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[HIGH COURT OF AUSTRALIA.]

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AGAINST

HUSH ;

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Criminal Law—Prosecution—Evidence—Unlawful association—Solicitation of contributions therefor—Proof—Averments in information—Documentary evidence—Nature and scope of “averments”—The Constitution (63 & 64 Vict. c. 12), secs. 51 (xxxix.), 61—Crimes Act 1914-1932 (No. 12 of 1914—No. 30 of 1932), secs. 30A (1) (a), 30D*, 30R*—Judiciary Act 1903-1927 (No. 6 of 1903—No. 9 of 1927), secs. 68, 79—Justices Act 1902-1931 (N.S.W.) (No. 27 of 1902—No. 17 of 1931), sec. 78 (1).*

The defendant was charged under sec. 30D of the *Crimes Act* 1914-1932 that he was the publisher of a newspaper which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, whereby he was deemed to have solicited contributions of money for the said association. To establish that the solicitation alleged was made on behalf of the Communist Party, averments in the information were relied upon as constituting prima facie proof under sec. 30R of the *Crimes Act*. The information averred that the newspaper in question was the official organ of

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SYDNEY,
Nov. 21-23 ;
Dec. 8.

Gavan Duffy
C.J., Rich,
Starke, Dixon,
Evatt and
McTiernan JJ.

*The *Crimes Act* 1914-1932 provides:—By sec. 30A: “(1) The following are hereby declared to be unlawful associations, namely:—(a) Any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages—(i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage; (ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or (iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or

among the States, or which is, or purports to be, affiliated with any organization which advocates or encourages any of the doctrines or practices specified in this paragraph.” By sec. 30D:—“(1) Any person who—(a) gives or contributes money or goods to an unlawful association; or (b) receives or solicits subscriptions or contributions of money or goods for an unlawful association, shall be guilty of an offence. Penalty: Imprisonment for six months. (2) For the purposes of this section the printer and the publisher of a newspaper or periodical which contains any solicitation of subscriptions or contributions of money or goods for an unlawful association, or any notification or

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the Communist Party, and that the defendant published the newspaper, which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, in the following terms:—"Prepare for August First.—Sydney.—The August 1st conference was held in the Trades Hall on Monday 27th June, at 8 p.m. Eighty delegates attended, representing sixty-four organizations. . . . Conference decided to hold a monster anti-imperialist war demonstration on International Day against imperialist war, August 1st. . . . Prominent speakers from fraternal organizations and the central committee will address the demonstrators. A central campaign committee . . . was set up, while all delegates were given certain definite tasks and will report to conference. . . . Central committee will meet every Monday night . . . in the Trades Hall. All working-class organizations not already represented are requested to appoint two delegates to conference, and individual workers are requested to attend and help build a mighty mass demonstration against imperialist war. Funds are urgently needed for the above task. Rush them in immediately.—W. H. Nugent, Campaign Secretary." It did not appear by whom the conference was summoned, nor who Nugent was, other than that he was the "campaign secretary." The newspaper containing the alleged solicitation was put in evidence.

Held, by Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ. (Rich J. dissenting), that the averments and evidence did not establish the offence charged.

The nature and scope of "averments" discussed.

Per Evatt J.:—(1) When the question in dispute is the meaning of a written document in evidence, the Court must construe the document for itself, and sec. 30R of the *Crimes Act* does not operate to establish a meaning contrary to that which the Court considers the document in fact bears. (2) In view of secs. 68 and 79 of the *Judiciary Act* 1903-1927 and sec. 78 (1) of the *Justices Act* 1902-1931 (N.S.W.), the information, which contained multifarious averments of an evidentiary character, was an abuse of the process of the Court.

indication as to the places where or persons to whom payment or delivery may be made of subscriptions or contributions of money or goods for an unlawful association, shall be deemed to solicit subscriptions or contributions of money or goods for an unlawful association." By sec. 30R:—" (1) In any prosecution for an offence under this Part, or for an offence to which any provision of this Part is material, the averments of the prosecutor contained in the information or indictment shall be prima facie evidence of the matter or matters averred. (2) The last preceding sub-section shall apply to any matter so averred although—(a) evidence in support or rebuttal of the matter averred . . . is given by wit-

nesses; or (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be prima facie evidence of the fact only. (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section. (4) This section shall not lessen or affect any onus of proof otherwise falling on the defendant. (5) Any book, periodical, pamphlet, handbill, poster or newspaper purporting to be issued by or on behalf of, or in the interests of, an association shall, unless the contrary is proved, be deemed to be so issued."

RULE NISI for prohibition.

Francis Harold Devanny, of 141 Foveaux Street, Surrey Hills, Sydney, contractor, was, on the information of Sidney Edgar Hush, charged under sec. 30D of the Commonwealth *Crimes Act* 1914-1932 that he "did solicit contributions of money for an unlawful association, namely, the Communist Party of Australia, in that" he "was the publisher of a newspaper, to wit, the *Workers' Weekly*, on the first day of July 1932 which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party and" he "is thereby deemed to have solicited contributions of money for the said unlawful association."

The information, which consisted of sixty-eight pages of type-written matter, contained sixty-one averments. These, so far as they are material to this report, were substantially as follows:—

1. The said Francis Harold Devanny is the publisher of the *Workers' Weekly*, a newspaper printed and published at 15 Dixon Street, Sydney, and registered under the *Newspapers Act* 1898 (N.S.W.).

2. The *Workers' Weekly* is the official organ of the Communist Party of Australia.

3. The Communist Party of Australia is the Australian section of the Communist International, which controls the organization of political propaganda relating to Communism and seeks to lead and direct the industrial organizations throughout the world within and without the trades-union movement.

4. The Communist International, known as the Comintern, was constituted for the purpose of overthrowing by violence the present economic, industrial and social organization of human society. It advocates political control by one class only and the suppression by force, if necessary, of the influence of all the other classes of the community.

5. The Red International of Labor Unions and the Third International are interlocked, and by reason of this connection the Communist Party of Australia is brought into co-operation with the Minority Movement, the Unemployed Workers' Movement, the International Labor Defence, the Workers' International Relief, the Workers' Defence Corps, the League against Imperialism, the

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League against War, the Returned Soldiers, Sailors, and Nurses' Anti-Imperialist Association, the Friends of the Soviet Union, the Pan-Pacific Trades Union Secretariat, the International Seamen's Club, the International Seamen and Harbour Workers' Association, the Young Communist League and the Young Pioneers. To the Minority Movement is affiliated the Pastoral Workers' Industrial Union of Australia.

6. The Red International of Labour Unions is the general staff for the world of the revolutionary trades-union movement and, working in conjunction with the Communist International, it urges international solidarity in revolutionary action. In close association with the Communist International, the Red International of Labor Unions is linking up in practice the economic and political struggles on the revolutionary lines of Communism.

7. The Third International was inaugurated in January 1919 and established in March 1919 at Moscow as the Communist International.

8. The Minority Movement is the Australian section of the Red International of Labor Unions, and concentrates on placing Communists in control of unions, and its principal method is to advocate full union rights to all unemployed by having them fully recognized as unionists. Through them control is obtained of unions for the Communist Party. [Then followed in lengthy detail "the objectives of the Minority Movement" under various headings, as "set forth in a pamphlet published by it in June 1931" from which the following excerpts are made:—"Equalling their bitter hatred of 'their own' working class at home, is the rabid hate of the capitalists for the workers' fatherland, the Soviet Union, where, under a workers' and farmers' government, a socialist system is being constructed. . . . The capitalists recognize that the very existence of the Soviet Union, and the matchless achievements of its five year plan of socialist construction is one of the greatest factors making for the disintegration of its own system and tremendously accentuates the radicalization of the masses and by its own revolutionary example impels them toward decisive action that must result in the early spread of the soviet system to other parts of the world and eventually to all the world . . . The M.M. fights resolutely in defence of the

Soviet Union, and against all imperialist war, and will utilize all its power to cripple the war machine of the Australian capitalist class by preparing for strike action in war industries and in transport. The struggle against war, as well as the struggle for the unconditional freedom of New Guinea, must become a living part of all the campaigns of the Australian workers . . . The only way out of the capitalist crisis is the revolutionary way, through the overthrow of capitalism and establishment of the rule of the working class.”]

[Averments 9-18 set out shortly the objects of the various organizations referred to in averment 5 other than the four organizations first named therein.]

19. The Communist Party of Australia is an unlawful association within the meaning of the *Crimes Act* 1914-1932.

20. The Communist Party of Australia is a body of persons unincorporated which by its constitution and propaganda and otherwise advocates and encourages:—(i.) the overthrow of the Constitution of the Commonwealth by revolution and sabotage; (ii.) the overthrow by force and violence of the established government of the Commonwealth and of the States of the Commonwealth of Australia; (iii.) the destruction and injury of property of the Commonwealth and of property used in trade and commerce with other countries and among the States of the Commonwealth of Australia.

21. The headquarters of the Communist Party of Australia are at the Communist Hall, 395 Sussex Street, Sydney, New South Wales.

[Averment 22 set out *in extenso* the rules and constitution of the Communist Party of Australia, excerpts therefrom being:—

“IV. Objectives.—The Communist Party of Australia, which, in its capacity of leader and organizer of the revolutionary movement of the proletariat, fights for the capture of the working class and of large sections of poor and middle farmers for Communist principles and aims, for the colonial peoples in their struggles against Imperialism, for the establishment of the dictatorship of the proletariat, for the formation of an Australian Socialist Soviet Republic, for the total abolition of classes, and for the realization of socialism which is the initial stage of the Communist social order . . .

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H. C. OF A. VI. Duties of Party Members . . . (e) unconditionally carry out
 1932. all decisions of the higher Party organs . . . VIII. Democratic
 THE KING Centralism . . . In illegal and certain exceptional conditions
 v. affecting or endangering the Party, the lower Party organs and
 HUSH; individuals may be co-opted to various party organs with the
 EX PARTE indorsement of the superior Party organs. IX. The Structure of
 DEVANNY. the Party.—The scheme of Party structure is as follows . . .
 — (d) For the Commonwealth:—The Party Congress—The Central
 Committee (C.C.)—Political Bureau . . . XIII. Central Com-
 mittee . . . The C.C. is the highest authority of the Party
 between Party Congresses. It represents the Party as a whole over
 other party institutions, organizes the various organs of the Party,
 appoints the editorial boards of its central organs, who work under
 its leadership and control, organizes and guides all undertakings of
 importance for the entire Party, distributes all the Party forces,
 controls the Central Treasury, and conducts the work of fractions
 within bodies of a central nature . . . Full meetings of the
 C.C. (*Plenum*) must take place at least twice a year. The C.C.
 organizes departments for definite branches of its work:—Organiza-
 tion, Industrial, Agit-Prop., Women, Anti-Imperialist, Agrarian,
 and any other department it may think necessary. These depart-
 ments carry out their work along the general line laid down by the
 C.C. and are subordinate to the Polit-Bureau . . . XV. Party
 Finance. . . Finance of the Party organizations shall be
 obtained from Party dues, special collections, Party undertakings,
 etc. XVI. Official Newspapers and Pamphlets. . . The
Workers' Weekly shall be the central official organ of the C.P. of A.
 . . . The official organ or any newspaper or magazine, the
 property of the Party, shall be under the direct control of the C.C.
 They shall advocate only the principles, demands and methods of
 the Party as laid down in the Party policy.”]

23. The policy, objectives, principles, demands and methods of
 the Communist Party of Australia are further set forth in the follow-
 ing extracts from issues of the *Workers' Weekly* published on
 “eighteen several dates between 17th April 1931 and 3rd June
 1932.” [Then followed a number of extracts of which the following
 is typical:—“The five year plan is the path of world victory for

socialism. Fight against all imperialist war; transform the imperialist war of the capitalist class into civil war, the war of the oppressed and exploited against the capitalist class. Defend the colonial revolutions in India, China, and all other colonies and semi-colonies. Smash the offensive of capitalism with a working class counter offensive! Answer the united capitalist front with a united front of the rank and file of labor. The Communist International is the leader of the revolutionary struggles of the workers in all countries! Rally to the banner of the Communist International, the banner of the world revolution! Join the Communist Party of Australia—the Australian section of the Communist International!”]

[In averments 25-27 “the policy, objectives, principles, demands and methods of the Communist Party of Australia” were further set forth in extracts from (a) the “Party Training Manual”; (b) “Communism—The Programme of the Communist International”; and (c) “Statutes adopted by the fifth Congress of the Third International” printed in the membership book of the Communist Party of Australia, by which the books referred to in (a) and (b) were published. Par. 34 of the “statutes” provided that “the Communist Parties must be prepared to carry on their work illegally. The E.C.C.I.” (the leading organ of the Communist International in the period intervening between world congresses) “must assist the Parties in the preparation for illegal work, and see to it that the work is carried out.”]

28. Pursuant to par. 34 of the said statutes and for other reasons Communists acting in accordance with the tenets of the Communist Party of Australia have acted illegally and in deliberate defiance of the law, on the dates and in the manner and under the circumstances referred to in averments 29-39.

[By averments 29-39 it was averred that on eleven several dates between 26th February 1930 and 1st August 1932 unauthorized processions and meetings had been held in and about certain public streets in Sydney by numerous members of the Communist Party of Australia, and that such members had been convicted of offences for taking part in such unauthorized processions and meetings, and of other offences arising therefrom.]

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40. A publication called the "Manual of Organization" was issued by the Organizing Department of the Communist Party of Australia on 26th July 1928. [The contents of the "Manual of Organization" showing (*inter alia*) a very comprehensive scheme of organization for factory, shop, workshop, and waterside, etc., workers, were averred *in extenso*.]

41. Pursuant to sec. 6 of that part of the manual which is headed "Factory and Pit Groups—Organization and Functions," which section deals with the factory paper, factory papers or bulletins are published from time to time in the establishments referred to in averments 42-60.

[By averments 42-60 it was averred that papers or bulletins, variously and appropriately named, were published and circulated at various specified Government offices, workshops and depots, and also at privately owned factories, and on the waterfront, extracts from which were set out, being along the lines laid down in the "Manual of Organization" referred to in averment 40.]

61. On the 1st day of July 1932, you, the said Francis Harold Devanny, published the said *Workers' Weekly* which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, in the following terms:—"Prepare for August First.—Sydney.—The August 1st conference was held in the Trades Hall on Monday 27th June, at 8 p.m. Eighty delegates attended, representing sixty-four organizations. The conference was a splendid success, delegates taking active and enthusiastic part in the discussions surrounding various resolutions and other organizational work. Conference decided to hold a monster anti-imperialist war demonstration on International Day against imperialist war, August 1st. Demonstration to take the form of a mass procession leaving Central Square, City, at 10.30 a.m., proceeding along George Street, Park St., College St. to the Domain, where a great mass rally will take place. Prominent speakers from fraternal organizations and the central committee will address the demonstrators. A central campaign committee of 21 was set up, while all delegates were given certain definite tasks and will report to conference, which meets alternate Mondays in the Trades Hall. Next meeting: Monday July 11, at 8 p.m. Central Committee

will meet every Monday night at 8 o'clock in the Trades Hall. All working-class organizations not already represented are requested to appoint two (2) delegates to conference, and individual workers are requested to attend and help build a mighty mass demonstration against imperialist war. Funds are urgently needed for the above task. Rush them in immediately.—W. H. Nugent, Campaign Secretary."

At the hearing of the information before Mr. Laidlaw, Chief Stipendiary Magistrate, the various books, newspapers—limited to the parts averred and the imprints as to publication—and other documents referred to in the averments were (despite objections thereto made on behalf of the defendant) admitted in evidence in support of specific averments and also generally. Oral evidence was not given on behalf of either the informant or the defendant. The magistrate referred to *Williamson v. Ah On* (1) and held that the defendant was the publisher of the *Workers' Weekly*, the official organ of the Communist Party of Australia, which, from the evidence before him, was clearly a body which encouraged and advocated the overthrow of the Constitution by revolution. Devanny was convicted and sentenced to be imprisoned and kept to hard labour for six months, in addition to which he was ordered to pay the informant's costs, amounting to £36 15s., or, in default, to serve a further seventy-four days' imprisonment with hard labour.

By way of appeal from this decision, Devanny obtained a rule nisi calling on the informant to show cause before the High Court why the conviction and order should not be quashed, or why a writ of prohibition should not be issued prohibiting further proceedings under the conviction, on the grounds (*inter alia*):—

- (a) that secs. 30A, 30D, and 30R of the Commonwealth *Crimes Act* 1914-1932 were *ultra vires*, or did not apply;
- (b) that there was no evidence that the defendant published a solicitation of contributions for the Communist Party of Australia, but only for a committee representing sixty-four working-class organizations;
- (c) that there was no evidence that the Communist Party of Australia was an unlawful association within the meaning of the Commonwealth *Crimes Act* 1914-1932;

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(d) that none of the averments was sufficient to show (i.) that the Communist Party of Australia was as described in averments 19 and 20 ; (ii.) that the *Workers' Weekly* on 1st July 1932 contained a solicitation of contributions for the Communist Party of Australia ;

(e) that there was no evidence to support the information.

Further material facts sufficiently appear in the judgments hereunder.

Mack K.C. (with him *Evatt* and *Richards*), for the appellant. There is no evidence to support the information. Sec. 30R of the Commonwealth *Crimes Act* 1914-1932 is *ultra vires*, but, if not, the information is bad because it does not sufficiently aver. If moneys were solicited, there is no evidence before the Court that such moneys were solicited for the Communist Party. The soliciting organization—consisting of delegates from sixty-four working class associations—was cosmopolitan in its constitution, and the evidence fails to disclose that it, or its officials, had either direct or indirect connection with the Communist Party. Such connection is not shown by the mere fact that information concerning the organization appeared in the *Workers' Weekly*, that is, the official organ of the Communist Party, because such organ is primarily a newspaper and contains much matter which obviously has nothing to do with Communism. Averments in the information are nullified by subsequent disavements, e.g., the offence averred in the first paragraph of the information is disproved by the allegation contained in averment 61. As to what constitutes publication of a document, and whether the law was broken thereby, are matters for the Court to decide ; no onus is upon the accused. Sec. 30R does not permit of a prosecution of this nature ; its provisions were intended to be used in cases which could not be proved otherwise : any greater intention would render the section *ultra vires*. Sec. 30A is *ultra vires* because no general power of legislating with respect to crime is conferred upon the Commonwealth by the Constitution (*R. v. Bernasconi* (1)). None of the powers conferred upon the Commonwealth has reference to “ unlawful associations.”

(1) (1915) 19 C.L.R. 629, at pp. 634, 635.

[EVATT J. referred to *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.* (1).] H. C. OF A.
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As sec. 30A is *ultra vires*, it follows that sec. 30D, which depends upon it, and sec. 30R, which provides machinery for enforcing the provisions of those sections, are also unconstitutional (*Williamson v. Ah On* (2)). The matter should have been tried before a jury and not summarily, the conspiring to collect money for the purpose of giving it to an unlawful association being an offence at common law. *R. v. Archdall and Roskrige*; *Ex parte Carrigan and Brown* (3) was wrongly decided on this point and is not otherwise adverse to the appellant. (See also *Quick and Garran's Annotated Constitution of the Australian Commonwealth* (1901), p. 807.)

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Windeyer K.C. (with him *E. M. Mitchell* K.C. and *Dovey*), for the respondent. The averments contained in the information establish that the Communist Party is an unlawful association within the meaning of sec. 30A of the *Crimes Act* 1914-1932, for which subscriptions were solicited in its official organ, the *Workers' Weekly*, a newspaper published by Devanny. As Devanny has not tendered any evidence to the contrary, the allegations in the averments that the subscriptions, although solicited by the secretary of the Central Campaign Committee, were intended for the Communist Party must be accepted by the Court. The conference of the so-called "working-class organizations" was, as alleged, really a conference of the Communist Party. The constitution and rules of the Communist Party referred to in the information now before the Court show that that Party directs its efforts towards the overthrow of the Commonwealth Constitution and the various Governments by revolution, violence and sabotage, and is, therefore, an unlawful association. There is nothing in sec. 30R to suggest that the averments of the prosecutor should be limited to the ingredients of the offence (*R. v. Archdall and Roskrige*; *Ex parte Carrigan and Brown* (3); *Williamson v. Ah On* (4)). For the purpose of throwing the onus of proof on the defendant there are various matters from which deductions may be drawn as to guilt. The Commonwealth

(1) (1914) A.C. 237; 17 C.L.R. 644.

(2) (1926) 39 C.L.R., at p. 102.

(3) (1928) 41 C.L.R. 128.

(4) (1926) 39 C.L.R. 95.

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has an implied power of protecting its Governments from violence (*R. v. Kidman* (1)). That Devanny is the publisher of the *Workers' Weekly* is proved by the affidavit made and filed by him as required by the *Newspapers Act* 1898 (N.S.W.), secs. 3 and 4, a certified copy of which is made valid as evidence by sec. 18 of that Act. On the evidence before him the magistrate was entitled to hold that there was a solicitation in the *Workers' Weekly* for funds for an activity of the Communist Party; this was an offence under sec. 30D for which Devanny, as publisher, was liable under sub-sec. 2 of that section. Unless and until disproved, allegations contained in the averments should, by virtue of sec. 30R, be accepted as evidence. The averments are, for the most part, equivalent to particulars (*R. v. Archdall and Roskrige*; *Ex parte Carrigan and Brown* (2)). "Aver" means "allege" in the wider sense, that is, as including a statement of collateral relevant facts upon which the legal position depends, and not being confined to essential facts; the intention of the Legislature being to throw the onus of proof upon the defendant (see *Archbold on Indictments* (1916), p. 38; *Starkie on Criminal Pleading*, 2nd ed. (1822), p. 160; *Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 61), where essential facts have been averred the legal conclusion of such facts also has been shown. The allegations contained in averment 61 are within the scope of sec. 30R. The offence is the solicitation of subscriptions or contributions of money for an unlawful association; the purpose or object to which such money is applied by the association, or that the money was not in fact received by the association, is immaterial.

[EVATT J., on the question of the validity of the provision, referred to *Farey v. Burvett* (3), and *R. v. Kidman* (1).]

The Commonwealth is by the common law empowered to do whatever may be necessary for its welfare and the protection of its citizens, and the doing of things by the Commonwealth which, as here, are incidental to the exercise of such power is expressly provided for by sec. 51 (XXXIX.) of the Constitution (*R. v. Kidman* (1)). That the Communist Party is an unlawful association within the meaning of sec. 30A (1) (a) is shown by the averments,

(1) (1915) 20 C.L.R. 425.

(2) (1928) 41 C.L.R. 128.

(3) (1916) 21 C.L.R. 433.

which are supported by the documentary evidence before the Court, that the Party's object is the overthrow of the Governments of the Commonwealth by revolutionary means instead of by constitutional methods; a resort to violence by the citizens being freely advocated throughout the Party's propaganda. Although the conference consisted of delegates from various organizations and was styled the "August 1st Conference," it was really an activity by the Communist Party, the formation of such conferences being in conformity with the procedure to be followed by the Party as set out in the rules of that Party now before the Court, and the onus is upon Devanny of proving to the contrary. The offence was properly brought before the Court by way of information to be dealt with summarily (*R. v. Archdall and Roskrug*; *Ex parte Carrigan and Brown* (1); see also *Crimes Act 1914-1932*, sec. 21A).

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Mack K.C. in reply. The various matters should have been alleged according to their legal effect. Averments not conforming to such principle should be struck out as bad pleading (*Archbold's Pleading and Evidence in Criminal Cases*, 15th ed. (1862), p. 56; *Stephen on Pleading*, 2nd ed. (1827), p. 431, r. 5). Even if the first averment is good in itself, it is nullified by the vagueness and ambiguity of the other averments. The object of the conference, which was to promote peace, cannot be regarded as unlawful. In view of the ambiguity of the information the onus of proof should not be upon the defendant. The powers of the Commonwealth are confined to those conferred by the Constitution; such powers do not include a power to legislate in such a way as the Commonwealth purports to have done in secs. 30A to 30R, inclusive, of the *Crimes Act 1914-1932*.

Cur. adv. vult.

The following written judgments were delivered:—

Dec. 8.

GAVAN DUFFY C.J. AND STARKE J. The appellant was charged on information under the *Crimes Act 1914-1932* of the Commonwealth, sec. 30D, that he did solicit contributions of money for an unlawful association, namely, the Communist Party of Australia, in that he was the publisher of a newspaper, to wit, the *Workers'*

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Weekly, which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, whereby he was deemed to have solicited contributions of money for the said association. There follow sixty-one paragraphs, or averments as they are called, some alleging elements of the offence—e.g. 1, 19, 20, and 21—others, acts relied upon to establish the constitution of the association and its unlawful character—e.g. 2, 22, 23, 25, 26, 27, 40, and 61—others again, merely evidence supporting the allegation of the offence or irrelevant to it—e.g. 5 to 18, both inclusive, 24, 28 to 39, both inclusive, and probably 41 to 60, both inclusive. It is an amazing document, well calculated to embarrass the proper trial of the accused, and an amendment might properly have been required. But it was dictated no doubt by the provisions of sec. 30R of the *Crimes Act*, which are as follows:—“(1) In any prosecution for an offence under this Part, or for an offence to which any provision of this Part is material, the averments of the prosecutor contained in the information or indictment shall be *prima facie* evidence of the matter or matters averred. (2) The last preceding sub-section shall apply to any matter so averred although—(a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only. (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section. (4) This section shall not lessen or affect any onus of proof otherwise falling on the defendant. (5) Any book, periodical, pamphlet, handbill, poster or newspaper purporting to be issued by or on behalf of, or in the interests of, an association shall, unless the contrary is proved, be deemed to be so issued.” But these provisions do not amend or alter what may be called the rules of pleading or the rules regulating the statement of the offence charged. Every offence consists of acts done or omitted under certain circumstances. Unless some statutory provision exists to the contrary, the facts and circumstances constituting the offence should be stated, and in cases in

which the provisions of sec. 30R are relied upon they should be stated fully and with precision. But it is not right to set out evidence supporting the allegation of the offence. Still less is it right to state irrelevant facts merely giving colour to the prosecution. And in our opinion it is not sufficient, under the provisions of sec. 30R to state evidence from which the result or fact necessary to sustain the offence charged may be inferred, without any allegation of the fact or result itself. The averments should be so stated that they are sufficient in law to constitute the offence charged. Again, in the present case it should be observed that the generality of the statement of the offence in the opening paragraph of the information must be limited and understood in the sense particularly stated in the relevant averments or particulars which follow it.

The precise solicitation relied upon is that stated in par. 61 as follows:—"On the 1st day of July 1932 you the said Francis Harold Devanny published the said *Workers' Weekly*, which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, in the following terms:—" [The matter quoted in averment 61, as set out above, was here set out.]

The paragraph, to our mind, states the evidence from which the result or fact relied upon in its introductory words may be deduced or inferred. And it then becomes a matter of law whether that result or fact can properly be deduced or inferred from the publication alleged. There is nothing on the face of the document or in the evidence which establishes who "Nugent, Campaign Secretary," is, or precisely what association or organization needs funds for the purposes stated in the document. It emanates from a conference of delegates from sixty-four organizations, which may or may not include the Communist Party. The complete objects of the conference do not appear, either from the document or from the evidence, and all that certainly appears is that one of its objects was to protest against what is called imperialist war. All that is alleged is that the document was published in the *Workers' Weekly*, which, it is alleged in par. 2, and proved, is the organ of the Communist Party of Australia. But it is quite consistent with that allegation that the solicitation for funds was made by other

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organizations than the Communist Party. In our opinion, the averments or statements in this paragraph are insufficient in law to sustain the allegation of the offence charged.

Arguments were addressed to the Court attacking the validity of Part IIA of the *Crimes Act* 1914-1932, particularly secs. 30A, 30D, and 30R. But, in the view we take of the case, it is unnecessary to consider those arguments.

The appeal should be allowed, the conviction quashed, and the information dismissed.

RICH J. This is an appeal from a conviction under sec. 30D of the *Crimes Act* 1914-1932 upon a charge of soliciting contributions of money for an unlawful association. The appellant was convicted under sub-sec. 2 of sec. 30D as the publisher of a newspaper, viz., the *Workers' Weekly*, containing a solicitation of contributions for an unlawful association, viz., the Communist Party of Australia. The prosecution availed itself of sec. 30R and preferred an information containing a very large number of averments. Considered numerically, the bulk of these averments was directed to the constitution, purposes and propaganda of the Communist Party of Australia. In point, however, of present importance the averment which looms largest is that which states the publication of the solicitation and its character. It is as follows:—"On the 1st day of July 1932 you the said Francis Harold Devanny published the said *Workers' Weekly* which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia in the following terms:—" [His Honor here set out the matter quoted in averment 61, as set out above.]

The appeal was supported by arguments which go from the smallest points of evidence up to the greatest considerations of constitutional power. Evidence was offered in support of the averments out of caution, whether superabundant or not. On this evidence it was objected that it did not appear that the defendant was identical with the person of the same name and address who was registered under the *Newspapers Act* 1898. The answer to this objection is to be found in the case of *Smith v. Henderson* (1), where Parke B.

during the argument said: "Similarity of name and residence, or similarity of name and trade, will do." It was then said that the evidence of literature published by the Communist Party put in under sec. 30R (5) was insufficient to show that the Communist Party had for its objects or purposes the advocacy of any of the subversive measures stated in sec. 30A as badges of an unlawful association. The many references to the revolutionary programmes contained in this literature were said to be no more than peaceable prophecies of the profound changes to be gently wrought by the adoption of the communistic ideal, and that "war" was an emphatic metaphor for persistent advocacy of the policy to be adopted at the polls. But, when the newspaper of which the defendant is publisher speaks of "winning the masses for the defence of the Soviet, for turning the imperialist war into a war against capitalism, the overthrow of capitalism and the dictatorship of the proletariat," the explanation of mere hyperbole begins to falter. First, the exhortation to "transform the imperialist war of the capitalist class into civil war," the war of the oppressed and exploited against the capitalist class: to "defend the colonial revolutions in India, China and all other colonies": "smash the offensive of capitalism with a working-class counter-offensive"; then the more deliberate statement of the statutes of the fifth Congress of the Third International, printed in the membership book of the Communist Party of Australia, which announces that "the Communist International makes it its aim to put up an armed struggle for the overthrow of the international bourgeoisie and the creation of an international Soviet Republic as a transition stage to the complete abolition of the State," and, last, the "call upon all workers to follow the same road as the great proletarian revolution in Russia, the first victorious revolution in the world's history," are frank avowals of the determination of the Party to use force, if necessary, to overthrow the present dispensation. I have no doubt that the magistrate was justified in finding that the association had for its object the overthrow of the Commonwealth Constitution and the existing structure of government, within the meaning of sec. 30A.

It was next argued that the solicitation contained in the paragraphs of the *Workers' Weekly* set out above does not seek contributions for

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the Communist Party, but for another body organized for the temporary purpose of celebrating the Red International day by holding a demonstration against imperialistic war, an object to be universally applauded unless the greater evil of civil war is substituted for it. It must be admitted that the text of the paragraph lends much support to this contention, particularly if the reader makes no attempt to read between the lines. There is nothing to show that the sixty-four organizations were divisions of the Communist Party or that the eighty delegates were, within those organizations, what are called "fractions." But the conference must have been summoned by the Communist executive, and its purpose was to celebrate a Communist festival by the propagation of a doctrine perversely associated in its creed with civil strife. If this prosecution was governed by the ordinary presumption of innocence established by the common law for the protection of the ordinary subject accused of an individual offence against the criminal code, I would agree that sufficient proof has not been furnished to overcome it and establish positively that the contributions, if paid, would have found their way to the control of the Communist Party itself. But the statements in the newspaper paragraph are quite compatible with the view that the Communist executive retained control of the preparations for the demonstration and merely summoned the delegates of the sixty-four organizations to its aid, entrusting to these auxiliaries subordinate tasks only. And sec. 30R makes the averment *prima facie* proof of the allegation. I see nothing sufficient to dispel this proof. No evidence was called for the defence and, so long as the averments in the information stood, it rested upon the defendant to show that the contributions were not solicited for the Communist Party. In my opinion he has not shown it by arguments based upon the contents of the newspaper paragraph containing the solicitation. This opinion makes the argument material which was relied upon that the averments contained in the charge are not authorized by sec. 30R. Doubtless the voluminous information wears a strange appearance and many of the averments it contains smack less of pleading than of evidence, but we have become unfamiliar with the long enumeration of overt acts formerly contained in indictments for treason, seditious conspiracy, and the like. Possibly a study of old precedents of

such indictments would reveal much to support allegations contained in the present information which startle us through unfamiliarity (see *Chitty's Criminal Law* (1826), vol. 2, pp. 67a-102; vol. 3, pp. 1145-1193). But assuming that many of the statements contained in the information are inappropriate, and should find no place in it as averments, there can be no doubt that the critical averment that the paper contained solicitations for a contribution of money for an unlawful association, namely, the Communist Party of Australia, is well made (cf. *Attorney-General of New South Wales v. Macpherson* (1)). "The law rejecting surplusage applies equally in criminal as in civil proceedings" (*Taylor on Evidence*, 11th ed. (1920), sec. 263, p. 213).

If the information were shorn by amendment of all the allegations which on a minute examination of the document were found to be not averments, it would still be necessary to consider the efficacy of this critical averment in overcoming the objection that it does not appear that the contributions were for the Communist Party. In the view I take, this, at best for the defendant, would mean that a rehearing of the charge before the magistrate would be necessary lest upon the former hearing the defendant had been prejudiced (see sec. 21A (1) of the *Crimes Act* 1914-1932).

It was then argued that sec. 30R was void. No attack can be made upon it in this Court which is based upon the mere fact that it affects the operation of the presumption of innocence or tends to reverse the ordinary course of criminal proof and procedure (see *Williamson v. Ah On* (2), which on this point is unaffected by *Ah You v. Gleeson* (3)). I cannot see that the fact that the subject of unlawful associations does not come within any of the main powers enumerated in sec. 51 of the Constitution is against the validity of sec. 30R. If the unlawful associations, as defined by sec. 30A, or any of them, can be suppressed by an exercise of legislative power of the Commonwealth, whether the power be granted by sec. 51 (xxxix.) or be derived from a general consideration of the Constitution, the power over procedure in relation thereto should be just as extensive. But it is contended that the Legislature has not power to suppress the unlawful associations described in sec. 30A (1). Without discussing

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(1) (1870) L.R. 3 P.C. 268, at p. 281. (2) (1926) 39 C.L.R. 95.

(3) (1930) 43 C.L.R. 589.

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the validity of each and every descriptive epithet in sec. 30A (1), it is quite sufficient for the purposes of this case to say that it is impossible to doubt the legislative power to prohibit associations which by their constitutions or propaganda advocate or encourage the overthrow of the Constitution of the Commonwealth by revolution or of the established government of the Commonwealth by force or violence. Sec. 51 (XXXIX.) of the Constitution includes matters incidental to the execution of powers vested by the Constitution in the organs of government. The survival of the Constitution appears to me to be a matter most incidental to the execution of power under it. But, apart from this, sec. 61 of the Constitution expressly enacts that the executive power shall extend to the execution and maintenance of the Constitution. To prevent persons associating together for the purpose of destroying the Constitution is a matter incidental to maintaining it. The opinion that Federal powers extend to rendering impotent attempts to subvert Federal institutions is completely in line with the doctrine prevailing in America, where the clear words of our Constitution are not available (see *Cooley's Constitutional Limitations*, 8th ed. (1927), pp. 904-907). A further attack was made upon sec. 30D (2), which makes the publisher of a newspaper containing a solicitation of funds liable to punishment. I do not see why the Federal power should not extend to penalizing those who aid and abet, counsel, persuade, or encourage the formation of associations for such revolutionary purposes, and the provision does no more than this.

For these reasons I do not think the information should be dismissed.

In view of the contrary opinion of the majority, it is unnecessary for me to consider whether the defendant is entitled to have a rehearing on the ground I have indicated.

DIXON J. This is an appeal under sec. 39 (2) (b) of the *Judiciary Act* 1903-1927 from a summary conviction for an offence against the laws of the Commonwealth. Such a proceeding involves a full appeal upon facts and law (*Bell v. Stewart* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (2);

(1) (1920) 28 C.L.R. 419.

(2) (1931) 46 C.L.R. 73, at pp. 85, 87 and 107.

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The appellant was convicted under sec. 30D of the Commonwealth *Crimes Act* 1914-1932 of the offence of soliciting contributions of money for an unlawful association. The conviction was obtained under sub-sec. 2 of sec. 30D, which provides that for the purposes of the section the publisher of a newspaper which contains any solicitation of contributions of money for an unlawful association shall be deemed to solicit contributions for an unlawful association. The appellant was prosecuted as publisher of the *Workers' Weekly*, which, according to the evidence, was "the central official organ of the Communist Party of Australia" and under the direct control of the central executive of that body. The Communist Party is alleged to be an unlawful association within the meaning of sec. 30A (1) (a) of the *Crimes Act*, and literature was put in evidence under sec. 30R (5) which supports the conclusion that in fact it is an unincorporated body of persons which by its propaganda advocates the overthrow by force or violence of the established government of the Commonwealth. The issue of the *Workers' Weekly* of 1st July 1932 contained a solicitation of contributions of money for the purpose of "a monster anti-imperialist war demonstration on International Day against imperialistic war, August 1st." But the offence is not complete unless the contributions were solicited for the association called the Communist Party. The information against the appellant stated that the newspaper contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party of Australia, in the following terms, and it then set out in full the matter relied upon as amounting to the solicitation. Sec. 30R (1) of the *Crimes Act* provides that in a prosecution of the present description the averments of the prosecutor contained in the information shall be prima facie evidence of the matter averred. It is to be noticed that this provision, which occurs in a carefully drawn section, does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in

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effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus. The averment that the contributions were solicited for the association called the Communist Party must be considered with the text and context of the solicitation itself and with the other material in the case. When it is so considered, so much uncertainty is raised that, in my opinion, a tribunal of fact ought not to be satisfied beyond reasonable doubt that the contributions were solicited for the Communist Party. That body is an association organized upon a very definite if elaborate plan and composed of members duly admitted to its membership. Under a Party Congress, the Central Committee is the highest authority of the association. It appears from the publication relied upon as a solicitation that a conference called the August 1st Conference was held in the Trades Hall. How it was summoned does not appear, but it may be presumed that the Central Committee caused it to be summoned. Eighty delegates attended, representing sixty-four organizations. These organizations, apparently, are not branches of the Communist Party and, to whatever extent they may have shared its views, they were independent bodies. The conference decided to hold a mass demonstration against imperialistic war on August 1st. It elected a Central Campaign Committee and entrusted some task to each delegate. The conference was to meet again every alternate Monday in the Trades Hall, and the Central Committee, which appears to me to mean the Central Campaign Committee and not the Central Committee of the Communist Party, was to meet in the Trades Hall every Monday night. Having stated so much, the paragraph concluded:—"All working-class organizations not already represented are requested to appoint two (2) delegates to conference, and individual workers are requested to attend and help build a mighty mass demonstration against imperialist war. Funds are urgently needed for the above task. Rush them in immediately.—W. H. Nugent, Campaign Secretary." It does not appear who or what Nugent was. All this primarily suggests that the funds were to be paid in to, or for, the association of persons called the Central Campaign Committee. It is not absolutely inconsistent with the statements contained in the document that

the money should be received by, or on behalf of, or for the benefit of, the Communist Party to be expended by it in conducting the demonstration with the aid of the delegates sent by the outside bodies. But it seems more probable that the conference and the Central Campaign Committee, the body created *ad hoc*, was to receive it and expend it. Although some organ of the Communist Party may have been, and probably was, responsible for summoning the conference which formed the Central Campaign Committee, the statements contained in the article suggest that neither the conference nor the Central Campaign Committee was part of the Communist Party and that the delegates came from many other bodies, some only of which were part of the Communist Party. No facts are precisely averred, and none proved, which would show that, notwithstanding the tenor of the printed matter containing the solicitation, a contribution of money, if made in pursuance of the solicitation, would have been received by or on behalf of or for the benefit of the association called the Communist Party, and I am of opinion that the general allegation when considered with the composition of that association, and with what the newspaper paragraph relied upon actually says, ought not to result in a finding against the appellant upon this precise point. It may be thought that the distinction between, on the one hand, a contribution towards conducting a demonstration originating with a conference of bodies summoned by the Central Committee of the Communist Party, and, on the other, a contribution for that party itself, is not very substantial. But it must be remembered that the purpose and foundation of the provision prohibiting contributions to an unlawful association is the suppression of the body itself by cutting off supplies to it as an unlawful association. The particular demonstration in question does not appear to have had for its purpose the advocacy of anything contrary to Federal law, but, even if it were otherwise, upon this precise charge, it would not avail unless the body conducting it were part of the Communist Party.

I think that upon this ground the appeal should be allowed and the conviction set aside.

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EVATT J. The appellant was convicted before a stipendiary magistrate of the offence specified in sec. 30D (2) of the *Commonwealth Crimes Act*. That sub-section provides, in substance, that the printer and publisher of any newspaper which contains any solicitation of subscriptions "for an unlawful association" shall be guilty of the offence defined in sec. 30D (1), i.e., soliciting subscriptions for an unlawful association.

Part IIA of the *Crimes Act* contains a number of sections dealing with the "Protection of the Constitution." The validity of some of them has been challenged in these proceedings. Their general aim is the suppression of associations which advocate or encourage doctrines considered as dangerous to "constitutional" government, including the form and frame of government which is expressed in the Commonwealth Constitution. All of the sections were inserted in 1926 by Act No. 9 (March 16th, 1926), following upon the very important decision of this Court in *Ex parte Walsh and Johnson*; *In re Yates* (1), which was given on December 18th, 1925.

In that case the Commonwealth Government contended that the validity of sec. 8AA of the *Immigration Act* could be supported upon the footing that there was existing, at the relevant time, a serious industrial disturbance which threatened the peace, order and good government of the Commonwealth in relation to all the matters over which the Commonwealth and its various governmental organs had lawful jurisdiction; and that either sec. 51 (XXXIX.) or sec. 61 or some inherent legislative power authorized laws to "protect" the Commonwealth and its Constitution from the "subversive activities" of certain trade-union leaders. As much in 1932 as in 1925, the words "protect" and "subversive" are "ambiguous and general words" and are, for that reason, still of value in concealing vague and loose generalizations. (Cf. *Hawkins' Pleas of the Crown*, 8th ed. (1824), Book I., p. 6, quoting *Hale*).

The argument did not succeed in 1925, and the judgments of *Knox C.J.*, *Higgins* and *Starke JJ.* are quite opposed to the theory that, apart from secs. 51 and 52 of the Constitution, there is any inherent legislative power in the Commonwealth to "protect the Constitution" in the way it chooses. It is true that sec. 61 of the

Constitution declares that the "executive" power of the Commonwealth extends to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth." But this declaration, as was indicated in the *Wool Tops Case* (*The Commonwealth v. Colonial Combing, Spinning and Weaving Co.* (1)), only defines the general limits of the King's executive authority in respect of the Commonwealth and does not determine what the Executive may lawfully do upon any given occasion. Whatever powers or duties are conferred or imposed upon the King's executive government, by any section of the Constitution, or by such portion of the Royal prerogative as is applicable, may lawfully be exercised; but sec. 61 itself gives no assistance in the ascertainment or definition of such powers and duties.

The legislative power conferred by sec. 51 (xxxix.), like all the legislative powers of the Commonwealth, is exercisable lawfully only if it is "with respect to" the subject matter described in the placitum itself. If, and only if, the legislation passed is upon a matter which is truly incidental to the exercise of Commonwealth executive, legislative, or judicial authority, is it authorized by placitum xxxix.

Mr. Windeyer's very daring contention that the provisions of Part IIA dealing with the suppression of unlawful associations can all be supported by reference to sec. 51 (xxxix.) of the Constitution, need not now be examined. In accordance with the ruling of the Judicial Committee of the Privy Council in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.* (2), the Court will have to be satisfied, when the proper occasion arises, that each provision in question deals with matters which bear a sufficient relationship to the exercise of one or more Commonwealth powers to warrant that relationship's being described by the word "incidental." Upon such occasion, no doubt, the question may again be debated whether there is any "inherent" legislative authority in the Commonwealth Parliament which can support the validity of the enactments.

Further, even if some enactments in Part IIA are valid, it by no means follows that sec. 30D (2) itself is valid. For it punishes an

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(1) (1922) 31 C.L.R. 421.

(2) (1914) A.C. 237.

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act of the printer or publisher of a newspaper, whether or not he is a member of the "unlawful association," whether or not he even knows of the existence of such association, whether or not he knows of its unlawful character, and whether or not he knows that the printed or published solicitation is "for" the association. Does this sub-section not regulate the conduct of persons in respect of their printing or publishing matter which is condemned by reference to too distant a criterion or standard? That criterion or standard consists of some, not all, of the activities of some, not all, of the members of the body for which contributions are invited in the printed matter. It is clear enough that there is an attempt to cast upon printers and publishers of newspapers a duty which will often be impossible of performance. That may not invalidate the enactment. But it illustrates that the nexus between the conduct made punishable in the printer or publisher, and the subject matter, whatever it is, with which the Parliament is dealing in the other enactments of Part IIA, may be so shadowy as to be non-existent. In the present case the question need not be pursued further.

The magistrate admitted in evidence a large number of documents, consisting mainly of copies of the *Workers' Weekly* newspaper. No oral evidence was tendered by the officially selected prosecutor, one Hush, or by the defendant. The magistrate convicted upon the assumption that sec. 30R of the *Crimes Act*, which deals with the effect of averments contained in an information, is necessarily valid because of the decision of this Court in *Williamson v. Ah On* (1). It is not necessary to investigate such assumption. The question whether sec. 30R is valid depends upon whether it is a law with respect to some subject matter of Commonwealth legislative power clearly enumerated and specified in the Constitution. In *Williamson v. Ah On*, the relevant legislative power exercised was that in relation to the subject of immigration. The very nature of that subject matter may warrant an enactment which places upon a person suspected of being an immigrant the burden of showing, by evidence, that he is not. When the main provisions in Part IIA dealing with unlawful associations are revealed as laws with respect to some identifiable subject of power, then, but not till then,

can it be determined whether sec. 30R is supportable as an exercise of the same head of power.

This case is best dealt with upon the assumption that sec. 30R is wholly valid. But I think that it is very difficult to suppose that the section was intended to authorize such proceedings as took place in the present case. The first information which Hush filed against the defendant was for the very same offence as that alleged by him in the second information. The first information was of very great length. It did not merely state the substance of the offence in accordance with the regular practice and procedure, which are those of the New South Wales *Justices Act* (see *Judiciary Act* 1903-1927, secs. 68, 79), but proceeded to aver and allege a very large number of matters of a purely evidentiary character, including the alleged contents of written documents, and their supposed meaning, character and tendency. Sec. 30R nowhere expressly authorizes such an information, and sec. 21A of the *Crimes Act* postulates the power of the magistrate to correct defects in the information, whether in substance or in form. Sec. 30R assumes that the information will be in proper form, and asserts the legal consequences which are to flow from the contents of an information in proper form.

But the informant was not satisfied with his first attempt at drafting an information, and filed a second one, in respect of which the conviction under review was made. Counsel for the Commonwealth stated before us that this second information was the result of careful preparation on the part of the legal officers concerned. It is certainly one of the most amazing documents in the whole history of law. It consists, I am informed by one of the officers of the Court, of no less than 27,453 words. Thirty or forty words would have satisfied the requirements of the practice and procedure of the New South Wales Court. But the obvious intention of the prosecutor was, not to state the offence and to allow the law, including sec. 30R, to take its ordinary course, but to allege an enormous number of facts, of documents, of the contents of documents, of inferences from facts, and of inferences from documents, and then to invoke sec. 30R in order to induce the magistrate to accept this

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queer medley as satisfactory proof of everything averred, unless the defendant hazarded the task of destroying each and every averment.

The nature and extent of that task may be illustrated by one or two examples. Averment No. 33 of the information was as follows:—

“On the 1st August 1930 the Communist Party of Australia arranged for a body of their members and sympathisers to meet in Martin Place, Sydney, in order to smash the Cenotaph. On the intentions of such party and sympathisers becoming known to the Police twelve of the leaders of the party were arrested in Martin Place on a charge of vagrancy and held on such charge for sufficient time to frustrate their object.”

This averment was made in order to indicate the unlawful activities of the organization known as the Communist Party. It is an averment bearing no other relationship to the charge against the defendant. It was not alleged, as elsewhere in the information, that the unlawful conspiracy described in the averment was ever followed by any curial proceedings. It may readily be assumed therefore that no such proceedings were ever taken. And yet the Court was, and is, asked to infer as against the defendant the existence of an unlawful conspiracy so heartless and wanton as to cause overwhelming prejudice.

Other examples of a similar character spring to the eye, upon a perusal of the information. The averments contain quotations of articles from the *Workers' Weekly*, which have been torn from their context, and given a sinister character. The object of all this is to suggest that the Communist Party advocates, by way of offence, the use of physical force and violence. Political slogans, such as “Smash the Arbitration Court. Smash the Capitalist Offensive,” are selected by the informant in order to suggest that the word “smash” refers to the use of actual physical force. In one instance the informant actually averred one half of a sentence taken from the newspaper, omitting the first half of it, though it was necessary for the understanding of the whole. In another, selections from the election policy of the Communist Party were averred, without stating that it was the election policy of its candidates, and that it was expressed to be conditioned upon the support of the majority of the people. The information is full of *clichés* and question-begging phrases. Certain Internationals are alleged to be “interlocked,” as a result of which the Communist Party is “brought into co-operation with”

another movement. Upon this slender, and legally insufficient, basis the information proceeds to impute all the activities of the "interlocked" movement to the Communist Party.

It is not necessary to labour the point further. In my opinion it was within the competence of the magistrate to strike out from the information everything except the short statement of the offence. Further, I think that it was his duty to cause to be stated to the defendant, not the whole information, which, we are told, took no less than three hours to read, but only *the substance* of the charge. For sec. 78 (1) of the New South Wales *Justices Act* provides that "where the defendant appears at the hearing the substance of the information . . . shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted or why an order should not be made against him as the case may be."

It is, of course, well within the power of a magistrate to order particulars, and they are quite essential to the administration of justice in cases of this description. In my opinion, such information as that which the magistrate not only allowed to be used, but acted upon, even on the question of sentence, is an abuse of the process of the Court; and Courts exercising summary jurisdiction in New South Wales have power to prevent such an abuse of process.

Mr. *Mack* contended further that sec. 30R has no application to an averment which alleges either the existence or the meaning or legal effect of written documents. As it turns out, it is not necessary to decide this point. In the present case, the informant did in fact put in evidence the actual newspaper which contained the alleged request for contributions to the Communist Party. And sec. 30R (3) implies, if it does not expressly state, that the probative value of documentary evidence shall not be diminished by reason of the section. In the case of a dispute as to the meaning of a written document, the probative value of the document itself is so great that, for all practical purposes, it must annihilate anything elsewhere averred as to the meaning of the document. No Court exercising the judicial power of the Commonwealth could allow the prosecutor's *ex parte* statement of what the document means to outweigh the Court's own construction of the document.

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The printed "solicitation" is now before us. It is signed by a person, as to whose identity the prosecutor led no evidence, and averred no facts. It seems to me quite clear that the invitation to send in funds was for the purpose of assisting a combination of working-class organizations in holding a demonstration against war. It can easily be inferred that the Communist Party itself was one of the sixty-four organizations represented; but it seems to me impossible to conclude, especially in a criminal case, that all these organizations were part and parcel of the Communist Party itself. Meetings of the campaign committee were held, not at the headquarters of the Communist Party, but at the Trades Hall. The only reasonable inference from the terms of the printed matter is that contributions were being invited, not for the Communist Party, but for the special organization set up by a large number of working-class bodies, including the Communist Party.

Upon this footing, the appeal necessarily succeeds, and the prosecution must fail.

It becomes unnecessary therefore to determine the question whether enough matter was averred or proved in order to show that the Communist Party was advocating the overthrow by force or violence of the established government of the Commonwealth of Australia. In order to determine this question, the Courts will necessarily have to pay proper attention to the distinction between advocacy of a complete and radical social, political and economic change, and advocacy of the use of actual physical violence in securing that change.

There is much in the matters averred and printed to suggest that the Communist Party advocates that the whole Parliamentary machine must be completely changed—transformed—revolutionized, in order that a monopoly of political power shall be given to the working class, and that owners of private industries, property and wealth shall be dispossessed without compensation; further, that it is highly probable that so great a change, whether or not it is approved by the majority or ordained by law, will not be acquiesced in without resort to force on the part of those dispossessed, that, in this sense, a violent civil upheaval will, almost certainly, accompany the proposed transformation of society and that actual civil

violence and disturbance will accompany the attempted socialization of industry.

In order to determine the bearing of all these matters, reference would have to be made to the leading exponents of more modern Socialist thought, from Marx and Engels onwards. It is a subject upon which every student of history, political science, sociology and philosophy should be tolerably well informed. Even the averments in the present case include a historical reference to the three Internationals. In the ultimate ideal of a classless society, the Communist movement has much in common with the Socialist and working-class movement throughout the world. They all profess to welcome a revolutionary change from the present economic system, which, conveniently enough, is called Capitalism, and the more violent protagonists of which are now called Fascists. The doctrine of the class struggle raises a dispute as to fact, rather than opinion. It is not a question whether it is desirable to have a struggle between a property-less class and a property-owning class, but whether such struggle exists in fact. The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship, there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that a violent upheaval will ensue when the time comes to effect such substitution (*Encyclopædia Britannica*, 12th ed., vol. 30, p. 732 (*R. P. Dutt*); cf. *Laski's Democracy in Crisis*, pp. 194, 226, 227, 241.)

"When the time comes." It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. "The inevitability of gradualness" as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist

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Party in explaining their references to physical force, is that force and the threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability.

It may be contended that Part IIA of the *Crimes Act* seeks to prevent the dissemination of doctrines which advocate, or tend to encourage, the use of force with the immediate object of overturning the Government of the Commonwealth. On the other hand, if that Part of the Act looks further ahead, and proposes to prevent all advocacy of Communism as against Capitalism, it may be largely invalid. The Privy Council has determined that none of the lawful subject matters of Commonwealth legislative power "relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth" (*Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.* (1)).

I have sought in this opinion, whilst limiting my decision to the point as to the meaning of the publication contained in the newspaper published by the defendant, to indicate the general nature of some of the graver issues which remain undecided. I protest against the growing tendency to assume, without argument or proof, the existence of "inherent" power in the Commonwealth Parliament. In this case the very name—the "*Crimes*" Act—challenges inquiry, because unlike the Dominion of Canada, the Commonwealth does not possess general jurisdiction over the domain of criminal law. The States of the Commonwealth have power over that subject matter, and have exercised it very fully and extensively. This does not mean that the enactments of the Commonwealth Parliament, which were questioned before us, cannot be sustained as lawful by reference to some definite subject matter of Commonwealth power, for, in such event, the aspect of criminal law co-exists with that of the definite subject matter. But it does, or should, compel a very searching inquiry for the purpose of deciding whether some at least

(1) (1914) A.C., at p. 255; 17 C.L.R., at p. 654.

of the provisions of the *Crimes Act* are "properly framed" enactments with respect to a subject matter which is, by the Constitution, withdrawn from the power of the Parliaments of the States into the power of the Parliament of the Commonwealth.

The appeal should be allowed with costs here and below, and the conviction quashed.

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McTIERNAN J. In my opinion the appeal should be allowed, the conviction set aside and the information dismissed. It is an ingredient of the offence with which the appellant is charged that the contributions of money, which by force of sec. 30D (2), he, as the printer and publisher of the *Workers' Weekly*, is deemed to have solicited, were solicited *for an unlawful association*. The unlawful association, for which the informant says that the appellant solicited contributions of money, is the Communist Party of Australia. The initial question of fact is whether the solicitation, which the appellant is deemed to have made, was for contributions of money for that Party. At the commencement of the information it is said that the solicitation is contained in the *Workers' Weekly* which was published by the appellant on 1st July 1932. The terms of the solicitation are fully set out by the informant in par. 61 of the information and are immediately prefaced by an averment in the same paragraph which repeats that, on the 1st day of July 1932, the appellant published the *Workers' Weekly* "which contained a solicitation of contributions of money for an unlawful association, namely, the Communist Party, in the following terms." A copy of the *Workers' Weekly* of that date containing the alleged unlawful solicitation was in evidence and it is not necessary to repeat the terms of the solicitation. In this appeal it is for the Court to form its own judgment of the facts, so far as it is able to do so (*Dignan's Case* (1)). The probative value of the averment that contributions of money were solicited for the Communist Party does not, in my opinion, rise higher than the evidence which the prosecutor gave of the complete terms of the entire solicitation and which is the only evidence relating to it in the case. I am not satisfied beyond reasonable doubt that the terms of that solicitation, upon which the

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prosecutor relied, prove that the appellant solicited contributions of money for the Communist Party of Australia. No attack was made by the prosecution on the truth of any matters which are stated in the solicitation as matters of fact. It narrates that a conference of eighty delegates representing sixty-four organizations was held at the Trades Hall, Sydney, on 27th June 1932, and decided to hold "a monster anti-imperialist war demonstration on International Day against imperialist war, August 1st," and that the demonstration would take the form of a procession through the streets and a rally in the Domain. It concludes with this appeal:—"Funds are urgently needed for the above task. Rush them in immediately," and is signed "W. H. Nugent, Campaign Secretary." He is the secretary of the Central Campaign Committee of twenty-one, which, it is narrated, was set up by the conference. The "solicitation" further states that the conference would meet alternate Mondays in the Trades Hall and that "all working-class organizations not already represented are requested to appoint two delegates to Conference." So far there is no ground for any suggestion other than that the appeal was made for funds which were needed to meet the expenses of holding the demonstration, and that the demonstration was decided upon and organized by a conference of delegates representing at least sixty-four working-class organizations. But there are other facts which require consideration:—(1) The "solicitation" appeared in the official organ of the Communist Party of Australia; (2) the object of the demonstration is akin to one or more objects of that party; (3) the "solicitation" states that prominent speakers from fraternal organizations and from the "Central Committee" will address the demonstrators; (4) it announces not only the time and place of the meetings of the campaign committee set up by the conference but also the time and place of the meetings of the "Central Committee." The "Central Committee" is the "highest authority" of the Communist Party between its party congresses. (See rules and constitution of the Communist Party of Australia which are in evidence.) While these facts suggest that the demonstration was approved and supported by the Communist Party, and that it may have been represented at the conference by its own delegates, the conclusion does not follow

that the conference and the campaign committee respectively were not quite separate from and independent of the Communist Party. The facts which I have enumerated do not, in my view, rebut the presumption raised by the terms of the solicitation that either the conference or the campaign committee, but not the Communist Party or its central committee or some part of it, was organizing the demonstration or appealing for financial assistance to enable it to be carried out. If the campaign committee were in truth and in fact but a disguise for the Communist Party, or some committee or part of it, and the demonstration a disguised activity of the Communist Party carried out by that party, the prosecution has not, in my judgment, proved the disguise.

In the view which I take of this initial question of fact, it does not become necessary to decide the other questions which were argued.

Appeal allowed. Conviction set aside. Information dismissed. Respondent to pay costs of this appeal, and of proceedings before the Court below.

Solicitors for the appellant, *C. Jollie Smith & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

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