.
(5) 31 Ch. D., 402, at p. 408.
(6) (1898) 2 Q.B., 547, at p. 551.
(7) 1 Moo. P.C.C. (N.S.), 272.
(8) (1895) 1 Q.B., 758.
(9) 8 Pet., 591.
(10) (1910) A.C., 373.

to legislate is plenary, and includes retrospective as well as prospective legislation. See *Mitchell* v. *Clark* (1). Special leave should, in the circumstances, be granted. See *R.* v. *Bertrand* (2); *Harrison* v. *Scott* (3); *Attorney-General for Jamaica* v. *Manderson* (4); *Mitchell* v. *New Zealand Loan and Mercantile Co.* (5). If this Court in entertaining an appeal from a judgment after verdict in a criminal matter can only have regard to matters appearing on the record, the record, if it was drawn up, would contain the direction of the Judge. See *Winsor* v. *The Queen* (6); *R.* v. *Short* (7); *R.* v. *Grand and Jones* (8).

Cur. adv. vult.

The following judgments were read :—

Sept. 16.

GRIFFITH C.J. This motion is in form an application for special leave to appeal from a judgment of the Supreme Court of South Australia discharging the respondent from custody upon a verdict of not guilty after a trial on indictment. Regarded as a motion for leave to appeal from a judgment of the Court it is not open to formal objection, but it is admitted that the judgment itself cannot be impeached so long as the verdict upon which it was founded stands. The real object of the application is therefore to set aside the verdict and obtain a new trial. The verdict was in fact given by direction of the Judge, and the ground put forward in support of the motion is that the direction was erroneous in law. It is objected for the respondent that this Court cannot grant a new trial in such a case. If it cannot, a formal order of leave to appeal would obviously be futile.

It is not suggested that at the establishment of the Commonwealth a new trial could be granted after an acquittal under the laws of South Australia or of any of the Australian Colonies, but it is contended that the High Court can grant it. If it can, the authority to do so must have been created by the Constitution. The argument is based on sec. 73, which confers upon the High Court jurisdiction (with certain exceptions) to hear and determine appeals from all

(1) 110 U.S., 633.
(2) L.R. 1 P.C., 520.
(3) 5 Moo. P.C.C., 357, at p. 370.
(4) 6 Moo. P.C.C., 239.
(5) (1904) A.C., 149.
(6) L.R. 1 Q.B., 289.
(7) 19 N.S.W.L.R., 385.
(8) 3 S.R. (N.S.W.), 216.

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"judgments, decrees orders, and sentences" of the Supreme Courts of the States. It is pointed out that, when upon the hearing of a competent appeal it appears that justice cannot be done without a fresh trial, the Court of appeal has power to give that relief. That consequence necessarily follows, as a matter of common sense, when the judgment appealed from is wrong and the merits of the case have not been disposed of. But it does not follow that a Court of appeal can order a new trial in any case in which it is asked for.

The function of a Court of appeal is to correct errors of the Court appealed from, and to give such judgment as that Court itself ought to have made, or, in the case last mentioned, to put the case in train for obtaining it. If an appellate Court has jurisdiction to make an order which the Court appealed from could not itself have made under any circumstances, such a jurisdiction must be in the nature of original, and not of appellate, jurisdiction. The words which I have quoted from sec. 73 of the Constitution were a well known form of words that had long been in use in Orders in Council defining the kind of judicial pronouncements which were to be appealable as of right from the Courts of various British Possessions to the Sovereign in Council. They cannot be construed as conferring on the High Court new original jurisdiction.

The common law doctrine as to the effect of a verdict of acquittal is too well settled to require exposition, and it is too late to inquire into its origin. If it had been intended by the framers of the Constitution to abrogate that doctrine in Australia, and to confer upon the High Court a new authority, such as had never been exercised under the British system of jurisprudence by any Court of either original or appellate jurisdiction, it might have been anticipated that so revolutionary a change would have been expressed in the clearest language. To adopt the words of Sir *Peter Maxwell* (founded upon the language of *Marshall* C.J. in *United States* v. *Fisher* (1)), "it is in the last degree improbable that the Legislature would overthrow fundamental principles . . . or depart from the general system of law, without expressing its intention with irresistible clearness, and it would

(1) 2 Cranch, 358, at p. 390.

therefore be absurd to give any such effect to general words, simply because in their widest and most abstract sense they admit of such an interpretation" (*Maxwell on Statutes*, 1st ed., p. 66). So far from finding any such clear indication in the Australian Constitution, I find a clear indication of a contrary intention. Sec. 80 lays down as a fundamental law of the Commonwealth that the trial on indictment of any offence against any of the laws of the Commonwealth shall be by jury. The framers of the Constitution, the electors who accepted it, and the Parliament which enacted it, must all be taken to have been aware of the absolute protection afforded by a verdict of not guilty under the common law of all the States. With this knowledge they thought proper to enact that any indictable offence that might be created by the new legislative authority established by the Constitution should also be tried by jury. The history of the law of trial by jury as a British institution (not forgetting the Act called *Fox's Libel Act*) is, in my judgment, sufficient to show that this provision ought *primâ facie* to be construed as an adoption of the institution of "trial by jury" with all that was connoted by that phrase in constitutional law and in the common law of England.

It is, however, now contended that sec. 80 relates merely to procedure, and has nothing to say to the substantial protection afforded by a verdict of acquittal, and that upon the establishment of the Commonwealth (and creation of the High Court) all verdicts of acquittal given in the Supreme Courts of the States and all other Courts from which an appeal lay to the Supreme Courts became reviewable by the High Court in its absolute and unfettered discretion. For the reasons I have given I am unable to accept this argument.

Another argument addressed to the Court, with apparent seriousness, in support of the asserted power was to this effect: A judgment may be either interlocutory or final; an appeal will lie from an interlocutory as well as from a final judgment; when a Judge in the course of a trial decides a point of law he is often said to give judgment upon it, and what he says is often called a judgment, which, not being a final judgment, must be an interlocutory judgment: consequently, a direction of a Judge to a jury on a point

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of law is an interlocutory judgment and appealable as such. It is difficult to treat such an argument with gravity. It may be that the term "judgment" is sometimes applied colloquially to such a pronouncement, but I affirm with confidence that, for the purpose of discussion or description of the kind of determination from which an appeal may be brought, the term "interlocutory judgment" has never been used by lawyers to denote a judge's verbal direction to a jury given in the course of a trial antecedent to verdict. Then it was asked: Why should not the High Court under its power to entertain appeals from judgments be entitled to investigate the propriety of every step in the proceedings up to final judgment? This argument is appropriate for consideration by a Legislature, not by a Court.

In *Musgrove* v. *McDonald* (1) this Court, in a considered judgment, unanimously held that the jurisdiction conferred on the High Court by sec. 73 to entertain appeals from "judgments, decrees, orders, and sentences" did not include jurisdiction to entertain under the name of an appeal from a final judgment an application for a new trial in a civil action after the verdict of a jury. I need not repeat the arguments (to a great extent historical) on which this conclusion was based. I will only say that the lapse of years has confirmed my opinion as to their soundness. They are not less applicable to criminal cases. *Baume's Case* (2), which was not a considered judgment, proceeded, in my opinion, upon a misconception of the effect of sec. 2 of the *Judiciary Act*.

In my opinion, when the proceedings upon an indictment have been concluded by verdict followed by judgment, the Court cannot, under the British system of criminal law, unless expressly authorized by Statute, examine the validity of the proceedings except so far as they appear on the record. No authority was, or indeed could be, cited inconsistent with this view, which I expressed strongly during the hearing of the motion. In order to escape from it a further argument was put forward, based upon the now almost obsolete practice relating to the writ of *venire de novo*. The foundation for that writ was some error in the proceedings appearing upon the record, the effect of which was to show that there had been a

(1) 3 C.L.R., 132. (2) 4 C.L.R., 97.

mistrial. The errors generally relied upon were matters relating to the constitution or behaviour of the jury, *e.g.*, a mistaken decision upon a challenge, either to the array or to the polls, or a mistaken discharge of the jury (now decided to be in the absolute discretion of the Judge: *Winsor* v. *The Queen* (1)), or a matter appearing upon a bill of exceptions. The practice as to bills of exceptions was introduced by the *Statute of Westminster the Second* (13 Edw. I.). Up to that time (1285) there was no means of bringing an erroneous ruling of a trial Judge before a Court of appeal. The only mode of correcting such an error was by an application to the discretionary power of the Court to grant a new trial (as pointed out in *Musgrove* v. *McDonald* (2)), from the exercise of which no appeal lay.

The *Statute of Westminster* was as follows:—"When one impleaded before any of the Justices alleged an exception, praying they will allow it, if they will not, if he that alleged the exception write the same, and require that the Justices will put their seals, the Justices shall do so; and if one will not, another shall; and if upon complaint made of the Justices, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception with the seal of the Justices thereto put, the Justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

The form of a bill of exceptions, which was annexed to, but did not ordinarily form part of the record, is to be found in *Chitty's Forms* (10th ed., at p. 241), where it will be observed that the fact that the exception, *i.e.*, the objection to the Judge's ruling, is not entered in the postea, as it would be if it was an ordinary incident of the trial, is recited. This new remedy did not extend to criminal cases.

Further, whatever power the High Court may have to entertain an appeal from a judgment of the Supreme Court of a State, it must give judgment according to the law of that State. In other words, the power to entertain an appeal does not confer on the

(1) L.R. 1 Q.B., 390. (2) 3 C.L.R., 132.

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Court of appeal power to administer a different law. If, therefore, this Court had in any case jurisdiction to entertain an application for a new trial in a criminal case, it would be bound in dealing with the application to apply the law of the State as to granting new trials in such cases. This position is clearly established by the case of *Brown* v. *Dean* (1), in which it was held by the House of Lords that a law conferring upon a Court jurisdiction to grant new trials after judgment upon such terms "as it may think just" does not authorize the adoption of a new basis for granting them. As I have already said, it is not suggested that by the law of South Australia a new trial could be granted after a verdict of acquittal on any ground whatever.

For all these reasons I am of opinion that this Court cannot, without making a new law for itself, grant a new trial in this case. The grant of special leave to appeal would therefore, as I have already said, be futile.

The Royal Prerogative to review all judicial proceedings in the British Dominions outside the United Kingdom rests upon an entirely different footing from the appellate jurisdiction of this Court.

The ancient right of the King as the fountain of justice to dispense justice in his Council survived to some extent in England even after the establishment of Courts of common law. In colonial causes the jurisdiction extended to all decisions of all Courts of Justice whether the proceedings were of a civil or criminal character, and this prerogative still exists except so far as it has been limited by Statute (*Falkland Islands Co.* v. *The Queen* (2)). Cases may be found in the reports (for instance, *Stace* v. *Griffith* (3)) in which the Privy Council has entertained an appeal on the somewhat elastic ground that there had been a complete failure of justice in the colonial Court. I am not, however, aware of any case in which an appeal has been entertained from a verdict of not guilty found by a jury.

The appellate jurisdiction of this Court is the creature of Statute, and we are not at liberty to say that because an appeal

(1) (1910) A.C., 373.

(2) 1 Moo. P.C.C. (N.S.), 299.

(3) L.R. 2 P.C., 420.

lies to the High Court from all judgments, orders, decrees, and sentences of the Supreme Courts of the States we will entertain applications to review them except in accordance with the law and practice of those States (*Dagnino* v. *Bellotti* (1)).

The circumstance that in speaking of the exercise of the Royal Prerogative the word "appeal" has sometimes been used in an extended sense cannot enlarge its meaning as used in the Australian Constitution, so as to include such a general power of supervision over the proceedings of the Supreme Courts of the States as we are now asked to assert.

I have refrained from making any reference to the nature of the offence with which the accused was charged, which is quite irrelevant to the question of our power to grant a new trial, and can only legitimately enter into our consideration, if at all, by way of warning, if we should be momentarily tempted to forget that the maxim *Inter arma silent leges* has no application to the administration of the actual law, or to lose sight of the time-honoured practice of British Courts of Justice, which do not qualify their regard for the interests of accused but unconvicted persons by any reference to the gravity of the offence with which they are charged.

But I should add that, in my opinion, if the Court could, in accordance with the law which it is called upon to administer, grant a new trial in this case, it would for many reasons, which appear to be obvious, be in the highest degree unjust to exercise its discretion by doing so. Many of these reasons will be pointed out by one of my learned brothers who is of the same opinion, and I do not think it necessary to repeat them at length.

In my judgment the motion should be dismissed with costs.

ISAACS J. In this important case, it is essential to a right comprehension of all that it involves, to understand clearly and exactly what happened at the trial.

Francis Hugh Snow, a merchant in Adelaide, was indicted by the Commonwealth in the Supreme Court of South Australia for the offence of attempting to trade with the enemy, contrary to the provisions of the *Trading with the Enemy Act* 1914. The main

(1) 11 App. Cas., 604.

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facts of the proceedings, so far as they are relevant to this appeal, are perfectly simple. The case came before his Honor Mr. Justice *Gordon* and a jury of twelve. The Crown evidence lasted many days, and at its conclusion the learned Judge, after argument on points raised by the defendant's counsel, formally decided in a written judgment, that the trial should not be allowed to proceed any further, and that the jury should not be permitted to consider the actual guilt or innocence of the accused. That is the cardinal point in this case. The grounds of the decision were that the Act did not recognize any offence of attempting to trade with the enemy before 23rd October 1914, that all evidence prior to that date must be excluded from consideration, that the balance of the evidence taken by itself was insufficient to support any charge, and that consequently the case must be instantly stopped at that point, and altogether withdrawn from the jury, and the accused discharged. The jury were thereupon directed in law that they had no function whatever to perform except to formally say "not guilty," which, in blind and dutiful obedience to the judicial direction, they did, and the Judge thereupon with equal formality entered a judgment of "not guilty," and so for the time ended this important trial.

It is self-evident that if the Judge's ruling as to the meaning of the Act is correct the trial went to its just conclusion. If, however, that ruling was wrong, it is equally evident that the whole proceeding ended in a fiasco, due entirely to that illegal ruling. In the latter case, as will be presently seen, on the view taken by the learned Judge at the trial, the Crown had given quite sufficient evidence to enable the jury to determine whether in fact the accused had or had not committed the offence, and it was for them to exercise their own minds upon the evidence before them. Sec. 80 of the Constitution is distinct that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury." Consequently, where there is evidence on which a man may be found guilty or not guilty, it is the jury, and the jury alone, which, as between the Commonwealth on the one hand and the accused on the other, must determine the fact. The verdict which that section contemplates is one which the jury are to be allowed to arrive at under the guidance

and with the assistance of the Judge, but still freely and independently on their own view of the evidence, and not at his dictation. If they can be practically forced to acquit where there is evidence on which conviction is open, they can equally be forced to convict though their own opinion will lead them to acquit.

In *Winsor* v. *The Queen* (1) *Cockburn* L.C.J. says that one of those principles that lie at the foundation of our law is the maxim that judges shall decide questions of law, and juries questions of fact—that is, of course, where the Court sees there is evidence on which the question of fact can be decided.

And so the Crown says, in effect, there has been a mistrial, a legal fiasco, and asks this Court under its appellate power to correct the error, not of the jury, because they were bound to accept the law as stated by the Court, but *the fundamental error of the primary Judge*, and to allow the case to run its lawful course, until the jury have exercised their free constitutional duty and by a real verdict determined, independently of any compulsion, whether the accused is in fact guilty or innocent. But it must be clearly borne in mind that the main application is not for a new trial: it is to set aside the judgment as unwarranted by law; and the request for a new trial is only a secondary and consequential result of the main application. The distinction is vital, because this appeal is based on an imperative rule of law, whereas new trials in essence depend on the discretional power of the Court.

On this appeal various legal objections were made by learned counsel on behalf of the accused. Substantially, they may be reduced to five: (1) that the *Trading with the Enemy Act* is wholly invalid; (2) that it is invalid so far as it relates to trading, and to attempt to trade, with the enemy prior to 23rd October; (3) that if the Act is valid it was rightly interpreted by *Gordon* J.; (4) that, supposing his ruling was wrong, the Constitution does not permit the error to be corrected; (5) that if the law does permit of such correction, this Court in its discretion ought to refuse to allow it to be made.

It will be at once seen that every question except the last is on

(1) L.R. 1 Q.B., 289, at p. 303.

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its face a most important one that ought not to be left in doubt for a single instant longer than this Court can help.

The last two, and particularly the last one, depend on the nature of the case itself as it appears from the materials which the parties have placed before us, and upon which alone—added to what is common knowledge—we can form our opinion.

It is necessary, therefore, to examine a little more closely the circumstances disclosed; and this I may conveniently do at once, as they have to be considered with reference not only to the legal objections but also the question of discretion, which in view of the diversity of our opinions becomes the determining factor.

The offence with which Snow was charged is one of unparalleled gravity in the history of Australia. The crime for which Carl Lody was shot, was mild in comparison. Though technically laid as an offence under the Statute, it was, in effect, one constituting both by common law and the *Statute of Treasons* an act of high treason. Reduced to plain language it is this. Commencing on 14th September, and continuing on several subsequent dates, namely, 17th, 18th, 19th, 21st, 23rd, 24th, 25th, 26th, 28th and 30th September, and then continuing on 2nd, 5th, 8th, 12th, 13th, 15th, 20th and 22nd October, and again on 2nd, 3rd, 4th and 5th November, with possible intermediate days, the accused endeavoured to obtain from the Mount Lyell Mining and Railway Company, about 6,000 tons of copper to be supplied to the German firm of Aron Hirsch & Son, carrying on business at Halberstadt in Germany as well as at other places in Europe, as Rotterdam, Naples and Genoa.

For a British subject in the hour of his country's greatest need to attempt to get 6,000 tons of copper out of the control of the Empire is in itself, if proved, an unpardonable act; but when in addition, if the accusation is true, the attempt contemplates handing it over, in return for pecuniary reward, to our enemies to sow death and destruction in our ranks, and those of our Allies, words utterly fail to describe the atrocity of the crime. If the charge be true in fact, it was no sudden slip, but a deliberate and sustained and sordid disregard by the accused of the ties of allegiance to the Sovereign, and the most sacred bonds of honour and fidelity and natural sentiment towards his fellow subjects.

The Crown's evidence was apparently voluminous. The case for the prosecution lasted over ten days, and then closed. When the Crown's case closed, the defendant called no evidence. His learned counsel, besides urging that there was not sufficient evidence to go to the jury, took some objections, of which only two are stated and dealt with in the affidavits before us. Those two were: (1) that the Act did not, on a proper construction, make an attempt to trade with the enemy an offence, if the attempt was prior to the passing of the Act, 23rd October 1914; and (2) that, consequently, eliminating all evidence as to what Snow had done before 23rd October, the remaining evidence did not establish a case of attempting to trade with the enemy after the passing of the Act.

The Crown contended that, taking the evidence as a whole, there was ample to go to the jury. It admitted that if all the evidence up to 23rd October were to be excluded no case could be made, but it contended that the prior evidence should not be excluded, and that the Act provided punishment for attempts made since the King's Proclamation.

The arguments on the points of law occupied no less than nine days, and the learned Judge reserved judgment. After a week's consideration, *Gordon* J. delivered a written judgment of the most formal character, in which he gave a decision and full reasons for the decision. The ruling was that the Act was not retrospective as to attempts, and the reasons are fully stated in the judgment with authorities quoted. He decided, therefore, to exclude all evidence of attempts prior to 23rd October, and, having so decided, he went on to state his agreement with the contention for the accused that there was no evidence fit for the jury as to attempts to trade with the enemy afterwards.

His Honor's words were:—"The facts upon which the Crown rested the case centred upon what took place in September 1914, between the Mount Lyell and Mount Morgan Mining Companies on the one hand, and the accused and Vogelstein & Co. of New York on the other. I understood Mr. *Cleland*" (who was Crown counsel) "himself to admit—and it is, in my opinion indisputable—that unless the jury accepted the view taken by the prosecution of the intention and conduct of the accused in connection with

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proposals made to the Companies in September, there was no case. These negotiations were completely at an end before the *Trading with the Enemy Act* was passed. They are, *therefore, for the reasons I have given, entirely shut out from consideration.* With this evidence taken away, there is no evidence left upon which the jury could lawfully find any one of the counts in the information sustained. *The result is that the accused stands discharged.*"

So we see that the considered judgment of the Court—which the opposite opinion regards as no judgment—was that the case of actual guilt or innocence of any attempt before 23rd October to violate the King's Proclamations of August and September could not be and must not be referred to the jury for their consideration, and that the accused should be discharged. It is also absolutely clear that not only did the magistrate who committed Snow for trial on 11th February 1915, think there was a *primâ facie* case established against him, but the learned Judge who tried the case thought so also, if the Act created any such offence as attempting to trade with the enemy before 23rd October. After that judgment was pronounced, there was considerable discussion as to procedure, the learned Judge at first inclining to the view that the accused should be discharged on his Honor's direction without any formal pronouncement by the jury. But eventually, on a certain note in *Halsbury's Laws of England* (vol. IX., p. 367) being referred to, and on learned counsel for the accused contending that *that was what withdrawing the case from the jury meant*, he altered his view as to the procedure, and directed the jury to acquit the accused; thereby carrying out by that form of procedure his previous decision, to which he adhered, that the defendant must be discharged.

The jury obeyed, and accordingly returned a perfunctory verdict of acquittal, which was followed as a matter of course by an equally perfunctory judgment of acquittal. The vital judgment was, of course, the ruling I have referred to: all else was mere consequential superstructure on that radically unsound foundation—the ultimate judgment being mere registration of what had been previously decided by the Court.

The word "verdict" is only the anglicized form of the Latin word "veredictum," which, translated, means "statement of the

truth " ; and in this case the Judge, by reason of the view he held as to the law, directed the jury that the only possible statement of the truth was that the accused was not guilty of the alleged crime. That is what is here called their " verdict " ; and on that verdict the ultimate judgment was formally entered. But it is plain that the ultimate judgment was not the outcome of any real verdict, but the so-called verdict and the ultimate judgment were the necessary outcome of the solemn, but entirely erroneous, decision that preceded both.

The Crown's present application is for leave to appeal, so that there may be an opportunity to correct that fundamental error, and so that the case may go on to its normal conclusion, by the jury finding for themselves according to their own opinion of the evidence whether the accusation is well founded or not. The first, second and third points raised by the respondent, urgent though they be, must, so far as this case is concerned, remain undetermined, but assumed, if either of the other two objections be successfully maintained.

And as to both of those later objections, the present is a test case. It tests whether we have a Constitution that enables the Commonwealth laws to be respected and fully enforced, or whether, if a chance slip is made in the course of a trial, if, for instance, the dexterity or persuasiveness of counsel leads a Judge trying an indictment to decide for some reason as to which, as Lord *Loreburn* once said, the Judge is confidently right but transparently wrong, that the charge will not lie, when in truth it will, and leads him therefore to discharge the accused, so that law, and possibly justice, are thwarted, the slip is irremediable provided he goes through the formality of a nominal verdict. In England, in every State of Australia, in, I believe, every other British possession, either the Court alone or Parliament can provide a remedy for that condition of affairs. But it is said that our Constitution is so fatally defective that where a great offender is proceeded against, one whose offence is so great that indictment with its heavier penalties is alone adequate to meet the case, such an error is irremediable by anything the Commonwealth can do. It is not denied that smaller offenders whose conduct may be met by trial before a magistrate with lighter

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consequences, may, notwithstanding acquittal by the primary tribunal appointed to determine both facts and law, be pursued until justice is satisfied. Of course, if it is irremediable in this case, it is, and ought to be, irremediable in every other. To be compelled to allow a man to escape justice by evading a jury by means of an argument which proves to be fallacious, if he has, in fact, been guilty of what is charged here, is the last confession of constitutional incompetency. If the Constitution is, as it claimed to be by those holding the opposite opinion, powerless to correct this manifest error, or if the Court in its discretion declines to permit the correction, then the people of Australia must remain unsatisfied whether, having regard to this transaction, Snow is a loyal subject or a traitor within the gates—a situation in my opinion dangerous to the community, and, moreover, to an innocent man himself, as the respondent might on proper investigation turn out to be, a position, I should think, absolutely unendurable. Whether he is guilty or not, we know not; but it is necessary to inquire whether the Constitution breaks down when we endeavour to have that simple question of fact ascertained, or whether it is a right exercise of our discretion to prevent that ascertainment. These circumstances are, in a time such as this, most essential to bear in mind when we have to exercise the *discretion* with which Parliament has entrusted us, and when the respondent, as in this case, asks the Court to exercise it by refusing to interfere with the judgment. The main reason suggested for that was that there was an acquittal, and it was urged that new trials in cases of acquittal are contrary to the long established practice of English tribunals. That is true, but that was because their practice had hardened into law, and no English Statute has said for the English Courts, and no State Statute has said for the State Courts, what our Constitution has said for this Court, leaving it to Parliament to limit the grant of power if it will. But what has Parliament said? If it had chosen, it could have said that in acquittals there should be no special leave granted. It has not said so, and when it thinks the public interest or the general sense of the community makes such a limitation desirable it will say so, but in the meantime we have no right to insert by way of judicial amendment of the enactment an exception not found there.

After considerable thought the Court unanimously, in *In re Eather* v. *The King* (1), said :—"As we interpret sec. 35 (1) (*b*) of the *Judiciary Act*, the Court has an unfettered discretion to grant or refuse special leave in every case, but we think that the term 'special leave' connotes the necessity for making a *primâ facie* case showing special circumstances."

Now, unless we are to fetter our discretion by declaring the mere fact of acquittal a universal reason for refusing special leave, it cannot so operate here, and if we so declare we clog our powers with the practice of other Courts, just as we clogged it at first with the practice of the Privy Council. Other reasons have been suggested. One is that he has already been exposed to considerable expense and anxiety. But even if that could possibly outweigh the enormous importance of investigating the case to the end, it must be remembered that most of the expense was due to his own efforts to avoid the jury's consideration of the facts, and so he is himself the author of the added expense and prolonged anxiety. Another reason stated was that there is another charge of which we know nothing pending against him. How that tells in his favour I am unable to imagine. In any case he may be quite innocent of that while guilty of this ; and I see no reason in the mere fact alleged to deny to the Crown its right to sift this accusation to the point of settlement by a jury. A third reason was that this alleged offence was prior to the passing of the Act. But we cannot lose sight of the fact that Parliament has put prior offences on the same footing as subsequent ones, and this is not a class of conduct that any man could believe to be innocent even without the Act. I do not, of course, suggest that the accused is guilty, that has not been determined, but any man who actually did what is charged here, even before the Act was passed, must have known he was disloyal.

I reject all these considerations.

The nature of the case itself, then, is such as to satisfy my most exigent requirement as to special circumstances, particularly if we bear in mind what the Judicial Committee said in *Bertrand's Case* (2), namely, that "the object of a trial is the administration of

(1) 20 C.L.R., 147.

(2) L.R. 1 P.C., 520, at p. 534.

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justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party."

I know of no rule which should be allowed to guide the Court in the exercise of its discretion, except the one stated by *Brett* M.R. in *In re Manchester Economic Building Society* (1) in the following words :—" The Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given." Where there has been a real acquittal, where the jury have been allowed to consider the facts for themselves and have come to their own conclusion that the accused is an innocent man, justice may require that in the circumstances he should not be exposed to the pain and cost and danger of another trial, notwithstanding some departure from the strict letter of the law during the course of the trial. I would in such a case give powerful weight to that consideration whenever such a case arises.

But where, as here, the accused by his own counsel deliberately endeavours to evade taking the actual opinion of the jury, and succeeds in inducing the presiding Judge to withdraw the case entirely from the jury, then the formal and perfunctory statement of " not guilty " by the jury—merely echoing the Judge's pronouncement—possesses none of the substantial characteristics which lead the British mind to think that a man once declared innocent by the solemn considered opinion of his fellow-countrymen should not lightly be called upon to undergo the ordeal again.

There is thus an utter absence of any solid reason for preventing the case from proceeding to the normal conclusion which the accused himself prevented.

The case of *Brown* v. *Dean* (2) has obviously no application to a case where, as already decided by this Court, the discretion is absolutely unfettered.

So far, therefore, as the case depends on my discretion, I unhesitatingly decline to use it for the purpose of preventing the truth of this matter being fully ascertained.

I come now to the question of whether there is *power* under the

(1) 24 Ch. D., 488, at p. 497. (2) (1910) A.C., 373.

Constitution to attain that end. On this branch discretion is left behind, and, whatever the circumstances of the case may be, it becomes a question of pure law. If the Constitution is as defective as alleged, then we as a Court must disregard entirely the atrocity of the circumstances charged, and, looking only to the cold law of the Constitution, declare that the accused is entitled to escape through whatever loop-hole it presents.

In my opinion the Constitution is not so radically weak as is suggested. Its provisions are to my mind plain, strong and comprehensive. Unless needlessly obscured or frittered away by unsubstantial distinctions, it seems to me difficult in the extreme to entertain any doubt on the subject.

The Constitution erected a new political system in Australia, and among other things constituted this High Court, which, besides having certain original powers of jurisdiction, was to be a new national Court of appeal in the fullest sense, not a mere Court of Error as technically known to the common law of England, and bound down by the obscure limitations, and antiquarian learning, of writs of error, and posteas, and bills of exceptions. It has inherited nothing in the way of jurisdiction from any other Court; it looks to the Constitution alone for the ultimate scope of its powers, a new statutory tribunal for a new statutory Commonwealth, and irrespective altogether of what jurisdiction was formerly enjoyed by State Courts, or might in the future be possessed by them, the High Court's powers were inscribed in plain language on that instrument of government, with no limitations, but those found in, or authorized by, the instrument itself. With profound respect for the opposite opinion, I venture to think that the fallacy it embodies is due to overlooking entirely the distinction between a Court of general appeal from judgments, &c., and a mere Court of Error as that is understood in British jurisprudence.

Sec. 73 of the Constitution says :—"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . . of any . . . Court exercising federal jurisdiction; or of the Supreme Court of any State," &c. No distinction is made between civil or criminal cases, nor

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between cases where the plaintiff or the defendant, the prosecutor or the accused, is successful. In an instrument of government, the Constitution of a great Commonwealth, the use of such a universal expression as "all judgments," &c., is not to be cut down unless some context points very distinctly to the limitation, and such context does not exist. The scope and object of the enactment at once distinguish the case from the instances to which *Maxwell* refers at p. 132 of the last edition. The judgment of Lord *Herschell* in *Cox* v. *Hakes* (1) is, to my mind, an unanswerable reply to the contention that the words should be restricted. If they should be, we could not have heard *Wallach's Case* (2), just decided. In *Jackson's Case* (3) the learned Chief Justice says of sec. 73 :—"Parliament has imposed no limitation on the right of appeal in criminal cases, and the only condition imposed is that special leave to appeal must first be obtained." In *Ah Sheung's Case* (4) the Chief Justice again said :—"The jurisdiction conferred by the Constitution extends to all decisions of the Supreme Courts of the States with such exceptions as may be made by Parliament ;" and, as no exception was made by Parliament in cases of habeas corpus, jurisdiction was asserted and exercised in a case where a man had been discharged on habeas. In other words "all" has been consistently held to mean "all" without qualification. *In re Eather* v. *The King* (5), already referred to, connotes the universality of this section, and says that there is no fetter on the discretion to grant that special leave once a *primâ facie* case of special circumstances is shown. For the purpose of my observations, I need only consider the Supreme Court as coming within the phrase "any Court exercising federal jurisdiction," because the Supreme Court of South Australia in this case was acting, not as the Supreme Court in State jurisdiction, but as a Court exercising federal jurisdiction under secs. 39 and 68 of the *Judiciary Act*. That the Supreme Court gave a judgment, is of course admitted, namely, the judgment of acquittal, the final judgment.

The argument that no revision can lawfully be allowed is reducible

(1) 15 App. Cas., 506, at pp. 528-529.
(2) 20 C.L.R., 299.
(3) 3 C.L.R., 730, at p. 736.
(4) 4 C.L.R., 949, at p. 951.
(5) 20 C.L.R., 147.

to four heads :—(1) That this is really an application for a new trial, and such an application is not within sec. 73; (2) that behind the judgment there stands a verdict which on its face is sufficient, no matter how it came into existence, and there is no power on an appeal against a judgment to disturb a verdict for any reason, and consequently the judgment must stand; (3) that, there being no circumstance such as would according to the former English criminal procedure in error have invalidated a verdict and judgment, the formal verdict is unimpeachable on appeal, notwithstanding there appears the most fundamental error of substance going to the root of the matter—and so again the judgment is protected; (4) that at all events verdicts of acquittal cannot be impeached on appeal, even if verdicts of conviction can, because of sec. 80 of the Constitution.

(1) As to the first ground of objection, I have already shown that this is not primarily an application for a new trial. If the judgment is declared unsustainable, without more, the Crown could prefer a new indictment (*Southampton Case* (1)), and the new trial asked for is only a consequential ancillary proceeding expressly provided for by sec. 36 of the *Judiciary Act* to simplify future action.

(2) Then as to the second objection. If it be a valid contention that a verdict, however nominal and perfunctory it may be, however little it represents the minds of the jury, who act as mere automata on the occasion, blocks the way to a revision of the final judgment, then a verdict of conviction must have that effect, just as much as a verdict of acquittal. As is said by Sir *James Stephen* in his *Criminal Law of England* (1863), p. 228, in speaking of the common law, "in criminal cases, the Crown is bound by an acquittal as much as the prisoner by a conviction." In *Murphy's Case* (2) the Privy Council treat them as on the same footing for this purpose. The binding force of these two verdicts is reciprocal at common law. If a Court trying a case on indictment holds, for instance, that a Commonwealth Statute is constitutional when it is not, or that it creates criminal liability when it does not, or that evidence having fatal results for the accused should be admitted and compelled when it should not, or accepts a verdict entirely unsupported by

(1) 19 Q.B.D., 590. (2) L.R. 2 P.C., 535, at p. 548.

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any reasonable evidence, then, if the contention referred to be correct, an innocent man unlawfully convicted may have to suffer lifelong degradation, because in Australia the error cannot be examined and set right, and according to the now well understood Privy Council rule that tribunal will not interfere unless justice in its very foundations be subverted.

But once concede that an unlawful verdict of conviction is no bar to an appeal against the judgment on which it is founded, then the reasoning disappears; and all that is left is to show that for some occult reason, a verdict of conviction presents no legal objection to revision of the judgment, while a verdict of acquittal does.

But does every verdict of guilty, however obtained, and even upon such grievous misapprehension of the law as I have suggested, entirely exclude an appeal from the judgment which is based upon it? Those who contend for that truly alarming result must at least confess that Parliament does not think so, because it has made distinct provisions in flat contradiction, and has enacted by sec. 73 that a man convicted may, if error occurs at his trial, have the judgment set aside, may even have a verdict of not guilty entered, may have a new trial or other proper order "as justice requires." Part X. of the *Judiciary Act* is headed "Criminal" Jurisdiction. Sections 72, 73, 74, under the sub-head "Appeal" relate to reservation of points of law to be argued *only if a person is convicted.* Sec. 75 relates to limitations on setting aside a conviction for the wrongful admission of evidence. Sec. 76 provides for arrest of judgment. And then comes sec. 77, which says "Except as aforesaid," that is, the before mentioned statutory provisions, "and except in the case of error apparent on the face of the proceedings," that is, manifest error in law on the record, "an appeal shall not without the special leave of the High Court"—which necessarily means for some cause of error other than either of the two specified classes—"be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth."

It is quite plain, therefore, that the people of the Commonwealth, speaking by their Parliament have sought to secure accused persons

from illegal convictions at all events, and by three methods— (1) specified statutory procedure, (2) manifest error, and (3) special leave in other cases, according to the unfettered discretion of the Court.

Was Parliament incompetent to do this? Was Parliament incompetent for instance to allow a convicted man to obtain the redress provided by sec. 73 of the *Judiciary Act*? There can be no doubt that Parliament cannot enlarge the appellate power of this Court. That is conferred in its widest form by the Constitution itself, in the words already quoted, and in that widest form is exercisable by this Court, except so far as Parliament has thought fit to limit it. (See *per Marshall* C.J. in *United States* v. *More* (1).) And if the appellate power is blocked by a verdict however obtained, sec. 73 is a snare. Parliament having allowed, both by sec. 77 already quoted and by secs. 35 and 39, the fullest power possible to this Court to grant special leave to appeal, "notwithstanding that the law of the State may prohibit any appeal," whenever it thinks fit, it follows that if the leave in the present case is not given, it is not because Parliament has denied the right to grant it, but either because the Constitution does not permit it, or because the Court declines to exercise that right.

The proposition that we cannot make any order on appeal except one that the primary tribunal could make cannot, as it seems to me, be correct. The primary tribunal, if it errs at a point where further evidence is necessary, must go on and take that evidence. We cannot take that evidence and make the judgment. We cannot do so in the first instance, because that would be original jurisdiction. But surely we can order the primary tribunal to proceed to do so, or make an order substantially so directing. *Ah Sheung's Case* (2) is an instance. And that is exactly what is sought here, the only difference being that in *Ah Sheung's Case* there was no jury and here there was one.

The case of *Musgrove* v. *McDonald* (3) is relied upon for the position that on an appeal from a judgment the verdict of a jury cannot be attacked, but must, in all cases, be accepted as correct.

(1) 3 Cranch, 159.
(2) 3 C.L.R., 998.
(3) 3 C.L.R., 132.

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One answer may be made on the instant. In *Baume* v. *The Commonwealth* (1) it was solemnly decided by the same Court that had previously decided *Musgrove* v. *McDonald*, and with equal unanimity, that where a State Court was exercising federal jurisdiction the same rule does not apply, but that this High Court has jurisdiction to entertain even a motion for new trial. *A fortiori* it must have jurisdiction to entertain an appeal from the judgment for a reason going to the very foundation of the judgment. Upon that decision no doubt the Crown has relied in this case, and no doubt Parliament has relied upon it in continuing to entrust federal jurisdiction of such enormous importance to State Courts. If *Baume's Case* is to be adhered to, it is an absolute answer to the respondent's objection. If every recorded decision on the Constitution is to be regarded as binding until a statutory majority of this Court determines it to be wrong—though it may be the judgment of a single Judge—and notwithstanding an equal division of opinion in the Court as constituted, then *Baume's Case* must, until so overruled, be accepted as governing this case, because the present case is one of federal jurisdiction.

But, independently of that, we have here, as a Full Bench, the obligation of considering for ourselves the accuracy of *Musgrove's Case* (2). If it is to be taken as correct in the extreme view it is said to present, then, whenever a federal indictment is tried before a State Court, it is well to understand the constant risk of justice being entirely defeated on one side or the other. But is *Musgrove's Case* correct ?

That decision is supposed to be supported to that extent by the Privy Council case of *Tronson* v. *Dent* (3). A careful examination of that case, however, which in this Full Bench we are bound to make, particularly as it is the decision of the Judicial Committee, will show that it does not support so sweeping a proposition. And as that is at the root of the second branch of the argument of the respondent, I shall state the effect of that case.

An action was tried in the Supreme Court of Hong Kong with a jury. Certain preliminary objections were raised which afterwards

(1) 4 C.L.R., 97.
(2) 3 C.L.R., 132.
(3) 8 Moo. P.C.C., 419.

proved to be futile, and the trial proceeded, the Judge charged the jury in the ordinary way, and the jury, in the ordinary way, considered what verdict they would give, and found in favour of the plaintiff with damages. After the verdict, and before the judgment, the Court gave leave to appeal to the Privy Council. The next step was the signing of final judgment. The appeal to the Privy Council came on, and the grounds, apart from the preliminary objections, which were, as I say futile, were simply such as are usual on new trial motions, and did not set up a case of mistrial or entire withdrawal of the case from the jury. There was a real verdict. An objection was taken that the appeal was really a motion for a new trial, which, indeed, it was, being in substance a complaint that the jury had formed an erroneous conclusion, and not a real appeal from any act of the Court, except in one respect, the first to be mentioned.

The Privy Council held :—(1) That on that one point, namely, manifest error by reason of the declaration being bad, they held against the objection. (2) That in Hong Kong in the Ordinances constituting the Supreme Court, it was enacted that English practice should be followed, and a new trial applied for, as it was the verdict, and not the judgment that was complained of. Sir *John Patteson*, in a passage that is the keynote of the judgment on this point, said (1) :—"I cannot see anywhere upon the face of these proceedings, or on the facts which are brought before us, how there is any appeal against any act of the Court, otherwise than against a judgment of the Court; then, if that be so, what is this appeal? Why, it is nothing more or less than an application for a new trial; not an appeal against an act of the Court, but an application to have the verdict of the jury set aside, and a new trial granted." In other words, the Privy Council looked to the real substance of the matter, as I am endeavouring to do here. Then said their Lordships, the English practice being to move for a new trial, and that being expressly adopted in Hong Kong, it ought to have been followed. (3) That as the Royal Instructions provided an appeal only from a final decree or judgment or order, and as the application was "in effect and in truth neither more nor less than an appeal professing

(1) 8 Moo. P.C.C., 419, at p. 442.

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to be an appeal against a judgment, but, in truth, an appeal by way of motion to set aside the verdict, and to have a new trial" it could not be entertained (p. 446; repeated at the end of the judgment). I do not for a moment doubt that if in that case the Privy Council had found such a fundamental error as the act of the Court presents in this case, it would have entertained the appeal and reversed the judgment.

The case of *Tronson* v. *Dent* (1), in my opinion, itself leads irresistibly to the conclusion that the Court should examine the appeal to see what it is in truth and in effect that is challenged: whether it is the finding of the jury or the act of the Court. If it is the former, then, as in that case and in *Dagnino* v. *Bellotti* (2), it is not an appeal against the judgment of the Court. But, on the other hand, an application to set aside a judgment based on a verdict that is illegally given—that is, one of which the error consists, not in an unsound conclusion of fact by the jury, and for which they are made the tribunal to decide, but in *some fundamental mistake on the part of the Court*—is not in truth and effect an application for a new trial or a complaint against the verdict. This is a distinction which, as will be presently seen, is recognized and enforced by English law. It is in the last instance an appeal against a judgment which has no real substratum of legality to support it; and here, in this case, in truth and effect the appeal is that *no real verdict* was allowed to be given, but that the arm of the Court was interposed between the jury and the duty they were constitutionally appointed to discharge, and intercepted their performance of it.

That interlocutory interception, which for the purposes of this decision is assumed by the whole Court to have been illegal, is none the less open to revision, because the appeal is against the final consummation of the error. The Privy Council, in several cases, have held that unless there is some law or regulation which renders it imperative upon a suitor to appeal from every interlocutory order by which he may consider himself aggrieved, he may wait till the whole cause is decided and then have any erroneous interlocutory decision corrected. It was so held in *Maharajah Moheshur*

(1) 8 Moo. P.C.C., 419.

(2) 11 App. Cas., 604.

Sing v. *Bengal Government* (1), recognizing previous cases, and this was followed in *Forbes* v. *Ameeroonissa Begum* (2) and *Sheonath* v. *Ramnath* (3).

It is objected that the decision of *Gordon* J. was not an interlocutory judgment. Well, what was it? Was it not an act of the Court when the learned Judge took the case out of the hands of the jury, and intercepted them in the performance of their duty under sec. 80 of the Constitution? If we are to look for precedent, the English Courts have never in such a case permitted substance to be strangled by form. In the *Judicature Act* 1873, sec. 47, it is provided that "no appeal shall lie from any judgment of the . . . High Court in any criminal cause or matter, save for some error of law apparent on the record." The Court of Appeal in 1883, in *R.* v. *Foote* (4), said:—"The question is whether the word 'judgment' is used in a general or in a technical sense, as confined to final judgment in criminal cases. I am of opinion that it is used in the larger sense, of all decisions in criminal matters."

Again, in *Lane* v. *Esdaile* (5), when dealing with the words "order or judgment" in the *Appellate Jurisdiction Act*, Lord *Halsbury* L.C. said of a supposed decision sought to be brought within those terms, "although it was no one of those things in name it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie." This is exactly in line with the course of reasoning in *Tronson* v. *Dent* (6). I think the formal written judgment of *Gordon* J. was a judgment within sec. 73 of the Constitution and appealable either in conjunction with or independently of the final judgment.

(3) The third point is that notwithstanding an erroneous ruling of the Judge on even a fundamental point, a judgment based wholly on a verdict founded on that ruling cannot be impeached, but an application for a new trial must be made, where new trial is permissible, and otherwise there is no redress. It is, of course, formally conceded by those of my learned brethren who support that objection, that an appeal does lie from every judgment, and therefore, in a sense,

(1) 7 Moo. Ind. App., 283, at p. 302.
(2) 10 Moo. Ind. App., 340, at p. 359.
(3) 10 Moo. Ind. App., 413.
(4) 10 Q.B.D., 378, at p. 380.
(5) (1891) A.C., 210, at p. 211.
(6) 8 Moo. P.C.C., 419.

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from this judgment. To deny so much would simply be to flatly contradict the literal terms of the Constitution.

But the concession as applied here is only nominal and amounts to nothing. The objection withholds in substance what it professes to yield. It says :—" True you may appeal from the judgment, but the moment you encounter the verdict you are stopped. *Gordon* J., once he had that verdict, was right in acting on it by entering the judgment, and therefore we cannot say he was wrong." I entirely agree with those of my learned brethren who reject that reasoning ; and, with respect, I think its fallacy lies very near the surface.

The real question is : " *Can a judgment be appealed from on the ground that it has no support whatever, except a verdict that is not a real verdict but only a perfunctory verdict rendered on compulsion and wholly unwarranted by law?* " In the first place, the powers on appeal which this Court possesses are entirely independent of whether any appeal lies to a State Court or what power any State Court has on appeal. Sec. 39 of the *Judiciary Act* expressly says that in federal jurisdiction this Court may grant leave to appeal notwithstanding that the law of the State may prohibit any appeal. So that Parliament has not cut down otherwise unlimited powers of this Court under the Constitution.

In a sense *Gordon* J. was right in accepting and acting on the verdict once he had obtained it. But he was right, not in the sense that the law regarded it as valid, but because he for the moment thought it was. Every Judge must act according to his interpretation of the law, and whatever he does in that case is right from the standpoint of duty. But if his interpretation of the law is found to be wrong a Court of appeal must say that what he did was wrong as a matter of law and correct it, though it would still say it was right as a matter of duty, and that he, holding the opinion he did, could not do otherwise, because he would be acting inconsistently.

It is said the law required him to enter judgment upon the verdict. Again the same fallacy presents itself. There is no law which says that a Judge must accept an unlawful verdict or act upon it if received.

The State Court was invested with federal jurisdiction to try the case. Instead of enacting for itself an original code of procedure, the Commonwealth Parliament has said to the Courts so invested: "When trying Commonwealth cases, adopt as our procedure the same as you follow in State matters." So, in a sense, we have to inquire what course the law required in State matters. Now, I am unaware of any State law which requires a Judge to enter a judgment upon an unlawful verdict. If any law of South Australia does say so, none has been suggested; but the opinion I am opposing assumes that there is such a law. As I understand the law, it says to the presiding Judge: "Proceed according to law, both the substantive law and the procedural law, and, when you have a lawful verdict, enter judgment accordingly."

A judge's mistaken belief that a verdict is such as he is empowered and required to act upon does not make it such; and if the verdict is vitiated by a radical error of law it is unlawful, and not such as he was empowered or required to act on.

Shortly put, *Gordon* J. acted contrary to law in demanding such a verdict, he acted contrary to law in receiving and acting upon it, and a judgment coming into existence in that manner cannot be sheltered behind that which the law declares invalid. No stream can rise higher than its source, and such a judgment can claim no higher validity than the erroneous verdict it springs from. If the reasoning from which I differ be sound, it must prove to be so disastrous when applied to convictions and to civil cases that I do not grudge the amount of consideration I bestow upon it. With the greatest deference, it seems to me impossible to maintain the objection in the face of the natural meaning of the language of sec. 73 and of the relevant authority which binds us.

The first class of precedents are of general application. Until 1844, appeals for reversal of "judgments, sentences, decrees, and orders" of colonial Courts could not be brought to the Privy Council except from Courts of Error, or Courts of appeal. But in that year the Imperial Act 7 & 8 Vict. c. 69 was passed, by which appeals to the Sovereign in Council from any "judgments, sentences, decrees, or orders" of any Court might be brought, even though not a Court of Error or appeal. Observe the words are precisely the

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same as in sec. 73, though transposed. Under that Act, and strictly under the powers contained in that Act and not under the Royal Prerogative, and therefore in exactly the same circumstances as we can act, several appeals have been permitted for the reversal of judgments on grounds which it is said here are not permissible in appeals from judgments, including the defects of verdicts, which, when received by the Court, were acted upon with just as much propriety as in the present case.

The first application under the Act was a Jamaica case in *In re Barnett* (1), in which a verdict had been given against him for £1,619. What was complained of was a ruling of the trial Judge, who refused to sign a bill of exceptions, which deprived the defendant of his writ of error in Jamaica. Leave was granted to the petitioner, to enter and prosecute his "appeal or bill of exceptions" to the charge and opinion of the Judge. Again, in *Harrison* v. *Scott* (2), the Privy Council allowed an appeal from a judgment after verdict for misdirection, and a *venire de novo* was granted. This also was a bill of exceptions. A third case was *Attorney-General for Jamaica* v. *Manderson* (3), in which an appeal was permitted under the same Statute on a bill of exceptions. The appeal was allowed, Lord *Campbell* saying (4):—"Let us now look whether the law was properly expounded to the jury by the Judge of the Court below; for unless the Judge miscarried in this respect, the appeal cannot be maintained upon a bill of exceptions." That is a most important statement, because, in the first place, it completely answers the view that, once a verdict is received and the Court acts on it by entering judgment, the judgment on a judgment is unassailable, and, next, it points out what is sometimes overlooked, namely, that all misdirections are not on the same footing.

The fact that the error appeared in a bill of exceptions is immaterial to this point, which inquires merely whether an error of the interlocutory nature mentioned leading to a vicious verdict is ever a ground for an appeal against the final judgment. A provision for a bill of exceptions, which "is in the nature of an appeal" (3 *Bl.*

(1) 4 Moo. P.C.C., 453.
(2) 5 Moo. P.C.C., 357.
(3) 6 Moo. P.C.C., 239.
(4) 6 Moo. P.C.C., 250, at p. 256.

Com., 372), is only practice and procedure, and any other way of evidencing the error may be accepted as sufficient so long as there is the jurisdiction to entertain the objection.

Now I come to criminal cases; and before quoting the decisions themselves we have to bear in mind the fact that there never has been strictly speaking a Court of general appeal in England or in the Australian Colonies.

In *Stephen's History of the Criminal Law of England*, vol. I., p. 308, this passage occurs :—"It is a characteristic feature in English criminal procedure that it admits of no appeal properly so called, either upon matters of fact or upon matters of law, though there are a certain number of proceedings which to some extent appear to be, and to some extent really are, exceptions to this rule."

There might be proceedings in error for error manifest on the record, and it is conceded that if this judgment were challenged for error appearing on the record the appeal could be successful. And it is true that according to the practice prevailing in England and followed in State Courts—unless altered by Statute—the most vital objections to a verdict and judgment do not appear on the record. *Stephen* proceeds to observe (p. 309) :—"As the record takes no notice either of the evidence or of the direction given by the Judge to the jury the grossest errors of fact or of law may occur without being in any way brought upon the record, and as the writ of error affirms that there is error *on the record*, no error which is not so recorded can be taken advantage of by those means."

In the celebrated Report of the Commission on the Criminal Code 1879 (by Lord *Blackburn*, Lord Justice *Barry*, Sir *Robert Lush* and Sir *James Fitzjames Stephen*) it is said at page 37 :—"The record is so drawn up that many matters by which a prisoner might be prejudiced, indeed the matters by which he is most likely to be prejudiced, would not appear upon it; for instance, the improper reception or rejection of evidence, or a misdirection by the Judge would not appear upon the record. The remedy therefore applies only to questions of law, and only to that very small number of legal questions which concern the regularity of the proceedings themselves, *e.g.* an alleged irregularity in empannelling the jury

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(*Mansell* v. *R.*) or in discharging a jury (*Winsor* v. *R.*) or a defect appearing on the face of the indictment (*Bradlaugh* v. *R.*). The result is that the writ of error is confined to a very small number of cases of rare occurrence."

Now, this was really the only method of appeal in criminal cases known to the English law up to 1900.

There was a Court of Crown Cases Reserved, which first arose in 1848. Up to that time Judges, if they were in doubt about the legality of a conviction, met informally, considered the case, and either did nothing or recommended a pardon.

But when it is suggested that the right of appeal under sec. 73 of the Constitution is limited by the scope of writs of error or of the practice of English Courts, I am unable to accept the suggestion. Sec. 73 does not constitute this Court a Court of Error, but a Court of appeal in the widest and most general sense (see *R.* v. *Murphy* (1)). I decline absolutely, until coerced by a statutory majority of this Court, to accept the argument that, notwithstanding the unqualified terms of sec. 73, all those legal circumstances to which Lord *Blackburn* and his fellow Commissioners pointed as most likely to prejudice a prisoner are excluded from our consideration in the specially serious cases where a jury is to find the facts.

In my opinion we have, under the comprehensive terms of the Constitution, the power to decide any of the questions of law which a Court of Crown Cases Reserved ever has in England been specifically given power to determine. If that is not so, then sec. 73 of the *Judiciary Act* is necessarily invalid, because Parliament cannot extend the appellate power.

But if primarily there is that power, and Parliament has not taken it away, as it has not, we have exactly the same power as the Court had in *Yeadon's Case* (2), to which I now advert. That was a case quoted on the argument of this appeal, and I have not heard any answer to it. The Judge told the jury that they had no power to find the prisoner guilty of common assault on the indictment, as they wanted to do. On the direction the jury altered their verdict and returned one of "guilty," which meant "guilty of an assault occasioning bodily harm." The Court of Crown Cases

(1) L.R. 2 P.C., 535, at pp. 548-549. (2) Le. & Ca., 81.

Reserved (*Pollock* C.B., *Wightman* and *Williams* JJ., and *Martin* and *Channell* BB.) said there was a mistrial and ordered a *venire de novo*. Now, it is important to observe that the only power the Court had, as was pointed out by *Channell* B., was to "reverse, affirm or amend the judgment, but not the verdict." *Martin* B. said:—"There is no verdict, as the second is illegal." But why was the second verdict illegal? Simply because the Judge, as in this case, fundamentally misdirected the jury as to the verdict they were allowed by law to give. Obviously the Court did not accept the view that the judgment was unchallengeable on the ground that once the verdict was received the Court was bound to act upon it.

The law of that case has never been questioned, and is, I venture to think, perfectly sound, because it is well established that for mistrials in criminal cases a *venire de novo* is the remedy (see *per Blackburn* J. in *Winsor* v. *The Queen* (1). As already seen the procedure is far from obsolete, and was followed, as late as October 1914, in *Ingleson's Case* (2). And if that case is sound it appears to me a clear answer to the objection.

The so-called verdict of not guilty in this case therefore stands in this position. Until challenged in a competent Court of appeal it is presumed to be correct. But once it is challenged in a Court of appeal, and shown to rest on no legal foundation, it is then a mere nullity, and so we should regard it and set aside the judgment which it purports to support.

I am therefore of opinion that the constitutional grant of appellate power extends to the correction of such an error as appears in the present case by annulling the judgment and vacating the verdict.

(4) The next objection is that sec. 73 of the Constitution which enacts that the High Court shall have jurisdiction to hear and determine appeals from "all judgments" should be read "all judgments not being judgments of acquittal." I am unable to follow the learned Chief Justice in inserting into the Constitution any such exception.

It is suggested that sec. 80 cuts down sec. 73, because—as the argument runs—sec. 80 connotes finality in favour of the accused when there is a verdict in his favour. In the first place, as was

(1) L.R. 1 Q.B., 289, at p. 302. (2) 11 Cr. App. R., 21.

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recently said by the United States Court, the Constitution is not self-destructive, and when the universal word "all" is used in sec. 73 some equally clear word of restriction must be found elsewhere if the gift is to be divested. But, in the next place, the argument proves too much. Sec. 80 is not one-sided in its operation. True, it was reproduced from the American Constitution, and inserted to safeguard the subject from some supposed tyranny of Judges under Crown control—a relic of a time that has now passed into history; but, once there, both sides must abide by its operation alike. If it connotes finality where the accused is acquitted, so must it connote finality where the accused is convicted. That, as already pointed out, was Sir *James Stephen's* view of the common law, and it is noteworthy that Lord *Blackburn* and his colleagues, while stating that they "as a body express no opinion on the expediency of" providing a right of appeal both to the Crown and the prisoner, did, in fact, frame clauses having that effect, leaving it to the Crown's advisers to adopt or reject them as they thought best. The provisions were not adopted so as to allow of appeals in case of acquittal, but we may be quite certain that nothing fundamentally opposed to the essentials of British justice could have found its way into a document prepared by such eminent jurists. The principle itself has been accepted by the Dominion Parliament of Canada, by the *Criminal Code* of 1906, c. 146, secs. 1014 to 1018, very largely based on the draft code formulated by Lord *Blackburn's* Commission. See the case of *R.* v. *Fraser* (1) decided in 1913. There the trial Judge wrongly directed the jury to acquit the prisoner, and this was done. The appeal failed only because it was the private prosecutor, and not the Crown itself, who appealed.

No suggestion was made at the Bar or elsewhere that the Court can retry the accused or usurp the office of the jury, or review all verdicts of acquittal at discretion any more than verdicts of conviction. But what was argued, and I fully agree with it, was this: that this Court is entrusted by the Constitution with the sacred duty of seeing, in any matter which comes before it, that the Constitution and the laws are faithfully observed and not transgressed, and that no perfunctory verdict either for a plaintiff or a defendant,

(1) 30 Ont. L.R., 598.

or of conviction or acquittal, deprives the Court of a power to annul a judgment founded upon a total misapprehension of the law.

And, agreeing with that, I am of opinion that leave to appeal should be granted.

HIGGINS J. The question is, should we give special leave to appeal in this criminal case. It is urged for the appellant that the learned Judge who tried the case directed the jury wrongly, in stating that the Act as to trading with the enemy was not retrospective as to attempts to trade made during the war but before the passing of the Act, and in stating that therefore the negotiations of the accused as to copper which took place before the Act were (to use the words of the Judge) "entirely shut out from" their "consideration." It is stated in the appellant's affidavit, and not disputed, that "this case is of gravity involving matter of great public interest and importance." The respondent contends that the Judge's construction of the Act is right; that even if it is not right there can be no appeal from the judgment of discharge given after a jury's verdict of "not guilty"; and that the Act is invalid, either altogether, or so far as it is retrospective.

If there can be no appeal, that settles the question. It is said that there can be no appeal on two grounds: (1) that no appeal lies from acquittal after verdict; and (2) because the judgment simply followed the verdict, and this Court cannot reverse a judgment which was right according to the verdict. It must be assumed, in dealing with these objections, that the direction of *Gordon* J. to the jury was, or may be, wrong.

Now, as to the first objection, it has long been the practice of the English Courts to treat a verdict of "not guilty" in a criminal trial as being, in nearly every class of case, conclusive; to treat the consequent judgment of discharge as not being subject to any appeal, or even (except in such cases as fraud in the proceedings on the part of the accused) to an application for a new trial to the Court of trial, even when the jury has acted under a mistake made by the Judge in directing them as to the law. But this practice of no appeal was not confined to acquittals; until the *Criminal Appeal Act* 1907 there was no appeal in England from either conviction

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or acquittal. The *Crown Cases Act* 1848 allowed the Judge at the trial to reserve any question of law for all the Judges and Barons, but only in the case of a conviction. In 1907 a right of appeal was given to persons convicted, but no right of appeal was given from an acquittal. That is to say, in 1900, when our Constitution was passed into law, there was no appeal in English Courts from either conviction or acquittal; and since that time the British Parliament has created a right of appeal from conviction only. But how is the practice of the British Courts binding on the High Court under the Constitution? Sec. 73 of the Constitution provides as follows:—"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of any . . . Court exercising federal jurisdiction." It is not pretended that Parliament has made any "exception" or "regulation" which cuts down this unlimited power over *all* judgments except this—that the appeal cannot be brought without the special leave of the High Court (sec. 35 (1) (*b*)). The High Court is, by this provision, able to protect itself from being flooded with the innumerable appeals that might be brought in criminal cases of all kinds; and, according to the pronouncement of the Court in *In re Eather* v. *The King* (1), we have an unfettered discretion to grant or to refuse special leave in every case—including criminal cases (*Attorney-General of New South Wales* v. *Jackson* (2)). The jurisdiction of the High Court to hear appeals comes, therefore, direct from the Constitution, and cannot be cut down except by the Federal Parliament. The British Parliament has, by sec. 73, conferred on the Australian Parliament an unlimited discretion to say what appeals may be withheld from the High Court; and the Australian Parliament has, in effect, passed on the unlimited discretion to the High Court. We are not bound by any rule, whether based on time-honoured practice or otherwise, that has not been imposed by the Australian Parliament. We have treated this Court as not bound by the English rule, quite as rigid, that there can be no appeal from an order under a habeas corpus writ

(1) 20 C.L.R., 147. (2) 3 C.L.R., 730.

releasing a person detained. The rigidity of this rule is emphatically stated by Lord *Halsbury* in *Cox* v. *Hakes* (1). We have just now, in *Lloyd* v. *Wallach* (2), allowed an appeal from such an order made by the Supreme Court of Victoria; see also the case of *Ah Sheung* (3). Sec. 80 of the *Judiciary Act* provides that the common law of England shall govern all Courts exercising federal jurisdiction; but it is the common law "as modified by the Constitution" and only "so far as the laws of the Commonwealth are not applicable"; and the laws of the Commonwealth are fully applicable to the case. The fact that the accused has been actually discharged from custody is no bar to appeal (*cf. R.* v. *Mount and Morris* (4)). If the accused had been acquitted by a Court of summary jurisdiction, it is conceded that an appeal would lie from the judgment of that Court. If the accused had been acquitted without verdict in this case, as *Gordon* J. first proposed, it is clear that the appeal would lie; and I cannot conceive how the interposition of the formal verdict, given without consideration of the facts and under a mistaken direction from the Judge, can have the extraordinary effect of preventing the Court of appeal from rectifying the mistake.

But, it is urged, (2) how can there be an appeal from a judgment which is clearly right as merely following the verdict? One cannot appeal from a verdict, which is the act of a jury; one can only, under sec. 73 of the Constitution, appeal from a judgment, &c., of a Court. That is undeniably true. But if the judgment be set aside, on the ground of a mistake of the Court as to the law, the accused can be subjected to a fresh indictment on the same facts—he cannot plead *autrefois acquit*: *Com. Dig., Indictment* (N); *R.* v. *Wandsworth* (5); *R.* v. *Inhabitants of Southampton* (6); and see *R.* v. *Yeadon* (7). This is not an appeal from the verdict; nor is it even an application for a new trial. It is simply an appeal from the judgment of the Supreme Court of South Australia, to which the whole matter of the trial was entrusted under sec. 39 of the *Judiciary Act*. The facts had to be ascertained by a jury (under sec. 80 of the Constitution), and the law had to be stated to the

(1) 15 App. Cas., 506, at p. 514.
(2) 20 C.L.R., 299.
(3) 4 C.L.R., 949.
(4) L.R. 6 P.C., 283.
(5) 1 B. & Ald., 63.
(6) 19 Q.B.D., 590, at p. 599.
(7) 31 L.J. M.C., 70.

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jury by the Court; and under (what is assumed to be) a mistake of the Court as to the law, the jury have not yet applied their mind to the facts—these facts were entirely shut out from their consideration. The true position is that the learned Judge made the mistake of law (assuming it was a mistake) not merely in directing the jury, but in giving judgment after the verdict. If he had come to the true view of the law the moment after the verdict, it would have been his duty to refuse to give judgment in pursuance of the verdict. It is from the continuing mistake—the mistake made after (as well as before) the verdict—that the appeal lies. We cannot find precedents on the subject in the English Courts, for until very lately there has been no Court of appeal for criminal cases. But the Judicial Committee of the Privy Council can hear appeals from judgments, both civil and criminal, delivered by Courts in the overseas Dominions. It is true that according to the practice of the Privy Council it usually declines to hear appeals in criminal cases; but there are exceptions to the practice. There is no instance that I know of the Privy Council refusing to reverse a judgment, civil or criminal, on the mere ground that the judgment was given in pursuance of a verdict which stands. On the contrary, in *In re Dillett* (1) there was a conviction for perjury; the accused had served his sentence of six months; he had been struck off the roll of barristers as the result of the conviction; and yet the Judicial Committee advised Her Majesty to set aside the verdict and conviction. It had become, as they said, unnecessary to order a new trial, as the accused had undergone the sentence; but the order striking off the rolls was reversed. It is true that this was a case of an appeal brought by a convicted person, not by the prosecutor; but I am dealing now with the point that a judgment cannot be set aside which merely follows a verdict. If this objection to appeal is good in criminal cases, it would also be good in civil cases. Yet in civil cases the Privy Council has frequently refused to treat its appellate powers as blocked by a verdict obtained by misdirection of the Judge: See *In re Bennett* (2); *Harrison* v. *Scott* (3); *Attorney-General for Jamaica* v. *Manderson* (4); *Stace* v. *Griffith* (5).

(1) 12 App. Cas., 459.
(2) 4 Moo. P.C.C., 453.
(3) 5 Moo. P.C.C., 357.
(4) 6 Moo. P.C.C., 239.
(5) 6 Moo. P.C.C. (N.S.), 18.

In the case last mentioned, the objections to the Judge's charge did not even appear on the record, or on a bill of exceptions. The only power to hear an appeal on which the Privy Council acted in these cases was a power to hear an appeal from a "judgment" —as in the present case. In the Jamaica case, the words used were "judgment, sentence, decree, or order"—precisely the same words as are used in sec. 73 of the Constitution. In the present case, there was no opportunity for the prosecutor to seek to have the direction of the Judge as to the law corrected before the discharge of accused. No one suggests that an application would lie to the Full Supreme Court of South Australia for a new trial before judgment, in a criminal case. The prosecutor had, and has, no remedy whatever unless there can be an appeal from the judgment of *Gordon* J. In the case of an interlocutory order, regularly drawn up, passed and entered, it is not necessary for the aggrieved party to appeal at once; he can wait until judgment, until the case has been finally decided, and then attack the interlocutory order in the appeal from the judgment (*Maharajah Moheshur Sing* v. *Bengal Government* (1)). The same principle is applied where a point of law which would conclude the merits of the case has been argued and decided before the trial. In the present case no verdict has been entered, and no judgment has been entered; but the accused has been released from custody. I treat the judgment discharging the prisoner as an oral judgment consequent on the verdict; and for this purpose I may even assume that the learned Judge would not—and should not, even if requested—state in any postea, or in the judgment, the ruling which he gave as to the Act. It must be clearly understood that this Court is a Court of appeal, not a mere Court of Error—error on the face of the proceedings.

The position seems to be well summed up by *Parke* B. when expressing the opinion of the Judicial Committee in *Nathoobhoy Ramdass* v. *Mooljee Madowdass* (2):—"Undoubtedly such a verdict, in a common law suit, might be indirectly appealed from, in an appeal against the judgment in that suit, which is founded on that verdict, the evidence, as well as the finding, being brought up as part of the proceedings, and included in the transcript. But the

(1) 7 Moo. Ind. App., 283, at pp. 302-303 (2) 3 Moo. P.C.C., 87, at p. 96.

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verdict only, prior to judgment being given, could not be appealed from in a common law suit." The case of *Baume* v. *The Commonwealth* (1) is a distinct authority to the same effect, as to matters (such as the present) within the ambit of federal jurisdiction. In the previous case of *Musgrove* v. *McDonald* (2) one essential feature was that the appellant had not used his opportunity, before judgment being entered, of applying to the Supreme Court of South Australia for a new trial (it was a civil case, and the Supreme Court could grant a new trial); and the High Court ruled that an appeal did not lie, as of right. This Court certainly proceeded to lay down the law in terms of wider import. It was not a case of federal jurisdiction. I can only say that if I am compelled to choose between *Musgrove* v. *McDonald* and *Baume* v. *The Commonwealth*, I think that the latter, the more recent decision, is sounder in result. I am of opinion that where, at all events, this Court finds that there has been such a mistrial as in the present case—where it finds that the alleged trial was a fiasco, that the accused has not really been tried for the offence alleged—this Court has power to grant special leave to appeal from the judgment, and to correct all that has been done under the mistake of law.

What precise order should be made by this Court if it allow the appeal need not at present be settled. It cannot give a verdict itself (sec. 80 of the Constitution); it cannot allow an appeal direct from the verdict, the verdict being the act of the jury, not of the Supreme Court; but it can allow an appeal from the judgment, and take into consideration all the curial steps by which the judgment was obtained. If the judgment be arrested, there will be no bar to a fresh indictment; if the judgment be set aside in the exercise of our appellate jurisdiction, and if it appears that justice cannot be done without a fresh trial, this Court has power (it would seem) to order a new trial (*Judiciary Act*, sec. 36). But the power to grant a new trial is a power merely incidental to the power to allow the appeal. As I have already stated, this is not an application for a new trial.

Now, as for exercising our power to grant special leave to appeal, there can be no doubt as to the importance of the question as to the

(1) 4 C.L.R., 97. (2) 3 C.L.R., 132.

construction of the Act. The Act provides against those men who enjoy the benefit of Australian peace and order, and at the same time supply, or try to supply, for profit, the sinews of war to the enemy. There can be no doubt, moreover, that the ruling of the Judge on the construction of the Act is not clearly right, is open to serious debate—as has been shown in the course of the long argument in this Court; and the construction of the Act ought to be settled for the guidance of the tribunals. There is, therefore, a *primâ facie* case for lifting this criminal prosecution from the level of ordinary criminal prosecutions, and for giving special leave to appeal. It may be that the Crown's contentions will be found to be wrong; but, if they are wrong, they should be so declared by this Court.

I was at first inclined to the view that as the construction of the Act is in issue in other proceedings which do not present the complications of this case, we should refuse the application for special leave. But, on reflection, I have come to the conclusion that this would not be a proper ground for refusing the claim of the prosecution that justice be done in this particular case. It does not remedy the grievance in this case that justice will be done in other cases. Moreover, if we now refuse the special leave, it may turn out that the other proceedings may have to be decided on other grounds; or that the other litigants may not press their proceedings. It is improper to leave the rights of one set of litigants at the mercy of another set; and if the accused was really guilty, and ought to have been convicted, it will be monstrous that he should escape after he has disregarded the Proclamations of his King and the interests of the community. The questions raised as to the validity of the Act, in whole or in part, ought also to be decided; it has not been the practice of this Court to evade the decision of points because of their importance or their difficulty. The Crown here, representing the public, asks for no exceptional treatment; it merely seeks to assert its rights as an ordinary litigant. It seeks to have justice done between the public and the accused on the ground that the acquittal of the accused has been ordered under a mistake of law as to the construction of an Act of the gravest importance.

But yet the practice of British Courts—the practice of not allowing any appeal, or even an application for a new trial to the Court

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of trial, in criminal cases (subject to the Act of 1907)—has to be considered before we give special leave to appeal. I have stated my view that this practice is not fatal to our jurisdiction of appeal; but it may affect our discretion as to granting special leave. If I could find that the practice is based on some important general ground of justice or of expediency, it should usually be followed; but I cannot find any such ground. The object of any appeal is that justice may be done when the Court below has made a mistake; and, although justice to a person wrongly convicted is of transcendent importance, it is not more important than justice to the public, and (in this case) to the soldier who for the sake of the public takes the pains and risks of warfare. The allegation against the accused is that, after war had broken out, and after the King had, by Proclamation, announced that there should be no trading with the enemy, the accused attempted to trade with the enemy. It is unnecessary for the present purpose, to decide whether what is alleged would amount to treason on the part of the accused under the law before the Act; it is enough to say that the accused here has never yet been tried for the alleged attempt to trade with the enemy—that his actions before 23rd October 1914 have been, by the ruling of the learned Judge, "entirely shut out from consideration." There has, in fact, been no trial of the facts charged; and the alleged mistake should be rectified, if and so far as it can be rectified. I am of opinion that special leave to appeal should be granted.

GAVAN DUFFY and RICH JJ. In this case the defendant Snow was tried before *Gordon* J. and a jury in the Supreme Court of South Australia exercising federal jurisdiction under the provisions of sec. 39 (2) of the *Judiciary Act* 1903, for the offence of attempting to trade with the enemy. At the conclusion of the Crown case his counsel urged that the acts of the defendant proved to have been committed before the passing of the Statute which created the statutory offence were innocent because the provisions of the Statute did not apply to such attempts, and that there were no acts proved on which the jury could properly find that there had been an attempt

to trade after the passing of the Statute. *Gordon* J. agreed with this view, and directed the jury to acquit the defendant. The jury were not bound in law to act on this direction, though undoubtedly it was their duty to do so. They returned a verdict of "not guilty," and we think it must be taken that they did so, not on any consideration of the evidence, but in deference to the opinion of the Judge. When that verdict was returned, neither the Judge nor the Supreme Court was at liberty to order a new trial or to ignore the verdict; there was no course open but to enter formal judgment in pursuance of the verdict, or to discharge the defendant as if such judgment had been entered. The Crown now asks for special leave to appeal against the direction of the Judge to the jury or, in the alternative, against the judgment which followed the verdict. In our opinion the direction given by the Judge to the jury was not a judgment within the meaning of sec. 73 of the Constitution or sec. 35 of the *Judiciary Act* 1903: it was a mere statement of the law for the benefit of the jury on which they should have acted though they were not bound to do so. Had they chosen to ignore his direction and return a verdict of guilty, he could not have insisted on any other verdict. Nor was it a decision of a Court within the meaning of sec. 39 (2) of the *Judiciary Act* 1903, though that, for reasons which we shall presently state, is immaterial if it was not a "judgment." The result is that no appeal lies from the direction complained of. We must next consider whether an appeal lies from the judgment which followed the verdict. In form we think it does, for such a judgment is undoubtedly within the words of the Constitution and of the *Judiciary Act* 1903, but the substantial question is whether this Court could, on the appeal, make any order in favour of the Crown; if it could not, special leave should be refused. It is said that the case of *Musgrove* v. *McDonald* (1) decides this point against the applicant, and we think it does unless the distinction set up in the subsequent case of *Baume* v. *The Commonwealth* (2) is valid. *McDonald's Case* is, in our opinion, a clear authority for the proposition that this Court cannot on an appeal from a judgment either set aside the verdict on which the judgment is founded, or ignore it. If the verdict is wrong, it must

(1) 3 C.L.R., 132. (2) 4 C.L.R., 97.

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either be set aside by means of an application to the Court in which it was obtained, or, if no power exists to set it aside by such means, it must stand with all its consequences. We have been asked to reconsider the decision in *McDonald's Case* (1). We do not desire to cast any doubt on the accuracy of the proposition just stated, but it is enough to say that we think the appeal jurisdiction does not allow us to set aside a judgment which appears to be the only one that could properly have been made by the Court from which the appeal is brought. Our function is to determine whether the Court was right in entering judgment at the time when judgment was entered, not whether there had been mistakes in the earlier proceedings. That is the function of a Court of Error which scrutinizes not the judgment only but the whole record. The same end is attained, and mistakes not corrigible in a Court of Error, because not appearing in the record, are also provided for by modern statutory provisions in force in the Commonwealth, as they are generally in British communities, which permit, and in some cases compel, the presiding Judge at a criminal trial to reserve for the consideration of the Court questions of law arising in the course of the trial. No assistance can be gained from a consideration of the nature of the questions entertained or the orders made in appeals before the Judicial Committee of the Privy Council in criminal cases when it sits to scrutinize the record on appeal from a Court of Error or without the intervention of such a Court; and in any case the exercise of the Royal Prerogative by the King in Council to correct all miscarriages of justice is not analogous to the functions of this Court exercising the appellate jurisdiction conferred by sec. 73 of the Constitution. The judgment in *Baume* v. *The Commonwealth* (2) was founded on the hypothesis that sec. 39 of the *Judiciary Act* 1903 gave to this Court a so-called appeal jurisdiction different from and greater than that mentioned in sec. 35 of the same Act, and that it did so by virtue of the provisions of sec. 77 of the Constitution. In our opinion the words " appeal to the High Court " whenever mentioned in sec. 39 mean the appeal mentioned in sec. 73 of the Constitution as regulated by sec. 35 of the *Judiciary Act* 1903, and nothing else. Sec. 39 does not create a new appellate jurisdiction, but prescribes

(1) 3 C.L.R., 132. (2) 4 C.L.R., 97.

the conditions under which the existing jurisdiction may be exercised with respect to decisions of Courts invested with federal jurisdiction. It follows from what we have said that the decision in *Musgrove* v. *McDonald* (1) remains unaffected by anything said in *Baume* v. *The Commonwealth* (2), and directly governs the present case. But a very substantial question arises here apart from these cases, and it is this : Assuming this Court to have the power denied it by the judgment in *Musgrove* v. *McDonald*, is this a case in which a new trial could be ordered? We think not. It is a well established rule of the common law in England, and, as we believe, in every political community existing under the British Crown, that, though new trials may in certain circumstances be ordered where a verdict has passed for the Crown, a verdict of "not guilty" given by a jury on a sufficient indictment in a purely criminal trial conducted by a competent Court is final. It is suggested that this is so merely because of the practice of the Courts of common law, and that, being free of this practice, we can disregard the verdict if it has been obtained by misdirection. If this be true, we can do so whenever such a verdict is tainted by irregularity or mistake. Why cannot the Court set aside such a verdict when it is against evidence or the weight of evidence, or unsatisfactory to the Court, when evidence has been wrongly admitted or rejected, when it is perverse, or for any other reason which is sufficient to secure a new trial in a civil case? The reason is precisely that which prevents us from setting aside the verdict here. In theory, the jury are in every case the sole judges of the issues they are sworn to try, and the issues cannot be withdrawn from them except by some such expedient as accepting a nonsuit, or withdrawing a juror, or discharging the jury for cause. In the interests of justice the Courts assumed a certain control over the verdict of juries in civil and quasi-civil cases, and for the same reason and in favour of defendants they gradually assumed a lesser control over verdicts for the Crown in purely criminal cases, but there has been no sustained attempt to interfere in any way with a verdict of "not guilty" in such cases, though the Courts showed some disposition to do so nearly three centuries ago in the "troubled times of the Commonwealth."

(1) 3 C.L.R., 132. (2) 4 C.L.R., 97.

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First, out of respect for life when all felonies were capital, and, later, out of respect for character and reputation, the Courts resisted every attack on the inviolability of the verdict of "not guilty," and that inviolability has remained part of the substantive law to the present day. If this be true, what right can we have to set aside the verdict of the jury in this case under the pretence of entertaining an appeal from the sequential judgment? The Crown is not asking us to do what we should be free to do, but for the practice of the Courts at Westminster—it is asking us to interfere where hitherto there has been no interference or right to interfere. In the case of *R.* v. *Bertrand* (1) the Supreme Court of New South Wales had yielded to such a contention, and Sir *John Coleridge* in delivering the judgment of the Privy Council (2) considered the validity of the argument. He said:—"It seemed not to be very seriously denied that, except for the precedent of *The Queen* v. *Scaife* (3), the Court below, in making absolute the rule for a new trial, had introduced a new practice; but it was said that this was in analogy with the whole proceeding of our Courts of Justice in regard to new trials; that as to these, as in many other instances, a wholesome improvement in our law had been made and established; that this improvement had been made in the exercise of a wise discretion, and perhaps inherent powers, for the advancement of justice; that new trials had commenced in civil matters, and advanced in them gradually, and, upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings, first where the substance was civil, though the form was criminal, and thence to misdemeanours, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto it was admitted that they had, except in the instance of *The Queen* v. *Scaife*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their Lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what

(1) L.R. 1 P.C., 520.

(2) L.R. 1 P.C., 520, at p. 533.

(3) 17 Q.B., 238.

anomalies, and even imperfections perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion: what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this Committee, has jurisdiction to alter it, but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be." Is it to be supposed that the British Parliament, when providing by sec. 80 of the Constitution that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury," were leaving to this Court in its appellate jurisdiction the right to control at its pleasure the verdict of the jury? If so, that section is indeed a "mockery, a delusion and a snare." But the truth is that, in saying that the trial of offences shall be by jury, Parliament has said that the persons tried shall have all the benefits incidental to a trial by jury, and one of them is that a verdict of "not guilty" shall be final and conclusive on the issue the jury are sworn to try, the issue of "guilty or not guilty." In our opinion this Court has jurisdiction to give special leave to appeal from the judgment which followed the verdict in this case, but as the judgment cannot be interfered with while the verdict stands, and as there are no means of setting that verdict aside, it would be useless to give such leave, and we should refuse to do so.

POWERS J. As this case is very important and I arrive at a different conclusion from that arrived at by any of my colleagues, I propose to give, as concisely as I can, the reasons for my judgment, avoiding, as far as I can, repeating what has already been fully dealt with in the judgments just delivered.

In this case the defendant Snow was charged, in the indictment in question, with the offences of unlawfully attempting to trade with the enemy during the continuation of the present war, on certain named days in September and October 1914 (prior to 23rd October) and on the 2nd, 3rd, 4th and 5th days of November 1914. The *Trading with the Enemy Act* 1914 (No. 9 of 1914) was

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assented to on the 23rd day of October 1914. The indictment was laid under that Act. The defendant was tried for the offences mentioned, before *Gordon* J. and a jury, in the Supreme Court of South Australia, a Court exercising federal jurisdiction under the provisions of sec. 39 (2) of the *Judiciary Act* 1903.

The learned Judge at the trial, after the case for the Crown had closed and after hearing lengthy argument, but before any verdict was given by the jury, adjourned the hearing for a week, and then delivered a considered judgment. At the conclusion of that judgment the learned Judge said :—" With this evidence taken away, there is no evidence left upon which the jury could lawfully find any one of the counts in the information sustained. The result is that the accused stands discharged." What took place before the verdict of the jury was actually given has been referred to in detail by my brother *Isaacs*. After a long discussion the learned Judge appears to have decided that the course he first intended to adopt was not correct, and he directed the jury to bring in a verdict of " not guilty." The jury, in accordance with the direction, and without retiring, returned a verdict of not guilty. The defendant was discharged.

It is, I think, clear from the material before us in the appeal book, that the jury were not allowed to consider the evidence tendered in the case in support of the charges for attempting to trade with the enemy before or after the passing of the *Trading with the Enemy Act*. The facts deposed to were, as the learned Judge said, shut out from their consideration. The jury simply gave, by direction, a nominal verdict to give effect to the ruling of the learned Judge, namely, (1) that attempts to trade with the enemy before the Act was assented to, were not offences punishable under the Act; (2) that there was no evidence fit for the jury of any attempt to trade with the enemy in any of the ways described in the information after the *Trading with the Enemy Act* was passed on 23rd October 1914.

The course which the learned Judge in the end adopted was the usual course adopted where the presiding Judge considers there is no case to go to the jury, and, if the learned Judge was right in his view of the law, the direction was right. The question in this case

has been complicated by the first judgment delivered, and the fact that counsel for the accused contended that the course adopted by the learned Judge was the proper course to take to carry into effect the judgment referred to.

The Crown now applies for special leave to appeal (1) against the judgment after acquittal, on the ground that the judgment was not based on a verdict of a jury in the ordinary sense of the words, but that there was a mistrial, the defendant having been in fact tried by a Judge and not by a jury, or (2), in the alternative, against the judgment of the learned Judge before verdict, on which judgment the jury acted, formally bringing in, by direction, a verdict of not guilty, without being allowed to consider their verdict, and only to give effect to the judgment previously delivered by the Court.

The first, and most important, question to be decided is whether this Court can under any circumstances entertain an appeal in a criminal case where there has been a judgment of acquittal after a verdict of a jury, *however obtained*, in the Supreme Court of a State exercising federal jurisdiction. That question can, I hold, only be decided by reference to the Constitution, and the *Judiciary Act*, because the appellate jurisdiction of this Court is subject only to such exceptions and to such regulations as Parliament prescribes. As no exceptions or regulations have been prescribed by Parliament, we need only look to the Constitution to see whether such a judgment is within the words used in the Constitution, giving this Court jurisdiction to hear and determine appeals. (See sec. 73).

I understand that my brothers *Gavan Duffy* and *Rich* agree that the word "judgment" in sec. 73 includes a judgment of acquittal after a verdict of acquittal by a jury, but that they do not think any useful order could, on the appeal, be made in favour of the Crown, and therefore leave to appeal should be refused. Secs. 36 and 37 of the *Judiciary Act*, I think, show that this Court can set aside the judgment, once jurisdiction is admitted, if it is erroneous, but my brothers *Isaacs* and *Higgins* have dealt fully with that objection. I agree with what they have said on that point. I think it is clear that, if the words "judgments, decrees, orders, and sentences" in sec. 73 of the Constitution do not include judgments

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of acquittal in criminal cases tried in the Supreme Court of a State exercising federal jurisdiction by a Judge and jury, they do not include judgments of conviction after trial by a Judge and jury in State Supreme Courts exercising federal jurisdiction, and appeals from judgments of conviction based on verdicts of juries have long been recognized in England and in all the States.

As to the very important question whether this Court has the jurisdiction to hear and determine an appeal from the judgment in question, sec. 73 of the Constitution provides as follows :—" The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of any . . . Court exercising federal jurisdiction." It was not contended that Parliament has made any exception or regulation which cuts down the unlimited power. The only regulation is that the appeal cannot be brought except with the special leave of the High Court. See sec. 35 (1) (*b*) of the *Judiciary Act*; see also sec. 77 of the same Act conferring an unlimited discretionary power of appeal from any cause not referred to in secs. 72 to 76. Secs. 72 to 77 deal with appeals in criminal cases. I hold that it is not for this Court, but only for Parliament, to make exceptions, if any, to the powers granted by sec. 73 of the Constitution, and that the words " appeals from all judgments " in sec. 73 should be construed by us, as a Court, to mean appeals from *all* judgments, and not appeals from all judgments except (1) judgments based on verdicts of acquittal by a jury in criminal cases, or (2) judgments based on verdicts of a jury in the Supreme Court of a State, or (3) judgments based on verdicts of conviction by a jury in criminal cases in the Supreme Court of a State exercising federal jurisdiction, or any other exceptions that may from time to time be suggested to the Court. The exceptions are only those enacted by the Parliament of the Commonwealth. Nor do I think that the power given by the Constitution to this Court to hear and determine appeals from all judgments of State Courts exercising federal jurisdiction can be altered or limited by any State law. Sec. 39 (2) (*c*) of the *Judiciary Act* provides that " The High Court may grant special leave to appeal to the High Court from any decision of any Court

or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge."

If sec. 39 of the *Judiciary Act* is to be ignored, or if sec. 73 of the Constitution only gives this Court jurisdiction to hear and determine appeals allowed by a State law, any State can, by passing a State law, prevent any appeal to this Court from the State Courts, even when those Courts are exercising federal jurisdiction. The appellate jurisdiction of this Court would thus depend on the pleasure of the different States, and differ in each State. I cannot accept the argument that when the Constitution gave jurisdiction to this Court to hear and determine appeals against all judgments, it only gave this Court power to *entertain* appeals from all judgments, but only to *grant* appeals in some cases, and also that the appeals which this Court can hear and *determine* depend on State laws, or the want of them. It is true that this Court should administer the laws of the State, but the appellate jurisdiction to this Court to decide whether judgments given in the State Courts are lawful or erroneous cannot be affected by any State law.

It is admitted that neither in England nor in the Australian States is there any recorded case of an appeal or an application for leave to appeal in an ordinary criminal case after judgment of acquittal based on a verdict of a jury. If I am right in holding that " appeals " in sec. 73 of the Constitution does, however, include such an appeal, it is for Parliament, if it thinks fit, not for this Court, to make such judgments an exception, and in that way prevent this Court from granting appeals in such cases, if it finds it necessary to do so.

It is interesting to note that in March 1907 the United States Congress passed a law, " Chapter 2564, an Act providing for writs of errors in certain instances in criminal cases " giving the United States a general power to obtain writs of error in certain cases *in criminal cases*, but specially providing that no writ of error should be granted where the verdict on indictment was in favour of the defendant. It was thought necessary to pass such a law although the same provision is made in the United States Constitution as in ours, viz., that indictable offences shall be tried by jury.

In 1906 the Canadian Dominion Parliament, on the other hand, passed an entirely different Act specially allowing the Crown to

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appeal against judgments of acquittal in criminal cases based on a verdict of a jury: *Criminal Code*, Chapter 146, secs. 1014 to 1018.

I think that this Court was right when it held, as a Full Court in 1906, in the case of *Attorney-General for the Commonwealth* v. *Ah Sheung* (1), that there was no doubt as to the jurisdiction of the High Court to entertain an appeal against an order by the Supreme Court of a State under a writ of habeas corpus discharging a person under arrest. The jurisdiction conferred by the Constitution extended to all decisions of the Supreme Courts of the States with such exceptions as might be made by Parliament, and no exception had been made by the *Judiciary Act* in cases of habeas corpus. The same words are applicable in this case. There is jurisdiction because no exception has been made by the *Judiciary Act* in cases of judgments based on acquittals by a verdict of a jury, in trials in the Supreme Court of a State exercising federal jurisdiction.

As I have said, it is admitted that no appeal has yet been asked for or granted in Great Britain or in the States in a case of an acquittal by a jury in a criminal case, but is it not equally true that no appeal has ever been granted in England against an order for release obtained under a habeas corpus by a person under arrest? If the fact that no such appeal can be granted by any appeal Court in England or in the States prevents it being included in the words "all judgments" in sec. 73 of the Constitution, then this Court was wrong in granting the appeal in *Ah Sheung's Case* (1), and was also wrong in allowing the appeal allowed to-day by this Court in *Lloyd* v. *Wallach* (2). *Parkin* v. *James* (3) and *Baume* v. *The Commonwealth* (4) are also judgments by this Court in favour of the view that the only exceptions to the appeals mentioned in sec. 73 of the Constitution are those, if any, made by the *Judiciary Act*.

It was contended that this Court should not grant leave to appeal in this case, on the ground that the Full Court of this Court (consisting at the time of three Judges) in *Musgrove* v. *McDonald* (5) held that an appeal did not lie to the High Court of Australia from a verdict of a jury, or a judgment of the Supreme Court founded

(1) 4 C.L.R., 949.
(2) 20 C.L.R., 299.
(3) 2 C.L.R., 315.
(4) 4 C.L.R., 97.
(5) 3 C.L.R., 132.

upon a general verdict of a jury, except by way of appeal from a decision of the Supreme Court in an application for a new trial. That decision has not been reversed (unless, in part, by *Baume's Case* (1), to which I will refer), but we were expressly asked, as a Full Bench of six Judges, to reconsider the judgment in *Musgrove* v. *McDonald* (2) on this application, and the Court agreed to reconsider it.

If *Musgrove* v. *McDonald* decided the question raised in this case, and if no other later decision had been given qualifying it, as the majority of this Court, on reconsideration, do not see their way to reverse that judgment, I personally would feel bound by the decision. After carefully considering other cases, particularly *Baume* v. *The Commonwealth*, I have come to the conclusion that the judgment in *Musgrove* v. *McDonald* does not prevent this application being granted, because the same Judges, in a Full Court decision nine months later, in *Baume's Case* qualified their decision in *Musgrove's Case*, by holding that this Court has jurisdiction to entertain a motion for a new trial after the verdict of a jury in the Supreme Court of a State *exercising federal jurisdiction* under sec. 39 of the *Judiciary Act* 1903. The judgment in this case against which leave to appeal has been asked for was one in which the verdict of a jury was given in the Supreme Court of a State exercising federal jurisdiction under sec. 39 of the *Judiciary Act* 1903, and therefore the later decision in *Baume's Case* should, until reversed, be accepted as the law, and this Court ought in the meantime to follow it. After *Baume* v. *The Commonwealth*, it appears to me that *Musgrove* v. *McDonald* can only be held to apply to cases in which the Supreme Court is not exercising federal jurisdiction. *Musgrove* v. *McDonald* is, in my opinion, inconsistent with *Parkin* v. *James* (3), an earlier case, and with the *Attorney-General for the Commonwealth* v. *Ah Sheung* (4) and *Baume* v. *The Commonwealth* — both later cases decided by a Full Court. Holding, as I do, that these three cases are right, and that appeals from all judgments are included in the words "appeals from all judgments" in sec. 73 of the Constitution, I think the

(1) 4 C.L.R., 97.
(2) 3 C.L.R., 132.
(3) 2 C.L.R., 315.
(4) 4 C.L.R., 949.

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judgment in *Musgrove* v. *McDonald* (1) was wrong. I also hold, for the reason previously mentioned, that in this particular case *Musgrove* v. *McDonald*, even if right, is not a bar to this Court granting an appeal in this case, where the State Supreme Court was exercising federal jurisdiction.

What was decided in the four cases mentioned may be shortly stated as follows :—

Parkin v. *James* (2) (decided on 19th April 1905).—"The words 'the Supreme Court of any State' in sec. 73 of the Constitution are used to designate that Court which at the time of the establishment of the Commonwealth was in any particular State known by the name of 'the Supreme Court' of that State. Held, therefore, that, subject to the conditions mentioned in that section, an appeal lies to the High Court from every judgment," decree, order, or sentence "which, according to the law of a particular State, is a judgment," decree, order, or sentence "of the Supreme Court of that State . . . . The conditions imposed by sec. 35 of the *Judiciary Act* 1903 on appeals to the High Court from judgments," decrees, orders, or sentences "of the Supreme Court of a State are exhaustive."

Musgrove v. *McDonald* (1) (decided on 25th November 1905).—"An appeal does not lie to the High Court of Australia from a verdict of a jury, or from a judgment of the Supreme Court of a State founded upon a general verdict of a jury, except by way of appeal from a decision of the Supreme Court in an application for a new trial. An application for a new trial after verdict, upon whatever ground, does not fall within the words of the Constitution, sec. 73—'appeals from all judgments, decrees, orders, and sentences' of Federal Courts or State Courts."

Attorney-General for the Commonwealth v. *Ah Sheung* (3) (decided on 29th June 1906).—"The High Court has jurisdiction to entertain an appeal from the Supreme Court of a State in a case of habeas corpus." In that case *Griffith* C.J. said :—"We have no doubt as to the jurisdiction of the High Court to entertain this appeal. The jurisdiction conferred by the Constitution extends to all decisions

(1) 3 C.L.R., 132.

(2) 2 C.L.R., 315.

(3) 4 C.L.R., 949.

of the Supreme Courts of the States with such exceptions as may be made by Parliament, and no exception is made by the *Judiciary Act* in cases of habeas corpus."

Baume v. *The Commonwealth* (1) (decided on 27th August 1906).—"*Semble*, that on a motion for a new trial on the ground of misdirection the High Court will follow the practice of the Supreme Court and refuse to grant a new trial if the misdirection involves only a trifling amount. . . . . The High Court has jurisdiction to entertain a motion for a new trial after the verdict of a jury in the Supreme Court of a State exercising federal jurisdiction under sec. 39 of the *Judiciary Act* 1903."

In *In re Eather* v. *The King* (2), this year, in reference to a case of criminal appeal from a conviction refused by a Full Court of New South Wales, a Full Court consisting of six Judges stated that this Court has an unfettered discretion to grant or refuse special leave *in every case*, but that the term "special leave" connotes the necessity for making a *primâ facie* case showing special circumstances.

I therefore hold that under sec. 73 of the Constitution this Court has jurisdiction to hear and determine appeals from all judgments from State Courts exercising federal jurisdiction, including judgments of acquittal based on verdicts of juries, and that that view is supported by the decisions of this Court in *Parkin* v. *James* (3), *Attorney-General for the Commonwealth* v. *Ah Sheung* (4) and *Baume* v. *The Commonwealth* (1), and by *In re Eather* v. *The King* (2).

Although I agree that sec. 73 of the Constitution confers jurisdiction on this Court to hear and determine this appeal, I agree that special leave to appeal should not be granted in this case. It is not contended that the Crown has any legal right at common law, or under any special Statute, to appeal against any judgment of acquittal in a criminal case based on a verdict of a jury, and it is admitted that if this Court has jurisdiction to grant special leave to appeal in such a case it is still a matter for the discretion of the Court whether such appeal should, or should not, be granted. No appeal from a judgment of acquittal in a criminal case, following

(1) 4 C.L.R., 97.
(2) 20 C.L.R., 147.
(3) 2 C.L.R., 315.
(4) 4 C.L.R., 949.

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a verdict of not guilty by a jury, has, so far as I know, up to the present day been made or attempted to be made in England or Australia. In view of the fact stated, special leave to appeal in such a case should only be granted, if at all, under very special circumstances indeed.

We are asked by the Crown to take that extreme course in this case for the following reason :—The learned Judge of the Supreme Court of South Australia in the exercise of his duty as a Judge, after lengthy argument, and after full consideration, and after delivering a considered judgment, directed the jury on a question of law, and told them that it was their duty to bring in a verdict of not guilty on the ground and under the circumstances previously referred to in this judgment.

The jury was properly impanelled, the verdict of the jury was not perverse, and the mistrial (if any) was caused by the ruling and misdirection of the Court, not by any act of the jury or of the accused.

Parliament has by sec. 35 (1) (*b*) given to this Court a general and unfettered discretion to grant or refuse special leave from all judgments, decrees, orders, and sentences. A general discretion given in such general terms, not referring specially to criminal trials although including all judgments, should, in my opinion, be exercised in accordance with the principles adopted in English and Australian Courts. In this case I do not think the Crown would have applied for leave to appeal except to have an important question of law settled, namely, whether persons attempting to trade with the enemy before the Act was assented to are guilty of offences against the Act. That question will be decided by this Court this week long before the appeal in this case could be decided.

I hold that leave should not be granted in this case for the following reasons :—

The right to "trial by jury" has been specially preserved by the Constitution to British subjects within the Commonwealth (see sec. 80), and heretofore in all British communities, except Canada, a verdict of not guilty by a jury in a criminal trial has in

every case been accepted as conclusive, although no Statute law prevents an appeal from judgments of acquittal.

The period has passed which makes it urgent in the public interests that the only question raised by the Crown should be decided by this Court in this particular case. That question will be decided by this Court in the case of *Moss* v. *Donohoe* (in which argument has been heard and judgment has been reserved by this Court), or in *Berwin* v. *Donohoe*, long before this appeal could, if leave is granted, be heard.

The Crown has not submitted to the Court any evidence or facts to enable the Court to decide whether there was any evidence on which a jury might properly have convicted the accused. The contrary was strongly urged by his counsel, Sir *Josiah Symon*. No *primâ facie* case on the merits has been submitted (*In re Eather* v. *The King* (1)). The Crown relied solely on the one fact, that there was a mistrial because of the act of the learned Judge in deciding as he did on the question of law referred to.

Further, this Court has not yet decided whether the learned Judge was wrong in directing the jury as he did on the question of law.

In the different States, Criminal Appeal Acts have lately been passed to give further facilities to persons convicted of crimes to appeal against judgments, but I do not know of any Act in England or in Australia giving any right to the Crown to appeal in a criminal case against a judgment based on a verdict of not guilty by a jury, nor do I know of any Statute preventing an appeal. There is nothing to prevent any of the States passing such a law at any time. If they do so, it will not, in my opinion, alter sec. 73 of the Constitution or give to this Court any appellate jurisdiction it does not at present possess.

This particular case is one in which the Crown contends that the Act No. 9 of 1914 read with the *Acts Interpretation Act* of 1904 is retrospective, and makes an attempt to commit an act, not punishable under any Commonwealth Statute at the time it was attempted, punishable as an offence. The question whether the

(1) 20 C.L.R., 147.

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Commonwealth Parliament has the power to pass *ex post facto* laws has been argued at great length before this Court in this and other cases, and has not yet been settled. For that reason also this does not appear to me to be a fit case in which to grant for the first time in the history of Australia leave to appeal from a judgment of acquittal based on a verdict of a jury in a criminal case.

The accused is at present held to bail on another indictment for attempts to commit offences against the *Trading with the Enemy Act*, and the proceedings on that indictment are only delayed pending a decision of this Court on the legal question raised by the Crown on this application for leave to appeal, namely, whether there can be a legal conviction for an attempt to trade with the enemy before the Act was assented to, namely, 23rd October 1914.

Ever since trial by jury was instituted, there have been verdicts of acquittal which the Crown has considered perverse, and verdicts returned on directions of Judges which the Crown has not agreed with, but in no case, up to date, has the Crown in any British community—except Canada—proposed to pass Acts to give the Crown a statutory right to an appeal in such cases, and I do not know of any Government in England or in Australia applying to appeal against a judgment based on an acquittal by a verdict of a jury.

The application of the Crown is for special leave to appeal so as to obtain a new trial on the indictment presented to the Supreme Court of South Australia, or to be placed in a position to be able to proceed on a fresh indictment. That indictment included charges for attempts to trade with the enemy *after the Act was passed*, as well as before, and the judgment included an acquittal of the accused on the charges of attempting to trade after 23rd October last, as well as the charge for attempting to trade with the enemy before the Act was passed. The application is for special leave to appeal against a judgment of acquittal upon charges including charges of attempts to trade after the Act was passed which were not proved in the first trial, and it seems to me out of the question to grant leave to twice vex an accused in a criminal case after acquittal, under the circumstances.

The granting of leave to appeal in this case would encourage

the Crown to expect this Court to grant leave to appeal in other cases of an acquittal by a jury where any decision or direction of the Judge to a jury was erroneous in law. It would not be very serious to a rich man who could afford to defend himself, however frequently the Crown desired to retry him, but it would be a serious innovation so far as the poor are concerned, and such an innovation should, if introduced at all, be introduced by the Legislature by special legislation—as in Canada.

Personally, I think the only cases in which our discretion should be exercised, when the leave to appeal asked for is from a judgment of acquittal in a criminal case based on a verdict of a jury, are those in which there has been some collusion or other improper action of the accused or of the jury, not in cases where the error is a misdirection by a Judge on a question of law.

The Crown appoints the Judges of the Court and is responsible for the appointment of persons properly qualified to interpret the law, and if accused persons are acquitted by juries in criminal cases because of some honest mistake of law made by a Judge without any collusion or fault of the accused, I do not think this Court should, taking into consideration the practice of the Courts for the last hundred years at least, grant leave to appeal against such judgments. Here the jury would have been perverse not to have acted as they did on the direction of one of His Majesty's Judges of the Supreme Court of the State of South Australia.

It is hard to define definitely the principles upon which the practice referred to is based, but I do not see any sufficient reason why, *in this case*, we, as Judges, should alter a long established practice of the Courts with respect only to persons tried in Australia for offences against Commonwealth laws.

In conclusion, after hearing the judgments just delivered by my brothers *Isaacs* and *Higgins* holding that we as a Court should, in this case, exercise our discretion and grant leave to appeal because, amongst other reasons, the nature of the offence in time of war lifts it out of ordinary cases, I think it right to add that, in my opinion, we have no right to adopt one practice in time of war and another in time of peace. It is for Parliament, not this Court,

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during time of war to take any exceptional and extreme steps necessary for the defence of Australia and its people; and all Parliaments are doing so.

It is also necessary, I think, in time of war—when all members of this Court feel so strongly that no one guilty of supplying or attempting to supply the enemy with munitions of war or any material required for munitions of war for a miserable money consideration, or at all, should escape punishment—to remember that we have no right, as Justices of the High Court, to exercise a personal or arbitrary discretion, or consider our own personal feelings at all, but only to act according to law without fear or favour, and, in exercising the discretion reposed in us, only to exercise it judicially. Lord *Loreburn*, in the House of Lords, in *Brown* v. *Dean* (1) said :—"A County Court Judge is entitled to grant a new trial 'if he shall think just.' Those words do not give him an arbitrary discretion. 'If he shall think just' means if he shall think just according to law. The rules to which I have referred are the law which he, like other Judges, is bound to obey."

I therefore agree that the motion should be dismissed.

GRIFFITH C.J. The motion will be dismissed with costs. That is the decision of the majority of the Court.

ISAACS J. I give no opinion on the question of costs.

POWERS J. I only agreed to the dismissal of the motion as a matter of discretion. I hold that the Crown was legally justified under sec. 73 of the Constitution in appealing, and that this Court could have granted the application. Snow's counsel, by misleading the Court (if it was wrong in its direction), caused the Crown to take these proceedings to have the important question of law raised at the trial settled. Snow should not benefit in costs by a successful attempt to prevent the question of his guilt or innocence being tried. It is at least unusual to make the Crown pay costs in criminal appeals. I therefore dissent from the order for costs.

Motion dismissed with costs.

(1) (1910) A.C., 373.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the respondent, *Bakewell, Stow & Piper*, Adelaide, by *Norton, Smith & Co.*

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE REGISTRAR OF TITLES FOR VICTORIA.

EX PARTE THE COMMONWEALTH.

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SYDNEY, *March* 9, 10.

MELBOURNE, *June* 3, 4; *Sept.* 16.

Griffith C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Land—Acquisition by the Commonwealth—"Sell and convey," meaning of—Lease by municipality to Commonwealth—Power of municipality to grant lease—Lease for 500 years at peppercorn rent—Refusal by Registrar of Titles to register—Local Government Act 1903 (*Vict.*) (*No.* 1893), *secs.* 238,* 239*—*Lands Acquisition Act* 1906 (*No.* 13 *of* 1906), *secs.* 5, 8, 9—*Defences and Discipline Act* 1890 (*Vict.*) (*No.* 1083), *sec.* 12—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXI.), 69, 70.

High Court—Jurisdiction—Mandamus to Registrar of Titles of Victoria—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (III.).

A municipality in Victoria purported to lease certain land, of which it was the registered proprietor, to the Commonwealth for a term of 500 years at a rental of one peppercorn yearly if demanded. The lease contained a covenant by the Commonwealth to pay all water and sewerage rates in

* Sec. 238 of the *Local Government Act* 1903 (Vict.) provides that "Every municipality shall have and be deemed to have had power to let on lease to His Majesty or the Board of Land and Works for any term and subject to any exceptions reservations covenants or conditions any land building or tenement vested in such municipality."

Sec. 239 provides that "Every municipality may grant convey or transfer in fee simple or for any less estate, and either with or without a money or other valuable consideration, unto His Majesty or to the Board of Land and Works or to the Minister of Public Instruction any land building or tenement; and every such grant conveyance or transfer heretofore made shall be good and valid in law and equity."

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respect of the land and not to use it for any purposes but purposes in connection with naval and military defence. The Registrar of Titles for Victoria having refused to register the lease,

Held, by *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Isaacs* J. dissenting), that the lease was not authorized by the *Local Government Act* 1903 (Vict.) or by the *Lands Acquisition Act* 1906, and, therefore, that the Registrar of Titles properly refused to register it.

By *Griffith* C.J. and *Isaacs* J.—The High Court has, under sec. 75 (III.) of the Constitution, jurisdiction to issue a mandamus to the Registrar of Titles of Victoria to register an instrument to which the Commonwealth is a party and which he has improperly refused to register.

MANDAMUS.

By an instrument under seal dated 1st April 1914 the Mayor, Councillors and Burgesses of the Town of Coburg, in Victoria, purported to lease to the Commonwealth a certain piece of land within the municipality, of which the Corporation were the registered proprietors, for the term of 500 years at the yearly rental of one peppercorn if demanded, subject to the covenants and powers implied under the *Transfer of Land Act* 1890 (Vict.), unless negatived or modified, and also subject to the following conditions:—(1) Covenants by the lessee (*a*) to pay upon demand the rent reserved and to pay all water and sewerage rates payable in respect of the premises if any should be legally chargeable, (*b*) not to assign, underlet or part with the possession of the premises or to use them for any purpose other than purposes in connection with the naval and military defence of the Commonwealth; (2) a covenant by the lessors for quiet enjoyment; and (3) mutual covenants (*a*) that the covenants and powers implied under sec. 100 (2) and 101 of the *Transfer of Land Act* should be negatived, and (*b*) that if the lessee should fail to pay the rent reserved within one month after demand, or if the lessee should fail to observe or perform any of the covenants to be observed or performed on his part, or if the lessee should use the premises for any purpose other than for purposes in connection with the naval and military defence of the Commonwealth the lessors might re-enter, and the tenancy should thereupon determine.

The lease having been lodged in the Office of Titles of Victoria