[HIGH COURT OF AUSTRALIA.]

WISHART . . . . . APPLICANT;
DEFENDANT AND APPELLANT,

AND

FRASER AND OTHERS . . . . . RESPONDENTS.
INFORMANT AND RESPONDENTS,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES, AND ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *April* 2, 4, 10.

Rich A.C.J., Starke, Dixon, McTiernan and Williams JJ.

Constitutional Law—Delegation of legislative powers—Act relating to national security and defence—Regulations thereunder—Validity—National Security Act 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5—*National Security (General) Regulations, reg.* 41 (1), (2).

High Court—Practice—Conviction by State Court of Petty Sessions exercising Federal jurisdiction—Prohibition—Application to High Court—Conviction affirmed by State Court of Quarter Sessions—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73 (ii)—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *sec.* 39 (2) (*b*), (*c*)—*Rules of the High Court, Part II., sec.* IV., *r.* 1—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *secs.* 112, 122.

Sec. 5 of the *National Security Act* 1939-1940 is not an illegal delegation to the Executive of legislative power, but is a valid exercise of the defence power.

An order of a Court of Quarter Sessions of New South Wales confirming on appeal a conviction by a magistrate exercising Federal jurisdiction is, while it stands, a bar to any appeal from the magistrate's decision direct to the High Court.

APPEAL, by way of order nisi for prohibition, from a Court of Petty Sessions of New South Wales, and APPLICATION for special leave to appeal from a Court of Quarter Sessions of New South Wales.

John Royston Wishart, a solicitor, was charged before a Court of Petty Sessions at Sydney on the information of Jack Lyall Fraser, a detective of the police force of the State of New

South Wales attached to the Commonwealth Military Police Intelligence, with an offence under sec. 10 of the *National Security Act* 1939-1940 and reg. 41 (1) (*b*) of the *National Security (General) Regulations* made pursuant to that Act, for that on 25th June 1940 at Sydney he did, with intent to endeavour to cause disaffection among members of the Second Australian Imperial Forces engaged in the service of the King, have in his possession a document which was of such a nature that the dissemination of copies thereof among such members would constitute an endeavour to cause disaffection among those members, contrary to the Act. The document referred to, which was set forth at length in the information, was addressed "To the soldiers of the Second A.I.F.," and was headed "Military punishment and the rank and file." It contained a statement, which was alleged to have appeared in a newspaper, of the treatment said to have been meted out to some members of the A.I.F. "who were doing time for minor offences, mainly A.W.L.," and the comment thereon was that "all this is just a first taste of the evils that military stupidity and red tape can cause and which the rank and file will have to put up with," and that "the solution of all your problems lies in the setting up of soldiers' committees." "Common causes of dispute" were said to be:—(1) "Canteen funds and comforts funds": it was stated that "in the last war maladministration and lack of proper supervision led to the diversion of great quantities of supplies and money from the soldiers to the pockets of private individuals." (2) "Fines and field punishment": these, it was stated, "are handed out arbitrarily without any effective right of appeal. Representative committees would act as a check on irresponsible officers and at the same time protect the soldier." (3) "Leave": there was, it was stated, "already a sharp difference developing between the amount of leave allowed to officers and the rank and file." (4) "Care of dependants": it was stated that "in the last war dependants' allowances were delayed and cut off on trivial and arbitrary excuses." (5) "Pensions": it was alleged that "from the start of the war the Government has stated that it is going to avoid piling up a large debt and in many ways it has shown a desire to run the war on the cheap. . . . Economy and the war needs of the soldiers will be sure to come into conflict." At the end of the document in bold type was an exhortation to "Elect soldiers' committees."

The evidence showed that on 25th June 1940, upon the police searching Wishart's office and his home, they found about fourteen copies of the document referred to in the information, and also copies of another document entitled "This Imperialist War," and

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a considerable quantity of communist literature. Wishart, who was the joint author of the subject document, said he believed that he had burnt all the copies of the document, but he admitted that between the date of its composition in January 1940 and the end of February 1940 he used the document with intent to endeavour to cause disaffection amongst members of the Second Australian Imperial Forces. About the end of March 1940 the Revolutionary Workers' League, an organization consisting of a few persons and of which Wishart was the secretary, became affiliated with the Communist League, and Wishart became a member of the executive of that body. He said that the subject document was not used after the affiliation, because it had not received the approval of the executive, but he admitted that in the middle of 1940 it was still a principle of the doctrines of the Fourth International that communist *nuclei* should be formed in every military unit and he considered that this principle should be acted upon. He said that he regarded the army as an instrument of capitalistic oppression, that he considered that soldiers' committees should be organized which would take over control of the army in due course, and that he would have liked the general situation to have advanced to such a stage on 25th June 1940 that the right time for doing this would have arrived, although it had not in fact done so.

In the margin of the information appeared the following, which —except that the italicized "*W. M. Hughes*" appeared written in ink by hand—was typewritten :—"I consent to the institution of this prosecution in respect of the contravention herein alleged of regulation 41 (1) (*b*) of the *National Security* (*General*) *Regulations*, and I also consent to the prosecution summarily of the offence herein alleged.

W. M. Hughes,
Attorney-General.
6–9–1940."

The magistrate, on 16th January 1941, convicted Wishart and sentenced him to imprisonment with hard labour for a term of six months.

Upon being so convicted Wishart lodged an appeal under sec. 122 of the *Justices Act* 1902 (N.S.W.) to the Court of Quarter Sessions against his conviction and sentence. On 6th February 1941 an application made by Wishart, within the time allowed by sec. 112 of the *Justices Act* 1902 (N.S.W.), to the High Court for a rule nisi for a statutory prohibition under that Act directed to the Right Honourable William Morris Hughes, Attorney-General for the

Commonwealth, the informant, Jack Lyall Fraser, and the magistrate, Frederick Donald Hercules Sutherland, was stood over by *Williams* J. until the appeal to the Court of Quarter Sessions had been disposed of. That appeal was heard before Judge *Stacy*, Chairman of Quarter Sessions, on 18th, 19th, 20th and 21st March 1941. The judge rejected part of the documentary evidence submitted by the informant which had been admitted by the magistrate. The judge, on 21st March, dismissed the appeal and confirmed the conviction and sentence of imprisonment with hard labour for a term of six months. On the ground that there was not any question of law which ought to be so submitted, he refused to exercise the discretionary power conferred upon him by sec. 5B of the *Criminal Appeal Act* 1912 (N.S.W.) to submit a question or questions of law to the Court of Criminal Appeal for determination.

Upon Wishart renewing, in the High Court, on 28th March, his application for a rule nisi for a writ of prohibition, *Williams* J. made an order returnable before the Full Court on 2nd April, and that application duly came on for hearing.

Mitchell K.C. (with him *Snelling*), for the respondents other than the magistrate, on a preliminary point. The applicant appealed under the *Justices Act* 1902 (N.S.W.) to the Court of Quarter Sessions against his conviction. That court heard the matter *de novo*, on evidence which was different from the evidence given before the magistrate, confirmed the conviction and ordered that the applicant be imprisoned for six months. The Chairman of Quarter Sessions is not a party to the proceedings before this court, nor is his order before this court. In the circumstances the magistrate's order, which is the only order before this court, is now defunct, and, therefore, there is nothing for this court to prohibit. The position which has arisen in this case was not dealt with in *R.* v. *Poole*; *Ex parte Henry* (1).

Barry, Assistant Crown Solicitor (N.S.W.), for the respondent magistrate.

Farrer, for the applicant. The procedure usually followed in cases where an appeal is made to the Court of Quarter Sessions, and an appeal on the law is made to the Supreme Court, is that the appeal to the Court of Quarter Sessions is held over pending the determination of the law by the Supreme Court, as in *Ex parte Giles* (2). That procedure was followed in this court until the decision in *R.* v. *Poole*; *Ex parte Henry* (1). If that decision be followed serious consequences

(1) (1938) 61 C.L.R. 1. (2) (1912) 29 W.N. (N.S.W.) 83.

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might flow in cases where imprisonment is possible. An aggrieved person is entitled to pursue both remedies (*R.* v. *Skinner* (1)). The Chairman of Quarter Sessions dismissed the appeal and confirmed the order of the magistrate ; therefore the applicant is being imprisoned under the order of the magistrate. In the circumstances, if the magistrate's order were set aside, there would not be any warrant for holding the applicant as a prisoner. If necessary, the further hearing of the matter should be adjourned with a view to the applicant making an application under sec. 73 (ii) of the Constitution and sec. 39 (2) (*c*) of the *Judiciary Act* 1903-1940 for special leave to appeal from the order of the Court of Quarter Sessions.

RICH A.C.J. This matter will be adjourned until Friday next, and that day will be fixed for the hearing of the application for special leave to appeal.

April 4. Wishart applied by way of notice of motion to the High Court for special leave to appeal from the order of the Court of Quarter Sessions dismissing his appeal from his conviction and sentence.

Farrer, for the applicant. The *National Security Act* 1939-1940 is an invalid exercise of power by the Federal Parliament, inasmuch as by sec. 5 of that Act the power given to the Parliament to legislate for the peace, order and good government of the Commonwealth in respect of the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth has been arrogated to the Executive. It is not competent for the Federal Parliament to hand over to the Executive the whole of the power to make a law, whether by regulation or otherwise, with respect to the defence of the Commonwealth. Parliament is unable to divest itself completely in favour of a subordinate body, of law-making power in respect of any particular function with which it has been itself endowed (*In re Initiative and Referendum Act* (2)). It is important to remember that it is not for this court to inquire into the nature of a regulation ; once a power has been handed over to the Executive, it can make such regulation as it thinks fit (*The Zamora* (3) ; *Farey* v. *Burvett* (4)). This case is vastly different from the case of *Roche* v. *Kronheimer* (5). The generality of sec. 5 is not restricted by the particular provisions of that section (*Huddart Parker Ltd.* v. *The Commonwealth* (6))—See also *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v.

(1) (1870) 1 A.J.R. 151.
(2) (1919) A.C. 935, at p. 945.
(3) (1916) 2 A.C. 77, at p. 107.
(4) (1916) 21 C.L.R. 433.
(5) (1921) 29 C.L.R. 329.
(6) (1931) 44 C.L.R. 492.

Dignan (1). The point was not raised in *Pankhurst* v. *Kiernan* (2) or in *Ferrando* v. *Pearce* (3). The only reason that can be advanced for regarding sec. 5 as a valid exercise of power is that, in spite of the decision in *Huddart Parker Ltd.* v. *The Commonwealth* (4), the words "and in particular" in fact indicate the subject matters upon which the Executive may make regulations. Reg. 41 does not fall within any one of those specified subject matters. The Attorney-General's consent which is purported to have been given in this case is not in proper form. In *Holland* v. *Jones* (5) there was authority for the consent as given, but reg. 41 requires a type of consent other than a written consent. The charges against the applicant are not established by the evidence. It was not proved that at the date of the charge the applicant had the intention of subsequently making use of the document referred to or in any way disaffecting the members of the Second Australian Imperial Forces by means of that document. On the contrary, the evidence shows that the applicant's possession of the document on the date charged was an accidental happening. As compared with the numerical strength of the Second Australian Imperial Forces the number of copies of the document said to have been found in the possession of the applicant is infinitesimal: See *R.* v. *McMahon* (6). Mere possession of the document is not sufficient to prove the charge.

Mitchell K.C. (with him *Snelling*), for the respondents, was called upon to deal with the facts. This court does not grant special leave to appeal in criminal cases on mere matters of fact. The Chairman of Quarter Sessions properly drew an inference of guilt on the part of the applicant from the facts in evidence before him. The facts that the applicant was the author or part author of the document; that, on his own admission, he had used it until March 1940; that, until it had just previously been so declared, he had been an active member of an organization which recently had been declared illegal; that, on his own admission, his ideas as to the social structure had not changed; and that he had retained possession of copies of the document and of other "revolutionary" documents, were sufficient to justify the inference drawn by the Chairman of Quarter Sessions. The applicant's state of mind with reference to the document until March is strong prima-facie evidence that that was a continuous state of mind which existed until and on the date charged (See *Attorney-General* v.

(1) (1931) 46 C.L.R. 73.
(2) (1917) 24 C.L.R. 120.
(3) (1918) 25 C.L.R. 241.
(4) (1931) 44 C.L.R. 492.
(5) (1917) 23 C.L.R. 149.
(6) (1894) 15 L.R. (N.S.W.) (L.) 131; 10 W.N. (N.S.W.) 204.

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Bradlaugh (1)); this, coupled with the fact that he retained copies of the document concerned and other documents, is additional evidence. The Chairman of Quarter Sessions was entitled to disregard or disbelieve, in whole or in part, evidence given by and on behalf of the applicant, and, also, to draw inferences adverse to the applicant from admissions made by him.

Farrer, in reply. The evidence established only that the applicant has a very definite and very confirmed political opinion ; it does not prove the charge brought against him. There was not any evidence that on the date charged he had any intention to disaffect members of the Second Australian Imperial Forces by means of the document, or otherwise ; nor is there any evidence that the document was capable of being used in an endeavour to cause such disaffection.

Cur. adv. vult.

April 10. The following written judgments were delivered :—

RICH A.C.J. In this matter the applicant was on 16th September 1940 charged with an offence against reg. 41 of the *National Security (General) Regulations* 1939-1940 made pursuant to the provisions of the *National Security Act* 1939-1940. The hearing of this charge, which lasted some days, was concluded on 16th January 1941, when he was convicted of the offence that he did on 25th June 1940 at Sydney with intent to endeavour to cause disaffection among certain persons, namely, members of the Second Australian Imperial Forces, engaged in the service of the King, have in his possession a certain document, which said document was of such a nature that the dissemination of copies thereof among such persons would constitute an endeavour to cause disaffection among such persons, contrary to the Act in such case made and provided. Against this conviction the applicant appealed to the Court of Quarter Sessions, which on 21st March 1941 confirmed the conviction. The applicant on 28th March 1941 applied to *Williams* J. and obtained an order nisi for prohibition to restrain the respondents from proceeding further in respect of the conviction.

On the return of the order nisi before this court it was suggested that while the order of the Court of Quarter Sessions confirming the conviction stood it would bar any right to appeal direct from the magistrate's order and that the applicant should apply for special leave to appeal from the order of the Court of Quarter Sessions. That is admittedly a valid order made by the Court of Quarter

(1) (1885) 14 Q.B.D. 667.

Sessions exercising Federal jurisdiction. If this court were to deal with the conviction by the magistrate and quash it, the extraordinary result would follow of two orders in existence at the same time—the order of this court and that of Quarter Sessions. The situation in *R.* v. *Poole*; *Ex parte Henry* (1) was different. There the court prevented a possible clash of orders by refusing to hear an appeal. As a matter of history I may state that the applicant in that case asked the judge of Quarter Sessions for leave to withdraw his appeal, the leave was granted, and the appeal was withdrawn. But, whether concurrent and cumulative remedies are permissible under the *Justices Act* 1902 (N.S.W.) or not, that Act cannot govern this court in hearing appeals from courts exercising Federal jurisdiction.

As to special leave the grounds alleged are four in number, viz., that (*a*) sec. 5 of the *National Security Act* 1939-1940 is invalid, (*b*) reg. 41 of the regulations made under the Act is *ultra vires* the Act, (*c*) the consent of the Attorney-General to prosecute was not proved, (*d*) there is no evidence of the charge laid. In support of the first ground it was contended that sec. 5 of the Act purported to delegate the whole power to make laws with respect to the naval and military defence of the Commonwealth and was therefore invalid. A similar contention has been raised in this court and has not been sustained. The decision in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2) and the former decisions there referred to finally dispose of this contention, and it follows that sec. 5 is a valid exercise of the power. (*b*) If the Act is, as I hold it to be, valid, the second objection fails. (*c*) We are bound to take judicial notice of the Attorney-General's signature, which is written under the consent indorsed on the information. (*d*) The character of the document speaks for itself. But it was contended that the intention to disseminate disaffection among soldiers which appears on the face of the document had ceased to exist at the end of March and that 25th June 1940, the date laid in the information, is the material date and of the essence of the offence. Since the adjournment I have carefully reread the evidence before the Court of Quarter Sessions. It is proved that the applicant was a part author of the document and joined in duplicating copies of it. Copies were found both in his office and in his bedroom in another dwelling on 25th June, and on this date "a close associate and co-worker of his" had other copies. Copies had been distributed at any rate before the end of March. I have no doubt in holding that the authorship of the document, its possession and retention of possession up to 25th June 1940, its distribution, and the other

(1) (1938) 61 C.L.R. 1.

(2) (1931) 46 C.L.R. 73.

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relevant and admissible evidence before the learned judge of Quarter Sessions fully justified him in inferring that the applicant's intention of himself using the document for the unlawful purpose or of allowing others to use it existed at the end of March and continued up to 25th June 1940. I should add that the date laid in the information is not of the essence of the offence (*R.* v. *James* (1); *R.* v. *Dossi* (2)).

In my opinion an appeal from the order of the Court of Quarter Sessions would fail and special leave should be refused. It follows from this refusal that the rule *nisi* should be discharged.

STARKE J. "It seems to me that it is burning daylight," to use an expression of *Halsbury* L.C., to state elaborate reasons for rejecting this appeal.

The appellant was charged with an offence under reg. 41 of the *National Security* (*General*) *Regulations* 1939-1940 made pursuant to the *National Security Act* 1939-1940 in that he, on 25th June 1940, with intent to endeavour to cause disaffection among Australian soldiers, had in his possession a certain document. A stipendiary magistrate, sitting as a Court of Petty Sessions in the exercise of Federal jurisdiction, convicted the appellant of the offence. He appealed to the Court of Quarter Sessions, as he was entitled to do under the law: See *Judiciary Act* 1903-1940, sec. 39 (2). But that court affirmed the conviction. Next he brought an appeal to this court by means of a rule *nisi* for statutory prohibition (*Grayndler* v. *Cunich* (3)) against his conviction by the stipendiary magistrate. If the Court of Quarter Sessions had reversed the decision of the stipendiary magistrate, its judgment would have held "the field to the exclusion" of the conviction by the stipendiary magistrate. And when Quarter Sessions affirmed the conviction, its judgment was equally conclusive, for it operated as a judicial determination by a competent and higher authority that the conviction was right. An application was made to the Chairman of Quarter Sessions to state a case pursuant to the provisions of the *Criminal Appeal Act* 1912 (N.S.W.), sec. 5B, but he refused the application. And no appeal has been brought to this court by way of case stated or otherwise against the judgment of Quarter Sessions. That judgment therefore holds the field so long as it stands unreversed, and precludes this court making any judicial determination to the contrary.

The appellant, however, when it was plain that his rule *nisi* must be discharged, moved for special leave to appeal from the judgment

(1) (1923) 17 Cr. App. R. 116. (2) (1918) 87 L.J. K.B. 1024.
(3) (1939) 62 C.L.R. 573, at p. 589.

of Quarter Sessions (*Judiciary Act* 1903-1940, sec. 39) upon the grounds :—

1. That the *National Security Act* 1939-1940 and the regulations made thereunder were invalid because the Act delegated legislative power to the Governor-General, contrary to the provisions of the constitution.

But this argument has been considered and rejected in many cases by this court : See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) and the cases there collected.

2. That it was not proved that the prosecution of the appellant was instituted with the consent of the Attorney-General (reg. 41 (2)).

But a consent signed by the Attorney-General appears upon the face of the information. Such an objection is hardly one for special leave to appeal, but it is disposed of by the decision of this court in *Holland* v. *Jones* (2).

3. That there was no evidence that the appellant committed the offence charged against him, or at all events that the conviction was against evidence and the weight of evidence.

Special leave to appeal should not be granted upon such a ground : it involves no important question of law nor any matter of public importance : it is an objection peculiar to the particular case. The objection, however, was argued before the court at some length, and the discussion made it abundantly clear that there was ample evidence to support the conviction.

The rule nisi for statutory prohibition should be discharged and special leave to appeal from the decision of Quarter Sessions should be refused.

DIXON J. For the purpose of relieving Wishart of a summary conviction and a sentence of imprisonment, two proceedings have been brought before us. Under sec. 10 of the *National Security Act* 1939-1940 and reg. 41 (1) (*b*) of the *National Security* (*General*) *Regulations* he was convicted before a police magistrate exercising Federal jurisdiction upon a charge that he did with intent to endeavour to cause disaffection among certain persons, namely, members of the Second Australian Imperial Forces, engaged in the service of the King, have in his possession a document of such a nature that the dissemination of copies among such persons would constitute an endeavour to cause such disaffection. He was sentenced to imprisonment for a term of six months.

Wishart appealed against the conviction to a Court of Quarter Sessions. But that court confirmed the conviction. Wishart then

(1) (1931) 46 C.L.R. 73. (2) (1917) 23 C.L.R. 149.

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took steps to invoke the appellate jurisdiction of this court. Under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1940 an appeal lies of right to this court from the decision of a court of a State exercising Federal jurisdiction, wherever an appeal lies, under State law, from its decision to the Supreme Court. An appeal by way of statutory prohibition lay from the magistrate to the Supreme Court, but no such appeal lay from the Court of Quarter Sessions. Wishart, in the first instance, ignored the confirmation by that court of his conviction and attempted to appeal from the conviction as of right. When it was objected that the order of the Court of Quarter Sessions confirming the conviction stood in the way of a direct appeal from the magistrate, he then applied under sec. 73 (ii) of the Constitution and sec. 39 (2) (*c*) of the *Judiciary Act* for special leave to appeal from the order of the Court of Quarter Sessions.

The two proceedings now before us for determination are the appeal from the magistrate and the application for special leave to appeal from the Court of Quarter Sessions. The first question to be decided is whether an appeal as of right from the decision of the magistrate exercising Federal jurisdiction can be maintained after it has been confirmed by the Court of Quarter Sessions, at all events while the confirmation stands.

The appeal to this court is given by sec. 73 (ii) of the Constitution and not by sec. 39 (2) (*b*) and (*c*) of the *Judiciary Act*, the operation of which is to distinguish between appeals as of right and appeals by special leave. It is a full appeal on law and fact of the same nature as other appeals to this court in its appellate jurisdiction. When sec. 39 (2) (*b*) refers to State law, it does so for the purpose only of saying from what decisions given by State courts exercising Federal jurisdiction an appeal shall lie as of right. It does not draw in the law of the State for the purpose of defining the nature or scope of the remedy or the jurisdiction of this court. In the same way, when sec. IV., rule 1, of the *Rules of Court* provides that appeals from inferior courts exercising Federal jurisdiction shall be brought in the same manner and within the same times and subject to the same conditions as are prescribed by the law of the State for bringing appeals to the Supreme Court in like matters, State law is invoked only for the purpose of supplying a procedure for appealing. It does not affect the nature of the appeal: See *Bell* v. *Stewart* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2); *Dunlop Perdriau Rubber Co. Ltd.* v. *Federated Rubber Workers' Union of Australia* (3); *R.* v. *Hush*; *Ex parte Devanny* (4); *R.* v.

(1) (1920) 28 C.L.R. 419, at p. 424.
(2) (1931) 46 C.L.R., at pp. 85, 87, 107.
(3) (1931) 46 C.L.R. 329, at p. 338.
(4) (1932) 48 C.L.R. 487, at pp. 506, 507.

Darling Island Stevedoring and Lighterage Co. Ltd.; *Ex parte Halliday and Sullivan* (1); *Grayndler* v. *Cunich* (2). In the present instance the law of the State relied upon as showing that a right of appeal to the Supreme Court would exist and as providing the procedure is secs. 112 et seq. of the *Justices Act* 1902 (N.S.W.). It is said that in a matter within State jurisdiction the Supreme Court would regard itself as bound to hear and determine an appeal by statutory prohibition against a conviction by a magistrate notwithstanding that in the meantime an unsuccessful appeal had been taken to a Court of Quarter Sessions and an order confirming the conviction had been made by that court. It is true that for a very long period in the Supreme Court of New South Wales it has been the accepted view that an appeal against a conviction to Quarter Sessions under what is now sec. 122 of the *Justices Act* 1902 (N.S.W.) might be pursued concurrently with the remedy by way of a statutory prohibition directed to the magistrate. "The remedy by prohibition is different and cumulative" is the short ground upon which an objection to the coexistence of the two remedies was overruled in *Ex parte Marx* (3) by *Stephen* C.J., *Hargrave* and *Faucett* JJ.: Cp. *Ex parte Wedlock* (4); *Ex parte King* (5). Further, it has been decided that by instituting an appeal to Quarter Sessions against his conviction a defendant does not preclude himself from obtaining a statutory prohibition from the Supreme Court while his appeal to Quarter Sessions is pending (*Ex parte Giles* (6)). The reasons given for that conclusion depend upon the difference in the nature of the remedies: the appeal to Quarter Sessions entitling the defendant to a second investigation of the facts upon oral evidence and a reconsideration of the penalty, while statutory prohibition means only an examination of the propriety of the decision of the magistrate. Accordingly it is the practice of the Supreme Court to decide a rule or order *nisi* for a statutory prohibition notwithstanding that an appeal from the conviction is pending in a Court of Quarter Sessions and for that court to hear an appeal notwithstanding that the Supreme Court has discharged the rule *nisi* for statutory prohibition. There does not appear to be any reported decision upon the question whether the converse course may be followed and a statutory prohibition obtained in spite of the fact that a Court of Quarter Sessions has in the meantime reheard the charge and confirmed the conviction. To hold that the *Justices Act* 1902 authorizes such a

(1) (1938) 60 C.L.R. 601, at pp. 618, 619.
(2) (1939) 62 C.L.R., at pp. 583, 591, 592.
(3) (1868) 7 S.C.R. (N.S.W.) 344.
(4) (1899) 20 L.R. (N.S.W.) (L.) 353, at p. 356.
(5) (1913) 30 W.N. (N.S.W.) 70.
(6) (1912) 29 W.N. (N.S.W.) 83.

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course appears to be an extension of the reported decisions of the Supreme Court. But assuming that such an extension would or should be made for the purposes of State jurisdiction, the consequence by no means follows that in matters of Federal jurisdiction an appeal may be maintained directly to this court from a magistrate notwithstanding that his decision has been confirmed in Quarter Sessions.

The jurisdiction of Quarter Sessions to hear appeals in matters of Federal jurisdiction arises from the operation which the decision of this court in *Ah Yick* v. *Lehmert* (1) gave to sec. 39 (2) of the *Judiciary Act* 1903-1940, and it is coextensive with its State jurisdiction. But, as I have already pointed out, the law of the State is not so incorporated in Federal law as either to limit or enlarge the appellate power of this court. It has no other operation than to distinguish in appeals from inferior jurisdictions between those as of right and those by special leave, and to supply a procedure.

The very consideration which led to the decision of the Supreme Court in *Ex parte Giles* (2) is lacking in the case of appeals to this court. For, although such appeals are reheard on the same evidence, they are in the nature of appeals by way of rehearing, and are very different from the limited remedy given by statutory prohibition. But in any case the present question is independent of the distinction between appeals as of right and appeals by leave. It is a question whether this court can ignore a decision of a competent court of Federal jurisdiction confirming an order or conviction of a court below it and, although the order of confirmation is left standing and is not brought before us by way of appeal or otherwise, nevertheless proceed to hear an appeal from the order so confirmed.

To that question there can, I think, be only one answer. It is not denied that the order of the Court of Quarter Sessions was within its jurisdiction and was validly made. While it stands it is a judicial declaration by a competent court exercising Federal jurisdiction establishing the order of the magistrate and preventing its being called in question. If this court made an order setting aside the conviction, there would be two inconsistent judicial orders in operation at the same time, that of the Court of Quarter Sessions confirming the conviction and that of this court discharging it. It would, of course, be open to the legislature to authorize a superior court to deal with an order of an inferior court notwithstanding that an intermediate court had confirmed it and the order of confirmation was not brought up for review. But even if the *Justices Act* 1902 (N.S.W.) has any such effect in State jurisdiction,

(1) (1905) 2 C.L.R. 593.

(2) (1912) 29 W.N. (N.S.W.) 83.

at all events so much of it as so operates has no application to appeals to this court from courts exercising Federal jurisdiction.

In *R.* v. *Poole*; *Ex parte Henry* (1) an attempt was made to induce this court to hear an appeal from a conviction by a magistrate exercising Federal jurisdiction while an appeal to Quarter Sessions from the same conviction was pending. The court refused to proceed with the hearing of the appeal until the party had abandoned his appeal to Quarter Sessions or that appeal had otherwise been disposed of. The correctness of the view that the two appeals were not mutually exclusive alternatives and that a party was not put to his election between them, but might institute both remedies concurrently, was tacitly assumed for the purposes of the court's decision: Cp. *O'Sullivan* v. *Morton* (2). No opinion was expressed upon the question whether, if this court did make an order affirming the conviction or any other positive order in reference to the conviction, it would remain possible for the Court of Quarter Sessions to interfere with the conviction. That question had not arisen, but in order to ensure that it would not arise and in order to maintain the position of this court as a court of final appeal, we refused to hear the appeal until the proceedings in Quarter Sessions were completely disposed of. An undertaking had been offered by the appellant to abandon these proceedings, but the court was not content with an undertaking and insisted that they should be brought to a formal end. Having regard to the appellant's offer to abandon his appeal to Quarter Sessions, there was no likelihood in *Henry's Case* (1) that the question presented by the appeal now before us would there arise, namely, the question what should be done by this court when Quarter Sessions had already confirmed the conviction under appeal to this court.

In my opinion the answer to that question is that we cannot ignore the order of the Court of Quarter Sessions confirming the conviction and that, unless we are satisfied that it was made without jurisdiction and is totally void, we must regard it as conclusive while it stands. The proper course for a defendant to take in such circumstances is to apply under sec. 39 (2) (*c*) of the *Judiciary Act* for special leave to appeal from the decision of the Court of Quarter Sessions exercising Federal jurisdiction.

That course Wishart has now taken, and it remains to deal with the substantive grounds of his application for special leave to appeal.

The first ground upon which his counsel relied is that sec. 5 of the *National Security Act* 1939 (No. 15 of 1939) is invalid. The regulation under which Wishart was convicted rests for its validity upon

(1) (1938) 61 C.L.R. 1. (2) (1911) V.L.R. 235. 33 A.L.T. 172

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the general words found at the beginning of that section and perhaps, alternatively, those at the end.

The material parts of the provision purport to confer power upon the Governor-General in Council to make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth and for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of the present war. It is said that such a provision is not a real exercise by the legislature of the power to make laws with respect to the naval and military defence of the Commonwealth and of the several States, but an invalid attempt to delegate that power or some part of it to the Executive.

Two distinct grounds of objection are involved in the argument, viz., (*a*) the objection that the legislature cannot "delegate" any of its powers at all, and (*b*) the objection that because of the separation of powers between the legislative, executive and judicial organs of government, none of the three can be made a repository of any power which properly belongs to either of the others.

In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) I have expressed my views upon the nature of each of these objections and the place they have under the Australian Constitution, and I shall not repeat what I then said. It is enough for me to say (i) that upon principle I have never understood how the theory, which is applied in the United States, that the legislature could not "delegate" at all any authority considered to be legislative could have any place in our Constitution (See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2)), and (ii) that it has been uniformly decided in this court that the distribution of powers in the Commonwealth Constitution does not prevent the legislature from confiding to the Executive such a power as that expressed in the words I have set out (See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3)).

It was suggested that in this particular instance of sec. 5 there was such a width or uncertainty of the subject matter handed over to the Executive that the enactment could not be said to be a law with respect to the naval and military defence of the Commonwealth or with respect to any other head of legislative power.

This suggestion cannot be sustained. The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are

(1) (1931) 46 C.L.R., at pp. 89-102. (2) (1931) 46 C.L.R., at pp. 94-96.
(3) (1931) 46 C.L.R., at p. 101.

a characteristic of the powers which it must exercise. Sec. 5 is clearly directed to the prosecution of the war and is a valid exercise of the defence power. The whole question is, in my opinion, concluded by the decision of this court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) and by the prior decisions of the court upon which that decision was founded.

It is, I think, undeniable that, once the validity of sec. 5 is established, it authorizes the regulation under which Wishart was convicted, viz., reg. 41.

The second ground upon which his counsel relied in support of the application for special leave is that it was not proved that the consent of the Attorney-General had been obtained for the prosecution as required by sub-reg. 2 of reg. 41. In the margin of the actual information is a typewritten consent purporting to bear the Attorney-General's signature. It is said that, as the sub-regulation is not expressed to require a consent in writing by the Attorney-General, the evidentiary provision contained in sec. 9 of the *National Security Act*, which relates to documents issued in pursuance of the regulations, cannot apply and therefore will not authorize the reception of the consent in evidence without proof. As the purpose of the sub-regulation is really to ensure that the written consent required by sec. 10 (4) shall be given for the purpose of reg. 41 by no other person but the Attorney-General, the foundation of this contention is more than doubtful. But in any case the court must take judicial notice of the Attorney-General's signature, and his consent therefore is made to appear (*Holland* v. *Jones* (2)).

Finally, it was contended that the evidence before the learned Chairman of Quarter Sessions did not warrant his conclusion that Wishart entertained the intention required by reg. 41 (1) (*b*) at the material date.

In the information 25th June 1940 was the date laid as that upon which he had in his possession with intent to cause disaffection a document the dissemination of which would, to state it briefly, cause disaffection among the troops. The finding that the document was of the required description clearly was justified. It is hardly open to doubt that it was composed with intent to endeavour to cause disaffection among soldiers, to whom it was addressed. Fifteen copies were found in Wishart's possession on 25th June 1940. He admits that he took part in composing the document. But that was in January, and in March circumstances arose which, he said, made it a document which he no longer desired to use. Accordingly

(1) (1931) 46 C.L.R. 73. (2) (1917) 23 C.L.R. 149.

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he says that in June the document was dead and the copies found were not in his possession for use. He says that they were retained by accident. It is no doubt true that to amount to the offence charged possession of the document must be accompanied by an intention to use it to cause disaffection. But I think it is a certain inference that he had possession of the copies in March and that possession was then accompanied by the required intention. Time is in no way of the essence of the offence, and March is within twelve months of the information: See sec. 21 (1) (*b*), *Crimes Act* 1914-1937. The proof of the coexistence in March of all the elements of the offence is therefore sufficient to justify the conviction under the information, the variance between the date proved and that alleged being treated as immaterial.

But in any case I am of opinion that the inference was fairly open to the Chairman of Quarter Sessions that Wishart had never completely given up his intention of using the documents he retained if the opportunity or occasion arose or offered. That inference I think is well founded in probability.

I am therefore of opinion that an appeal from the decision of the Court of Quarter Sessions should not succeed and that special leave should be refused.

McTIERNAN J. The applicant was convicted by a stipendiary magistrate exercising Federal jurisdiction as a Court of Petty Sessions in New South Wales of an offence against reg. 41 (1) (*b*) of the *National Security* (*General*) *Regulations*. The offence with which he was charged and convicted was that he did, with intent to endeavour to cause disaffection among members of the Second Australian Imperial Forces in the service of the King, have in his possession a document of such a nature that the dissemination of copies of it would constitute an endeavour to cause disaffection among them.

By the combined operation of sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1940 and sec. 112 of the *Justices Act* 1902 of New South Wales as amended the applicant was entitled to appeal against the order by means of an application to this court for an order *nisi* for statutory prohibition. The proceedings in this court were begun in that fashion.

The applicant also had a right to appeal to a Court of Quarter Sessions in New South Wales by reason of the combined effect of sec. 39 (2) and sec. 122 of the *Justices Act* as amended. The applicant exercised this right of appeal. The conviction was, therefore, the subject of two simultaneous appeals.

When the hearing of the appeal to this court was begun, we were informed that the Court of Quarter Sessions had heard and determined the appeal made to that court and had confirmed the conviction: See sec. 125 of the *Justices Act*. The appeal to Quarter Sessions is a rehearing of the case, and fresh evidence may be adduced. "It is evident that the Court of Quarter Sessions is seised of the whole question of the guilt or innocence of the accused, and is bound to pronounce upon all the issues of fact or questions of law which are necessary for the determination of the question whether the accused ought or ought not to be convicted upon the information" (*R.* v. *Poole*; *Ex parte Henry* (1)).

It follows that, even if the appeal by way of the application for statutory prohibition against the magistrate's order were to succeed, the order of the Court of Quarter Sessions would stand. This court, therefore, decided not to proceed further with the hearing of the appeal against the magistrate's order but to adjourn that appeal to give the applicant the opportunity, if he were so advised, to apply for special leave to appeal against the order of the Court of Quarter Sessions: See sec. 39 (2) (*c*) of the *Judiciary Act* 1903-1940. The application for special leave is now before us.

The conviction is challenged on the ground that the *National Security Act* 1939-1940 is *ultra vires* the Commonwealth Parliament because sec. 5 is an illegal delegation to the Executive of legislative power. The two familiar grounds upon which a law vesting the Executive with power to make regulations has been attacked are, first, that such a law infringes the doctrine of the separation of powers and, secondly, that the nature and extent of the vesting are such that the law is not a good exercise of the power of the Parliament to make laws with respect to any subject entrusted to it by the Constitution. The decisions of this court make the first ground an untenable one. Their effect is summed up by *Dixon* J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2) in these words:—"But I think the judgment" (in *Roche* v. *Kronheimer* (3)) "really meant that the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character. I, therefore, retain the opinion which I expressed in the earlier case"

(1) (1938) 61 C.L.R., at p. 6.
(2) (1931) 46 C.L.R., at pp. 100, 101.
(3) (1921) 29 C.L.R. 329.

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(*Huddart Parker Ltd.* v. *Commonwealth* (1)) "that *Roche* v. *Kronheimer* (2) did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law." However, the second ground does not necessarily fall with the first. The uncertainty or width of the subject matter with respect to which the Executive is given power to make regulations may prevent the law attempting to confer such power being a law with respect to any subject within the legislative powers of Parliament (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3)). Sec. 5 cannot fail for vagueness, for it clearly defines the field within which Parliament has empowered the Executive to make regulations. The section gives very wide powers to the Executive within that field. But it is obviously a valid exercise of the legislative power of the Commonwealth with respect to defence to vest the Executive, which has the duty of executing the defence power, with authority to make regulations within the field marked out by the section.

Another ground of appeal is that reg. 41 (1) (*b*) is *ultra vires* sec. 5. The section enumerates matters with respect to which it confers power on the Executive to make regulations and concludes with a general grant of power. The contention which is made for the applicant is that the generality of the grant is limited by the enumeration of particular matters preceding it. In my opinion, the language of the section leaves no doubt that its intention is that the general grant should not be controlled in that way. It follows that the regulation is *intra vires* sec. 5.

Reg. 41 (2) provides that "a prosecution in respect of a contravention of this regulation shall not be instituted except with the consent of the Attorney-General." There is an indorsement on the information purporting to be a consent signed by the Attorney-General. But it is contended that, while the signature proves itself (sec. 9 of the Act), the indorsement does not prove itself. The *National Security Act*, by sec. 10 (4), provides that where consent is required written consent will suffice. This section makes it unnecessary for the Attorney-General to be called to give oral evidence of his consent. The indorsement signed by him

(1) (1931) 44 C.L.R. 492. (2) (1921) 29 C.L.R. 329.
(3) (1931) 46 C.L.R., at p. 101.

and purporting to be his written consent is, therefore, admissible evidence that he consented to the prosecution.

The remaining question arises on the evidence. It is whether there was evidence which justified the finding that the applicant entertained contemporaneously with the possession of the document found on him the intent charged against him. After reading the evidence I find it impossible to agree with the applicant's contention that the evidence is insufficient to justify this finding.

There is, therefore, no ground upon which the application for special leave to appeal should succeed. The result is that the order of the Court of Quarter Sessions confirming the conviction must stand.

The application to make the order *nisi* absolute is, however, still before us, although in the argument the application for special leave was treated as the substantial matter. There is no decision of the Supreme Court of New South Wales on the question what it would do if an application to make absolute an order *nisi* for prohibition came before it after the conviction against which prohibition was sought had been confirmed by a Court of Quarter Sessions on appeal to it by the applicant. In the High Court the application to make the order *nisi* absolute is an appeal against the applicant's conviction of the offence charged against him. It puts in controversy the issue whether or not the applicant was guilty of the offence. The Court of Quarter Sessions was, upon the applicant's appeal to it, seised of that question, and its order is an adjudication that the applicant was guilty. The issues raised by the application to make the order *nisi* absolute are the same as those concluded by the order of the Court of Quarter Sessions. The result which should follow from the refusal to give special leave to appeal against that order is that the concurrent appeal should be dismissed by discharging the order *nisi*.

WILLIAMS J. I agree that the application for special leave to appeal against the order of the learned judge of Quarter Sessions should be refused. With respect to the first three grounds argued in support of the application and which are referred to in the judgment of the Acting Chief Justice, I agree with his judgment and that of my brother *Dixon*.

I only desire to deal shortly with the fourth ground, namely, that there is no evidence of the charge laid. The appellant admitted that he had copies of the document referred to in the information in his possession in February 1940 with intent to endeavour to cause disaffection amongst soldiers of the Second Australian Imperial

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Forces, and there is sufficient evidence to show that this intention continued to exist on 25th June. When the police searched the appellant's office and home on that date, they found about fourteen copies of this document together with copies of another document entitled "This Imperialist War" and a mass of communist literature. The appellant said he believed that he had burnt all the copies of this document, but the learned judge was quite entitled to disbelieve him. The evidence showed the appellant was a joint author of the document, the terms of which plainly showed that it was intended for use in order to endeavour to cause such disaffection. He admits that he used it between the date of its composition in January and the end of February for this purpose.

About the end of March the Revolutionary Workers' League, a society consisting of a few persons and of which the appellant was the secretary, became affiliated with the Communist League, and the appellant became a member of the executive of that body. He said that the document was not used after the affiliation because it had not received the approval of this executive, but he admitted that in the middle of 1940 it was still a principle of the doctrines of the Fourth International that communist *nuclei* should be formed in every military unit and he considered that this principle should be acted upon. He said that he looked upon the army as an instrument of capitalist oppression, that he considered that soldiers' committees should be organized which would take over control of the army in due course, and that he would have liked the general situation to have advanced to such a stage on 25th June that the right time for doing this would have arrived, although it had not in fact done so.

All this is evidence to show that the clear intention he had at the end of February to endeavour to disaffect the troops still persisted on 25th June, although, on that date, the fear of punishment was causing him to bide his time until the situation became more propitious for the resumption of that persistent and systematic propaganda which Lenin had advised his disciples must be carried on to final victory.

The learned judge was therefore entitled to confirm the conviction of the appellant, and the fourth ground also fails.

With respect to the application to make the rule *nisi* for prohibition absolute the position is shortly as follows. The appellant was convicted by the stipendiary magistrate on 16th January 1941. On 6th February he applied to me for a rule *nisi* for a statutory prohibition under the *Justices Act* 1902 (N.S.W.). The application was made within the time allowed by sec. 112 of that Act.

In the meantime the appellant had appealed to the Court of Quarter Sessions in accordance with sec. 122 of the Act, so that, in view of the decision of this court in *R.* v. *Poole*; *Ex parte Henry* (1), I stood the application over until the appeal had been disposed of. The appellant did not withdraw the appeal but elected to prosecute it. As a result the order of the magistrate was confirmed on 21st March by the learned judge of Quarter Sessions. On the appellant renewing his previous application for the rule *nisi* on 28th March I made an order returnable before the Full Court on 2nd April. As a result of the conviction having been confirmed, the order which is now effective is that of the Court of Quarter Sessions (See sec. 125), and I agree that there is no longer any order of the magistrate in respect of which a prohibition can be granted.

The application to make the rule *nisi* absolute should therefore be refused.

Special leave to appeal from order of Court of Quarter Sessions refused. Rule nisi for writ of prohibition in respect of order of magistrate discharged.

Solicitors for the applicant, *Glasheen & Co.*

Solicitor for the respondent magistrate, *A. H. O'Connor*, Crown Solicitor for New South Wales.

Solicitor for the other respondents, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1938) 61 C.L.R. 1.