[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BEVAN AND OTHERS;

Ex parte ELIAS AND GORDON.

H. C. OF A. 1942.

SYDNEY, *May* 4; *July* 8.

Rich, Starke, McTiernan and Williams JJ.

Defence—Navy—Commonwealth ships and personnel unconditionally transferred to the King's naval forces—Murder on transferred ship by transferred personnel—Court-martial—Power to impose death sentence—Naval Discipline Act 1866 (*Imp.*) (29 & 30 *Vict. c.* 109), *secs.* 45, 53 (1)—*Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (*Imp.*) (1 & 2 *Geo. V. c.* 47), *sec.* 1—*Defence Act* 1903-1941 (*No.* 20 *of* 1903—*No.* 4 *of* 1941), *secs.* 88, 98—*Naval Defence Act* 1910—1934 (*No.* 30 *of* 1910—*No.* 45 *of* 1934), *secs.* 5, 35, 36, 42.

Constitutional Law—Defence—Courts-martial—Legislative power of Commonwealth—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*vi.*), (*xxxix.*).

High Court—Jurisdiction—Constitutional question—Complete jurisdiction over whole matter—Habeas corpus—Officers of the Commonwealth—State officers—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (*v.*)—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *secs.* 30, 33.

Officers and seamen of the Commonwealth naval forces who are transferred unconditionally to the King's naval forces pursuant to sec. 42 of the *Naval Defence Act* 1910-1934 are "placed at the disposal of the admiralty" within the meaning of the proviso to sec. 1 (1) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (Imp.). The *Naval Discipline Act* 1866 (Imp.) as amended applies to such officers and seamen without any modifications or adaptations made by Commonwealth law in applying that Act to the Commonwealth naval forces.

Held, accordingly, by the whole Court, that a seaman of the Commonwealth naval forces who has been unconditionally transferred to the King's naval forces and who has been found guilty of murder by a court-martial may be sentenced to death in accordance with sec. 45 of the *Naval Discipline Act* 1866 (Imp.), notwithstanding the provisions of sec. 98 of the *Defence Act* 1903-1941.

Held, further, by *Starke*, *McTiernan* and *Williams* JJ., that legislation providing for the trial by court-martial of members of the defence forces is a valid exercise of the defence power.

The matter came before the Court upon the return of a rule nisi for a writ of habeas corpus directed to the members of a court-martial which had convicted of murder and sentenced to death two seamen transferred from the Commonwealth naval forces to the King's naval forces, and to two officers of the State of New South Wales, in whose custody the convicted seamen were.

Held, by *Rich* J., that the Court had no jurisdiction so far as concerned the two State officers who were not in the circumstances officers of the Commonwealth; by *Starke* and *Williams* JJ., that, as the interpretation of the Constitution was involved, the Court was clothed with the full authority essential for the complete adjudication of the matter and that the Court's jurisdiction was not lost by reason of the rejection of the constitutional point.

RULES NISI for habeas corpus, or, alternatively, prohibition.

Rules nisi had been obtained by Edward Joseph Elias and Albert Ronald Gordon, members of the naval forces of the Commonwealth, calling upon the respondents to show cause why a writ of habeas corpus should not be issued directed to them to have the bodies of Elias and Gordon before the Court to undergo and receive all and singular such matters and things as the Court then and there considered of and concerning them in this behalf or, alternatively, why a writ of prohibition should not be issued directed to the respondents to prohibit them from further proceeding with the verdict and sentence of a court-martial convened on 15th April 1942, upon the ground that the said court-martial had no power to sentence Elias and Gordon to death by reason of sec. 98 of the *Defence Act* 1903-1941.

The respondents were Captain Bevan, Royal Navy, who had been president of the court-martial, Commander Rayment, Royal Australian Navy, Lieutenant-Commander J. S. Bath, Royal Australian Navy, and another commander and a lieutenant-commander, members of the Royal Navy, who with the president had constituted the court-martial, John Vincent Cashman, superintendent of the State Penitentiary at Long Bay, Sydney, and Harry Charles Lester, sheriff of the State of New South Wales.

The *Naval Defence Act* 1910-1934 provides as follows:—

Sec. 3: "In this Act, unless the contrary intention appears— . . . 'The Defence Act' means the *Defence Act* 1903-1910 as amended from time to time and includes any Act for the time being in force in substitution for that Act."

Sec. 5: "Part I., sections thirty, forty-three, forty-six, forty-seven, fifty-one, fifty-three and fifty-eight of Part III. and Parts IV.

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to XIV. both inclusive of the *Defence Act* shall, subject to this Act, continue to apply in relation to the Naval Forces: . . . "

Sec. 35: "(1) The Governor-General may, for the purpose of naval service or training, place any part of the Naval Forces on board any ship of the King's Navy or in any naval training establishment or school in connexion with the King's Navy. (2) The members of the Naval Forces while so placed shall— . . . (*b*) be subject to the laws and regulations to which the members of the King's Naval Forces on the ship or attending the training establishment or school are subject."

Sec. 36: "The *Naval Discipline Act* and the *Naval Discipline (Dominion Naval Forces) Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces shall, subject to this Act and to any modifications and adaptations prescribed by the regulations, apply to the Naval Forces."

Sec. 42: "(1) The Governor-General may— . . . (*c*) transfer to the King's Naval Forces or to the Naval Forces of any part of the King's Dominions any vessel of the Commonwealth Naval Forces; and (*d*) transfer to the King's Naval Forces or to the Naval Forces of any part of the King's Dominions any officers or seamen of the Commonwealth Naval Forces. (2) Any transfer in pursuance of this section may be for such period and subject to such conditions as the Governor-General thinks desirable. . . . (4) Subject to the conditions of transfer, all officers and seamen of the Commonwealth Naval Forces transferred in pursuance of this section to the King's Naval Forces or to the Naval Forces of any part of the King's Dominions shall, while so transferred, be subject to the laws and Regulations governing the King's Naval Forces or the Naval Forces of the part of the King's Dominions to which they are transferred so far as those laws and regulations are applicable."

Secs. 88 and 98 of the *Defence Act* 1903-1941 (which are included in Part VIII. of that Act) provide as follows:—

Sec. 88: "Except so far as is inconsistent with this Act, the laws and regulations for the time being in force in relation to the composition, procedure (including the reception of evidence) and powers of courts-martial in the King's Regular Land Forces, the revision, confirmation, effect and consequences of the findings and sentences of such courts-martial, and the mitigation, remission and commutation of the sentences thereby imposed, shall apply to courts-martial in the Military Forces and their findings and sentences, and the like laws and regulations in relation to the King's Regular Naval Forces shall similarly apply in the case of the Naval Forces."

Sec. 98: "No member of the Defence Force shall be sentenced to death by any court-martial except for mutiny, desertion to the enemy, or traitorously delivering up to the enemy any garrison, fortress, post, guard, or ship, vessel, or boat, or traitorous correspondence with the enemy; . . ."

The *Naval Discipline Act* 1866 (Imp.) provides as follows:—

Sec. 45: "Every person subject to this act who shall be guilty of murder shall suffer death: . . ."

Sec. 53: "The following regulations are hereby made with respect to the infliction of punishments in her majesty's navy:—(1) The admiralty may, except in case of sentence of death, which shall only be remitted by her majesty, suspend, annul, or modify any sentence . . . , or substitute a punishment inferior in degree . . . , or remit the whole or any portion of the punishment . . ."

The *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (Imp.) provides as follows:—

Sec. 1: "(1) Where in any self-governing dominion provision has been made (either before or after the passing of this act) for the application to the naval forces raised by the dominion of the *Naval Discipline Act*, 1866, as amended by any subsequent enactment, that act, as so amended, shall have effect as if references therein to his majesty's navy and his majesty's ships included the forces and ships raised and provided by the dominion, subject, however—(*a*) in the application of the said act to the forces and ships raised and provided by the dominion, and the trial by court martial of officers and men belonging to those forces, to such modifications and adaptations (if any) as may have been or may be made by the law of the dominion to adapt the act to the circumstances of the dominion, including such adaptations as may be so made for the purpose of authorising or requiring anything, which under the said act is to be done by or to the admiralty or the secretary of the admiralty, to be done by or to the governor general or by or to such person as may be vested with the authority by the governor general in council; . . . Provided that, where any forces and ships so raised and provided by a self-governing dominion have been placed at the disposal of the admiralty, the said act shall apply without any such modifications or adaptations as aforesaid. (2) This act shall not come into operation in relation to the forces or ships raised and provided by any self-governing dominion, unless or until provision to that effect has been made in the dominion."

By an order of the Governor-General in Council made on 7th November 1939, all vessels of the Commonwealth Naval Forces and the officers and seamen on the books of these vessels were transferred

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unconditionally and for an unlimited period to the King's naval forces. No further order modifying or annulling this order had been issued.

H.M.A.S. *Australia* was one of the vessels thus transferred and she was at all relevant times one of His Majesty's ships in commission. On 12th March 1942, a murder was committed on H.M.A.S. *Australia* whilst on the high seas. An official investigation was conducted by a commander, one of the ship's officers, but the "circumstantial letter," in which the facts upon which the charge in each case was founded were set forth, forwarded to Rear-Admiral Crace, of the Royal Navy and the rear-admiral commanding the Australian squadron, was signed by the captain of H.M.A.S. *Australia*. The rear-admiral directed the captain to assemble a court-martial in the ship to try Elias and Gordon on the charge of murder reported in the "circumstantial letter." At the time of the murder and at the date of the letter Elias and Gordon were serving on board H.M.A.S. *Australia* and were borne on her books. At all relevant times Crace held commissions from the Lords Commissioners of the Admiralty and from the Governor-General of the Commonwealth empowering him to assemble courts-martial. The direction by the rear-admiral to assemble the court-martial in question purported to be under the commission from the Governor-General. At all material times Crace was the naval officer upon whom devolved the command of the naval forces pursuant to sec. 44B of the *Naval Defence Act* 1910-1934, those forces including, in addition to Commonwealth naval forces, naval forces of the Dominion of New Zealand.

The court-martial assembled in the ship at a port in the South Pacific that was not a British port on 15th April 1942. The captain of H.M.A.S. *Australia* acted as prosecutor and a lieutenant acted as prisoners' friend. In the course of his final address to the court-martial the prosecutor said in substance that he would not have undertaken the prosecution unless he had been firmly convinced personally of the guilt of both of the accused. The prisoners' friend protested, but the court-martial made no observation on its having been said. Elias and Gordon were found guilty of the murder and each was sentenced to be hanged.

On 22nd April 1942 warrants were issued by the captain to the Officer-in-Charge of the State Penitentiary at Long Bay, Sydney, New South Wales, to keep and receive Elias and Gordon so convicted and sentenced in his custody but directed that the sentence was not to be carried out until further directions were given. Pursuant to

the warrant Elias and Gordon were detained in custody at that Penitentiary.

The rules nisi came on for hearing before the Full Court of the High Court.

Further facts, statutory provisions and regulations are set forth in the judgments hereunder.

Dr. *Louat*, for the applicants. The provisions of sec. 98 of the *Defence Act* 1903-1941 apply to Commonwealth ships as part of Commonwealth territory. Sec. 106 of that Act shows that it was intended to apply the *Naval Discipline Act* 1866 only subject to such provisions as to punishment as were contained in the *Defence Act*. Transfer under sec. 42 of the *Naval Defence Act* does not amount to the placing of ships at the disposal of the Admiralty within the meaning of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911; the intention is to make a purely operational transfer. It is apparent from the financial provisions with regard to the navy that the ships so transferred continue to be a charge on the finances of the Commonwealth, the seamen continue to be paid by the Commonwealth, and the Commonwealth continues to be responsible for supplies. The intention of sec. 42 is to transfer ships subject to the continued application to the naval ships and personnel so transferred of Commonwealth law enacted concerning them. Although the *Naval Defence Act* was amended to include a reference to the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911, the words "subject to this Act" were retained, in other words, the application of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 was to be subject to existing Commonwealth law. If it should be found, or if it should be considered, that a provision for qualified application is not a compliance with the terms of sub-sec. 2 of sec. 1 of the last-mentioned Act, then the effect of that would be that that Act has never effectually been brought into operation. If, on the other hand, it is a compliance, that is, if a qualified application of that Act is adequate to attract the operation of sub-sec. 2, then the effect is that sec. 98 of the *Defence Act* 1903-1941 still governs the position because the *Naval Discipline* (*Dominions Naval Forces*) *Act* applies with the qualification. It is not contended that there was anything irregular in the convening or constitution of the court-martial. However, it does appear that in convening the court-martial the rear-admiral purported to act under his Commonwealth authority and not under his authority from the Imperial Admiralty. This fact may have some significance. A further fact of some importance is that the "circumstantial letter", which originates the

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proceedings and wherein should be set forth all the facts which are to be alleged in the case for the prosecution and which the King's Regulations and Admiralty Instructions direct is to be signed not by the captain but by the executive officer who has investigated the murder or crime and to be transmitted by the captain to the convening authority, was in this case signed by the captain who afterwards acted as prosecutor. The prosecutor assumed responsibility for all the statements which induced the convening authority to summon a court-martial. The remarks of the prosecutor to the court-martial and his attendance thereat having regard to his rank in comparison with the rank of the members of that court other than the presiding officer constituted or caused a failure of natural justice (*O'Shea* v. *Baldwin* (1)). If there was authority to impose the sentence a writ of habeas corpus is the remedy to which the applicants are entitled (*R.* v. *Suddis* (2)). By virtue of sec. 44B of the *Naval Defence Act* 1910-1934, the sentence should not be carried out unless with the consent of the Governor-General. The matter should not be referred for consideration under sec. 53 (1) of the *Naval Discipline Act* 1866 by the Governor-General as the representative of the King.

Weston K.C. (with him *O'Sullivan*), for the respondents. It is agreed that if the court-martial had been held in a Commonwealth vessel which had not been transferred to the British Admiralty the provisions of sec. 98 of the *Defence Act* 1903, as amended, would have been incorporated in the *Naval Defence Act* 1910-1934, and the court-martial would not have had authority to sentence the applicants to death. The right to hold the court-martial and to pass sentence was derived from sec. 42 of the *Naval Defence Act* 1910-1934 and from the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911. The Commonwealth Parliament clearly indicated in sec. 42 that in the case of transferred officers and seamen of the Commonwealth naval forces, the *Naval Discipline Act* 1866 and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 should apply without any modifications. The distinction between sec. 36 and sec. 42 of the *Naval Defence Act* is most material. Sec. 36 only adopts the *Naval Discipline Act* 1866 subject to the modification of sec. 98 of the *Defence Act* 1903-1941 ; no such condition attaches to sec. 42. Transfer of naval forces under sec. 42 is not merely an operational transfer. Naval forces so transferred are fully at the disposal of the British Admiralty. Sec. 42 is an alternative to sec. 36. The latter section deals with naval forces not transferred, that is, those which remain under the control of the Commonwealth. By sec. 42

(1) (1914) 10 Tas. L.R. 122.

(2) (1801) 1 East. 306 [102 E.R. 119].

the Parliament recognized that unless Commonwealth naval personnel transferred to the King's naval forces became subject to the laws and regulations governing the King's naval forces without modifications chaos would result. It would be thoroughly impracticable to have a fleet in which there were units from different Dominions each with a different disciplinary code, and particularly so if seamen transferred from different dominions were serving on the same vessel. In any event the matter comes within the provisions of sec. 1 (1) of the *Naval Discipline (Dominion Naval Forces) Act* 1911, which would override any Commonwealth legislation to the contrary. The grant of power from the Imperial Parliament to the Commonwealth Parliament to modify the *Naval Discipline Act* is only a power to modify in respect to vessels which and seamen who have not been transferred to or placed at the disposal of the King's Naval Forces. In the case of transferred vessels and seamen not only is there no power to modify or adapt, but there is an Imperial statute which provides that in such a case there shall be uniform discipline by way of one law and one set of regulations. The matter comes within secs. 45, 53 and 87 of the *Naval Discipline Act* 1866. This Court has no jurisdiction to grant habeas corpus. The officers who constituted the court-martial are *functi officio* (*Clifford and O'Sullivan* (1)). As regards the respondent sheriff and the respondent penitentiary official, the power of this Court to issue prohibition is restricted to matters in which it has original or appellate jurisdiction: See secs. 74 and 75 (v.) of the Constitution. Neither of these respondents is an officer of the Commonwealth or a person to whom prohibition should go. The authority of this Court is not and cannot be enlarged by sec. 33 of the *Judiciary Act* 1903-1940. Habeas corpus does not attach to the appellate jurisdiction nor to any portion of the original jurisdiction vested automatically in the Court by sec. 75. There is no provision in general terms in the *Judiciary Act* or in the *Defence Act* which gives this Court power in original jurisdiction concerning courts-martial. The Court has no power to entertain an application on any basis, but, assuming it has such power, the proceedings were entirely proper.

Dr. *Louat*, in reply.

Cur. adv. vult.

July 8.

The following written judgments were delivered :—

RICH J. Rule nisi calling upon the respondents to show cause why a writ of habeas corpus should not issue directed to them to have the bodies of Edward Joseph Elias and Albert Ronald Gordon

(1) (1921) 2 A.C. 570.

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before the Court to undergo and receive all and singular such matters and things as the Court then and there consider of and concerning them in this behalf and alternatively why a writ of prohibition should not be issued directed to the respondents to prohibit them from further proceeding with the verdict and sentence of the court-martial convened on 15th April 1942 upon the ground that the said court-martial had no power to sentence the said Edward Joseph Elias and Albert Ronald Gordon to death by reason of sec. 98 of the *Defence Act* 1903-1941.

On 7th November 1939 the Governor-General by an Order in Council ordered the transfer of all the vessels of the Commonwealth naval forces together with the officers and seamen of the Commonwealth naval forces borne on the books of the said vessels to be transferred to the King's naval forces, such transfer to continue in force until the issue of a further order modifying or annulling the order of transfer. It thus appears that no conditions were attached by the Governor-General to such transfer (sec. 42 (2) of the *Naval Defence Act* 1910-1934). And no further order modifying or annulling this order has been issued.

H.M.A.S. *Australia* was one of the vessels thus transferred and she was one of His Majesty's ships in commission during the period 12th March to 18th April 1942 and has remained in commission since 18th April 1942. On 12th March 1942 a murder was committed on H.M.A.S. *Australia* whilst on the high seas. An official investigation into the case was conducted by Commander J. M. Armstrong, but the "circumstantial letter" forwarded to Rear-Admiral Crace C.B. was signed by the captain of the ship. The rear-admiral directed the captain of the ship to assemble a court-martial in the ship to try the said Albert Ronald Gordon and Edward Joseph Elias on the charge of the murder reported in the "circumstantial letter." At the time of the murder and at the date of the letter the accused were serving on board the ship and were borne on her books. At all relevant times Rear-Admiral Crace held commissions from the Lords Commissioners of the Admiralty and from His Excellency the Governor-General of the Commonwealth of Australia empowering him to assemble courts-martial. The direction by the rear-admiral to assemble the court-martial in question purported to be under the commission from the Governor-General. The court-martial assembled in the ship on 15th April 1942. The captain of the ship acted as prosecutor and Paymaster-Lieutenant Trevor Rapke as prisoners' friend. Counsel who appeared on the application before us did not suggest that there was any irregularity in the convening, assembling or constitution of the tribunal. His main argument was that the

court-martial had no power to impose the sentence of death on the applicants.

The questions we have to determine necessitate an examination of the relevant statutory provisions relating to the maintenance of discipline contained in Imperial and Australian statutes relating to naval discipline. By sec. 36 of the Australian *Naval Defence Act* 1910-1934, "The *Naval Discipline Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces shall, subject to this Act and to any modifications and adaptations prescribed by the regulations, apply to the Naval Forces." Sec. 5 of the Australian *Naval Defence Act* "continues" (see sec. 5 of the *Defence Act* 1903-1941) the application of some of the provisions of the latter Act, of which sec. 98 is relevant to this case. That section prescribed the sentence of death for certain offences, but not including murder. But, as I have already stated, there had been an unconditional transfer pursuant to sec. 42 of the *Naval Defence Act* of all the vessels of the Commonwealth naval forces together with their personnel to the King's naval forces. Accordingly, by sub-sec. 4 of that section the seamen of H.M.A.S. *Australia*—one of the vessels transferred—became subject to the laws and regulations governing the King's naval forces. Turning then to the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 one finds in the proviso to sec. 1 (1) that "where any forces and ships . . . raised and provided by a self-governing dominion have been placed at the disposal of the admiralty, the" *Naval Discipline Act* 1866 "shall apply without any" of the "modifications or adaptations" mentioned in the body of sec. 1. The expression "self-governing dominion" means, *inter alia*, the Commonwealth of Australia (sec. 1 (3)). And the *Naval Discipline Act* 1866 by sec. 45 prescribes that: "Every person subject to this Act who shall be guilty of murder shall suffer death." Dr. *Louat*, however, contended that the effect of the transfer of the ship in question was not to place her at the "disposal of the admiralty" within the meaning of the proviso to sec. 1 (1) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 but that it was merely an operational transfer. By that I understood him to mean that the transfer was made for the purpose of the operation of the ships and did not affect in any way the application of the Australian statutory law in its application to the ships. But the transfer was an unconditional and wholesale transfer of ships and personnel. And the word "disposal" aptly describes an effective placing of ships and personnel under the control, direction and management of the Admiralty. Counsel for the applicants further

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contended that by virtue of sec. 36 of the *Naval Defence Act* 1910-1934 the application of the Imperial statutes was conditional, and he relied on the expression " subject to this Act and to any modifications and adaptations prescribed by the regulations." Sec. 36, however, is dealing with ships and personnel not transferred to the Admiralty and still under the control of the Commonwealth naval authorities, whereas sec. 42 provides without any modifications for the case of transferred ships and personnel. And this unconditional application of the Imperial code of discipline is reinforced by the proviso to sec. 1 (1) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911. The application of different codes where British and Dominion sailors were serving in the same ship would result in confusion leading to indiscipline and chaos.

A further argument submitted by Dr. *Louat* was based on the following facts. He said (as was the fact) that the " circumstantial letter " should have been transmitted by the captain but not signed by him, and contended that as the captain had signed the letter he had assumed responsibility for all the statements which induced the convening authority to summon the court-martial. Moreover, before the court-martial the captain, who acted as prosecutor, stated that what he proposed to say would in fact carry his own conviction. The accuseds' friend objected that the prosecutor should be careful to present facts and not personal views. No comment was made by the court-martial with regard to these matters, and they do not appear to have affected the due hearing of the case. I consider that there is no substance in this contention.

After a careful consideration of the relevant sections of the statutes to which we have been referred and of the facts of the case I am satisfied that the court-martial was properly constituted under the law and had authority to convict and sentence the applicants and that no ground has been submitted either for proceedings by way of prohibition or for habeas corpus.

I think I should make one further observation. So far as the respondents Cashman and Lester are concerned the claim for prohibition and habeas corpus fails because this Court has no general jurisdiction in that regard as its power is attached to and exercised in aid of Federal jurisdiction, whether original or appellate (*Ex parte Williams* (1)). Sec. 33 of the *Judiciary Act* does not enlarge the jurisdiction of the Court so far as habeas corpus is concerned and sec. 75 (v.) of the Constitution does not apply to these persons, who are not in the circumstances officers of the Commonwealth.

For these reasons I am of opinion that the application should be refused.

(1) (1934) 51 C.L.R. 545, at p. 548.

STARKE J. Rule nisi for a writ of habeas corpus or in the alternative for a writ of prohibition. It was obtained by two members of the naval forces of the Commonwealth, which form part of the defence force of the Commonwealth (*Defence Act* 1903-1941, sec. 30; *Naval Defence Act* 1910-1934, Part III.), who had been convicted of the murder of a stoker of the naval forces of the Commonwealth, by a court-martial which purported to have been assembled pursuant to the provisions of the *Naval Defence Act* 1910-1934 of the Commonwealth (See secs. 5 and 36) and the Imperial *Naval Discipline Act* 1866 (29 and 30 Vict. c. 109) and sentenced to be hanged on board such one of His Majesty's Australian ships and at such time as the Board of Administration for the Naval Forces should direct. The murder was committed on an Australian ship of war on the high seas, but the court-martial was assembled and held on that ship in a port in the South Pacific that was not a British port. On 22nd April 1942 warrants were issued by the captain and commanding officer of that ship to the Officer-in-Charge of the State Penitentiary at Long Bay, Sydney, New South Wales, to receive and keep the men so convicted in his custody, but directed that the sentence was not to be carried out until further directions were given. Pursuant to the warrant the men are now in custody at the Long Bay Penitentiary at Sydney. The validity of this warrant was not challenged upon the argument before this Court, but I have not, myself, been able to trace its authority. The *Naval Discipline Act* 1866, Part V., does not appear to authorize it. The Order-in-Council regulating courts-martial and the King's Regulations require the convening authority, that is, the officer authorized pursuant to the *Naval Discipline Act* 1866, sec. 58 (9), (12), to order courts-martial, to appoint a provost marshal, who is required to take the accused into his custody and safely to keep him until he shall have been delivered in due course of law. So soon as the court-martial is dissolved the president is to wait upon the Commander-in-Chief or senior officer with a letter reporting the finding and sentence. The Commander-in-Chief or senior officer must satisfy himself of the validity of the finding before he takes any step to give effect to the sentence, as by the issue of a warrant for imprisonment or detention. When sentence of death is to be executed the Commander-in-Chief or the convening authority gives direction as to the time, place and manner in which such sentence is to be carried out. No sentence of death passed by a court-martial can be carried into effect until confirmed by the Admiralty or by the Commander-in-Chief on a foreign station: See Order in Council, 11th October 1923, Statutory Rules and Orders (1923), p. 659 (1923 1291/L 20); King's Regulations 1936, "Explanation of

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Terms" p. xi., and ch. IX., Court-Martial, clauses 439 (2), 471 (2), (3), 471 (*a*); *Naval Discipline Act* 1866 (29 & 30 Vict. c. 109), sec. 53 (3). The *Naval Discipline Act* 1866, the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force, apply to the naval forces of the Commonwealth subject to the Act and to any modifications and adaptations prescribed by regulations (*Naval Defence Act* 1910-1934, sec. 36). But no sentence of death passed by any court-martial governed by the *Defence Act* 1903-1941 can be carried into effect until confirmed by the Governor-General (*Defence Act* 1903-1941, sec. 98; *Naval Defence Act* 1910-1934, sec. 5).

The officer who purported to act as the "convening authority" of the court-martial in the present case was the rear-admiral commanding the Australian Squadron. I cannot find in the material before the Court that he or anyone else appointed a provost marshal or that he or the senior officer present, unless he be the captain who issued the warrants of detention, authorized or sanctioned the warrants under which the convicted men are detained in the Long Bay Penitentiary. But even if the warrants under which the convicted men are detained and held in Long Bay be defective that would not then entitle these men to their discharge but only a remand to some lawful custody (*R.* v. *Mount* (1); *R.* v. *Bethel* (2); *Canadian Prisoners' Case* (3)). It is important, however, that the Court should be satisfied of the legality of warrants under which persons are held in custody: implication or conjecture is unsafe.

The main contention is, however, that the sentence and the detention of the men is unlawful by reason of the provisions of sec. 98 of the *Defence Act* 1903-1941 of the Commonwealth as follows:—"No member of the Defence Force shall be sentenced to death by any court-martial except for mutiny, desertion to the enemy, or traitorously delivering up to the enemy any garrison, fortress, post, guard, or ship, vessel, or boat, or traitorous correspondence with the enemy; and no sentence of death passed by any court-martial shall be carried into effect until confirmed by the Governor-General."

This Court, however, has not a general jurisdiction over the liberty of the subject (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (4)); it is not a common law court but a statutory court. To the Constitution and the laws made under the Constitution it owes its existence and all its powers, and

(1) (1875) L.R. 6 P.C. 283.
(2) (1695) 5 Mod. 19 [87 E.R. 494].
(3) (1839) 3 St. Tr., N.S. 963, at cols. 1013, 1030; 9 A. & E. 731, at pp. 786, 804, 805 [112 E.R. 1389, at pp. 1412, 1419].
(4) (1914) A.C. 237, at p. 255; 17 C.L.R. 644, at p. 654.

whatever jurisdiction is not found there either expressly or by necessary implication does not exist. "The Constitution does not in general terms, as in the case of the State Constitutions with reference to Supreme Courts, endow the High Court at a stroke with all the powers of the Court of King's Bench" (*The Tramways Case* [*No.* 1] (1)). It has appellate jurisdiction (Constitution, sec. 73) and original jurisdiction (secs. 75, 76). It is the original jurisdiction of the Court that is invoked in the present proceedings: See *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2); *The Tramways Case* [*No.* 1] (3). And I agree with *Isaacs* J. that the powers given by sec. 33 of the *Judiciary Act* 1903-1940 can only be exercised within the range of jurisdiction conferred upon the Court under the provisions of the Constitution (*Whybrow's Case* (4); *Jerger* v. *Pearce* (5)). In addition to the matters in which original jurisdiction has been conferred upon the High Court by sec. 75 of the Constitution, the *Judiciary Act* 1903-1940 in sec. 30 has provided that the High Court shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation, but no law has been made in general terms conferring original jurisdiction on the High Court in any matter arising under the laws made by Parliament, though jurisdiction has been given to the High Court in various matters arising under laws made by the Parliament, e.g., Income Tax Acts, Patents Act, and so forth: Cf. *Federal Commissioner of Taxation* v. *Lewis Berger & Sons (Australia) Ltd.* (6).

The *Defence Act* 1903-1941 confers no original jurisdiction whatever upon this Court in relation to the proceedings of courts-martial: See *Defence Act* 1903-1941, sec. 100. Counsel for the convicted men could do no more than refer the Court to the provisions of the *Judiciary Act* 1903-1940, sec. 33, which, for reasons already appearing, would not sustain the rule nisi unless the jurisdiction of the Court had been attracted. But consideration has led me to the conclusion that the matter before us involves the interpretation of the Constitution, which founds the original jurisdiction of this Court, though we heard no argument to that effect from counsel. And the jurisdiction being thus attracted, this Court is clothed with full authority essential for the complete adjudication of the matter and not merely the interpretation of the Constitution (*Troy* v. *Wrigglesworth* (7); *Hume* v. *Palmer* (8); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (9); *Hopper* v. *Egg and*

(1) (1914) 18 C.L.R. 54, at p. 75.
(2) (1910) 11 C.L.R. 1.
(3) (1914) 18 C.L.R. 54.
(4) (1910) 11 C.L.R., at pp. 48, 49: Cf. *O'Connor* J. at p. 42.
(5) (1920) 28 C.L.R. 588.
(6) (1927) 39 C.L.R. 468.
(7) (1919) 26 C.L.R. 305.
(8) (1926) 38 C.L.R. 441.
(9) (1934) 52 C.L.R. 189, at p. 200.

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Egg Pulp Marketing Board (Vict.) (1)). Once jurisdiction is acquired by the Court, that jurisdiction is not lost by reason of the rejection of the constitutional point (*R.* v. *Carter* ; *Ex parte Kisch* (2)).

Now this case involves the interpretation of the Constitution, because the position of courts-martial in relation to the judicial power of the Commonwealth comes in question. This Court has held that the judicial power of the Commonwealth can only be vested in courts and that if any such court be created by Parliament the tenure of office of the justices of such court, by whatever name they may be called, must be for life, subject to the power of removal contained in sec. 72 of the Constitution (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3) ; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (4) ; *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (5)). Judicial power for this purpose may be described as " the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action " (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (6) ; *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (7)). Naval courts-martial are set up (*Naval Defence Act* 1910-1934 of the Commonwealth, which incorporates the *Defence Act* 1903-1941 of the Commonwealth (See secs. 5, 36), and Imperial *Naval Discipline Act* 1866, secs. 87, 45, and Part IV.) and they exercise judicial power in the sense already mentioned. But do they exercise the judicial power of the Commonwealth ? If so the proceedings of such courts are unwarranted in point of law. The question depends upon the interpretation of the Constitution and whether such courts stand outside the judicial system established under the Constitution. The Parliament has power, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to 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. And by sec. 68 of the Constitution the command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the King's representative.

(1) (1939) 61 C.L.R. 665, at p. 673.
(2) (1934) 52 C.L.R. 221, at p. 229.
(3) (1918) 25 C.L.R. 434.
(4) (1925) 35 C.L.R. 422, at pp. 432, 433.
(5) (1931) A.C. 275, at pp. 284, 298, 299 ; 44 C.L.R. 530, at pp. 532, 545, 546.
(6) (1908) 8 C.L.R. 330, at p. 357.
(7) (1931) A.C., at pp. 295, 296 ; 44 C.L.R., at pp. 541, 542.

Under the Constitution of the United States of America the judicial power of the United States is vested in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish: Cf. the Australian Constitution, sec. 71. And the judges hold office during good behaviour (art. III., sec. 1). Power is conferred upon Congress to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces (art. I., sec. 8, clauses 13, 14). The President is Commander-in-Chief of the army and navy of the United States (art. II., sec. 2, clause 1). And the Fifth Amendment provides that no person shall be held to answer for capital or other infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, whereas the Australian Constitution (sec. 80) provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury but there is no exception in cases arising in the land or naval forces as in the American Constitution. But the frame of the two Constitutions and their provisions, though not identical, are not unlike. The Supreme Court of the United States has resolved that courts-martial established under the laws of the United States form no part of the judicial system of the United States and that their proceedings within the limits of their jurisdiction cannot be controlled or revised by civil courts. Thus in *Dynes* v. *Hoover* (1) Mr. Justice *Wayne*, delivering the opinion of the Court, said:—"These provisions" (that is, the provisions already mentioned) "show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other": See also *Kurtz* v. *Moffitt* (2); *Willoughby* on *The Constitution*, 2nd ed. (1929), vol. 3, p. 1542, par. 1011; *Willis* on *Constitutional Law*, pp. 447 et seq.

In my opinion the same construction should be given to the constitutional power contained in sec. 51 (vi.) of the Australian Constitution. The scope of the defence power is extensive, as is suggested by the decisions of this Court (*Joseph* v. *Colonial Treasurer* (*N.S.W.*) (3); *Farey* v. *Burvett* (4)), and though the power contained in sec. 51 (vi.) is subject to the Constitution, still the words "naval and military defence of the Commonwealth and the control of the

(1) (1858) 61 U.S. 65, at p. 79 [15 Law. Ed. 838, at p. 843].
(2) (1885) 115 U.S. 487, at p. 500 [29 Law. Ed. 458, at p. 461].
(3) (1918) 25 C.L.R. 32, at pp. 46, 47.
(4) (1916) 21 C.L.R. 433.

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forces to execute and maintain the laws of the Commonwealth," coupled with sec. 69 and the incidental power (sec. 51 (xxxix.)), indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise, and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative point of view.

But this still leaves standing the provisions of sec. 98 of the *Defence Act* 1903-1941, which preclude any court-martial sentencing members of the defence forces to death for murder. The convicted men had in 1939 been transferred to the King's naval forces pursuant to sec. 42 (1) (*d*) of the *Naval Defence Act* 1910-1934. The Order in Council transferring the men imposed no conditions of transfer, but I shall later refer to the precise terms of the order. And sec. 42 (1) (4) provided: "Subject to the conditions of transfer, all officers and seamen of the Commonwealth Naval Forces transferred in pursuance of this section to the King's Naval Forces . . . shall, while so transferred, be subject to the laws and regulations governing the King's Naval Forces . . . to which they are transferred so far as those laws and regulations are applicable." These final words of the section incorporate, so it is suggested, sec. 45 of the *Naval Discipline Act* 1866, which provides that every person subject to the Act who shall be guilty of murder shall suffer death. But it must be remembered that the officers and seamen transferred remain members of the defence forces of the Commonwealth. The applicability of the laws and regulations governing the King's naval forces to these officers and seamen cannot be determined without reference to the laws of the Commonwealth. If that law prescribes that members of its defence forces shall not suffer death for murder, then the provisions of sec. 45 of the *Naval Discipline Act* that they shall suffer death is inconsistent with it, and consequently inapplicable. Much clearer words than are contained in sec. 42 (4) would be required to make sec. 45 applicable. And more clearly is that so when sec. 36 of the *Naval Defence Act* 1910-1934 provides that the *Naval Discipline Act* 1866 shall only apply to the naval forces of the Commonwealth "subject to this Act," which, as already stated, incorporates sec. 98; and when sec. 88 of the *Defence Act* 1903-1941 applies the powers of courts-martial in the King's Regular Land Forces except so far as is inconsistent with the Act. Doubt is also possible as to the operation of sec. 42 (4) upon ships not belonging to the Commonwealth or beyond the Commonwealth, though *Croft* v. *Dunphy* (1) may have resolved some of these doubts: See *Responsible Government in the Dominions*,

(1) (1933) A.C. 156.

Berriedale Keith, 1st ed. (1912), vol. 3, pp. 1280, 1281; *Imperial Unity and the Dominions*, *Berriedale Keith*, (1916), pp. 313, 314.

An argument more solidly based was founded upon the Imperial *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (1 & 2 Geo. V. c. 47), which sec. 36 of the *Naval Defence Act* 1910-1934 enacts shall apply to the naval forces of the Commonwealth "subject to this Act and to any modifications and adaptations prescribed by the Regulations": See sec. 3, "Regulations", and sec. 5, incorporating sec. 98 of the *Defence Act* 1903-1941. The *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 provides in sec. 1 (1) that where any forces and ships raised and provided by any self-governing Dominion have been placed at the disposal of the Admiralty, the Imperial *Naval Discipline Act* 1866 as amended by any subsequent enactment shall apply without any modifications or adaptations.

These provisions have an historical background which may be found in Dr. *Berriedale Keith's Responsible Government in the Dominions*, 1st ed. (1912), vol. 3, pp. 1269-1298; 2nd ed. (1927), vol. 2, pp. 1001-1017, and in the same author's work *Imperial Unity and the Dominions*, (1916), pp. 310 et seq. There was no doubt of the authority of the King's dominions and colonies to provide for their local defence, but questions arose as to the effect of legislation operating beyond the territorial limits of the dominion or colony and also as to the international position of a local naval defence force in times of peace and war.

In 1865 an Act was passed to make better provision for the naval defence of the Colonies, the *Colonial Naval Defence Act* 1865 (28 & 29 Vict. c. 14). One of its sections (6) provided: "It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorize the Admiralty to accept any offer for the time being made or to be made by the Government of a colony, to place at Her Majesty's disposal any vessel of war provided by that Government, and the men and officers from time to time serving therein; and while any vessel accepted by the Admiralty under such authority is at the disposal of Her Majesty, such vessel shall be deemed to all intents a vessel of war of the Royal Navy, and the men and officers from time to time serving in such vessel shall be deemed to all intents men and officers of the Royal Navy, and shall accordingly be subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy": See also *Colonial Naval Defence Act* 1931 (21 Geo. V. c. 9).

"Doubtless it was still open," says Dr. *Berriedale Keith*, "for the Commonwealth to obtain Orders under the Act of 1865, but that

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Act was not in any way a necessary mode of procedure, and it was not surprising that the Commonwealth Parliament, in its naval legislation, No. 30 of 1910, relied solely on its own power of legislation, and the same course was followed in that year . . . by . . . Canada" (*Imperial Unity and the Dominions*, (1916), p. 313). Further difficulties appear to have been apprehended from the position of the Dominions and they were resolved by the passing of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (1 & 2 Geo. V. c. 47), already mentioned: Cf. also *Army Act* and its amendments (44 & 45 Vict. c. 58, secs. 177, 187c).

The Commonwealth *Naval Defence Act* 1910-1934 provided:—"The Governor-General may . . . (*d*) transfer to the King's Naval Forces . . . any officers or seamen of the Commonwealth Naval Forces": See sec. 42 (1). "Any transfer in pursuance of this section may be for such period and subject to such conditions as the Governor-General thinks desirable" (sec. 42 (2)).

In 1939 an Order in Council was made by the Governor-General in Council pursuant to this Act whereby he ordered that the officers and seamen of the Commonwealth naval forces borne on the books of the vessels of the Commonwealth naval forces be transferred to the King's naval forces and such transfer should continue until the issue of a further order modifying or annulling this order. The Order in Council followed the provisions of sec. 42 (1) (*d*) and (2). But sub-sec. 4, as already stated, provided that subject to the conditions of transfer all officers and seamen so transferred should while so transferred be subject to the laws and regulations governing the King's naval forces so far as those laws and regulations are applicable. The *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 (1 & 2 Geo. V. c. 47), as already mentioned, provided that, where any forces and ships raised and provided by a Dominion had been placed at the disposal of the Admiralty, the *Naval Discipline Act* 1866 and its amendments, e.g. *Naval Discipline Act* 1922 (12 & 13 Geo. V. c. 37, sec. 90B), should apply without any modifications or adaptations. But the *Dominion Naval Forces Act* did not come into force in relation to forces or ships raised and provided by any self-governing Dominion unless and until provision to that effect had been made in the Dominion. The *Naval Defence Act* was amended by the insertion of the following section (1912 No. 21, sec. 3; *Naval Defence Act* 1910-1934, sec. 36):—"The *Naval Discipline Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces shall, subject to this Act and to any modifications and adaptations prescribed by the

regulations, apply to the Naval Forces." Dr. *Berriedale Keith* suggests (*Imperial Unity and the Dominions*, (1916), p. 314) that the Act "is of doubtful validity, as it makes the application of the Act subject to the power of the Governor-General in Council to modify it, which is clearly not possible, as it is not provided for by the Imperial Act." In my opinion, the transfer of the officers and seamen of the Commonwealth naval forces to the King's naval forces pursuant to sec. 42 of the *Naval Defence Act* 1910-1934 places them at the disposal of the Admiralty, to adopt the words of the proviso to sec. 1 (1) (*a*) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911. That Act, however, as already mentioned, was only brought into operation in the Commonwealth subject to the *Naval Defence Act* 1910-1934, which incorporates by reference secs. 88 and 98 of the *Defence Act* 1903-1941.

Then there is sec. 42 of the *Naval Defence Act* 1910-1934, which was originally passed in 1910 (1910, No. 30) and which declares that officers and men transferred pursuant to that section shall while so transferred be subject to the laws and regulations governing the King's naval forces so far as those laws and regulations are applicable.

The *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 is an Imperial Act, but subject to the consent of the self-governing Dominions, that is to say, it shall not operate "unless or until provision to that effect has been made in the Dominion." In my opinion, if such provision be made the Act then operates as Imperial legislation, because the condition necessary to bring it into operation has been fulfilled. The Commonwealth, however, has plenary legislative power with respect to the naval and military defence of the Commonwealth and therefore power to pass laws relating to the discipline of the forces, including the adoption or adaptation of Imperial provisions relating to the discipline of the forces with or without modifications or adaptations. Still the Commonwealth law must not be repugnant to Imperial legislation extending to it (*Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (1)) —and cf. *The Commonwealth* v. *Limerick Steamship Co. Ltd.* (2); *The Commonwealth* v. *Kreglinger & Fernau Ltd.* (3). The *Statute of Westminster* 1931 (22 Geo. V. c. 4), it should be mentioned, has not been adopted in Australia and is therefore irrelevant.

So the question arises whether the proviso to sec. 1 (1) (*a*) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 does not override, to the extent there mentioned, the provisions of secs. 36 and

(1) (1925) 36 C.L.R. 130.
(2) (1924) 35 C.L.R 69.
(3) (1926) 37 C.L.R. 393.

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42 (4) of the Commonwealth *Naval Defence Act* 1910. The Imperial Act declares the effect of the *Naval Discipline Act* when applied by the legislatures of self-governing Dominions to the naval forces raised by such Dominions. It regulates not only the application of the *Naval Discipline Act* to the naval forces raised and provided by the Dominion, but also the relations of the Imperial Navy to the Dominion forces. It applies to the Dominion forces not only within the jurisdiction of the Commonwealth, but wherever those forces may be. And it provides in some cases for modifications and adaptations. In the case of forces and ships, however, raised and provided by a self-governing Dominion and placed at the disposal of the Admiralty then the *Naval Discipline Act* 1866 and its amendments shall apply without any modifications or adaptations. The *Naval Defence Act* 1910-1934, secs. 36 and 42 (4) is inconsistent with this latter provision. The result in one view is that the provisions of the *Naval Discipline* (*Dominion Naval Forces*) *Act* cannot operate because of the provisions of the Commonwealth legislation, but the better view, I think, is that these provisions are to the extent of their inconsistency void and inoperative.

"Any colonial law which is or shall be in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative" (*Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63, sec. 2)).

The Commonwealth *Defence Act*, sec. 98, provides that no members of the defence force shall (except in certain cases which are immaterial here) be sentenced to death, whilst the Imperial *Naval Discipline Act* 1866 provides in sec. 45 that every person subject to that Act who shall be guilty of murder shall suffer death. Those provisions are inconsistent with one another and the Australian provision is repugnant to the Imperial provision. It follows that sec. 45 of the *Naval Discipline Act* 1866 applies to officers and seamen of the Commonwealth naval forces transferred to the King's naval forces and placed at the disposal of the Admiralty.

There remains for consideration the authority under which the court-martial was assembled and sat upon the charge of murder against the convicted men. In 1940 His Majesty's Australian Squadron was under the command of a rear-admiral in the Royal Navy who was also in command of that squadron in 1942, including, it seems, naval forces and ships of the Dominion of New Zealand.

In the year 1940 the Commissioners for executing the office of the Lord High Admiral, for the better maintaining a proper government and strict discipline in His Majesty's ships and vessels, issued their commission to the rear-admiral commanding His Majesty's ships and vessels employed and to be employed in the Australian squadron to assemble courts-martial for the trial of persons belonging to the Royal Navy as often as he should see occasion. His Excellency the Governor-General and the Commander-in-Chief in and over the Commonwealth of Australia by a commission issued in 1939 authorized and empowered the rear-admiral commanding the Australian Squadron to assemble courts-martial as often as he should see occasion. The rear-admiral mentioned in the respective commissions was one and the same person. The Imperial commission finds its authority in the *Naval Discipline Act* 1866, sec. 58, and its amendments, whilst the Australian commission finds its authority in the *Defence Act* 1903-1941, sec. 86, the *Naval Defence Act* 1910-1934, secs. 42, 44B, and in the *Naval Discipline Act* 1866 and its amendments.

In April 1942 the rear-admiral, upon report to him of the acts of the convicted men, "in the exercise of the powers conferred on him by commission from His Excellency the Governor-General and Commander-in-Chief in and over the Commonwealth" directed a captain of the Royal Navy in one of His Majesty's New Zealand ships, to assemble a court-martial on board the Australian ship of war, already mentioned, on 14th April 1942 or as soon thereafter as circumstances would admit, which court, the said captain being president thereof, was ordered to try the men on the accompanying charge of murder. Pursuant to this order and direction the court-martial was assembled, and tried and convicted the men of murder as already mentioned.

In my opinion, the rear-admiral had authority to direct the assembly of the court-martial in the manner and form adopted. He had command of the Australian squadron, though the ships, officers and seamen in that squadron had been transferred to, and placed at the disposal of the Admiralty, and in that command were also, it seems, officers of the Royal Navy, serving on ships of war belonging to the Dominion of New Zealand. It is not clear whether that command was conferred upon him by the Imperial authorities or by the Australian authorities, or by both, though, I suppose, the command of Australian ships of war depended upon some Australian appointment or some consent to his appointment. But it is clear that he had the command above mentioned. A commission, as already stated, had been issued to the rear-admiral as

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such commander by His Excellency the Governor-General, authorizing him to assemble courts-martial, and to this authority may be added the provisions of sec. 44B of the *Naval Defence Act* 1910-1934. Moreover, the men charged with murder were members of the naval defence forces of Australia placed temporarily, though they were, at the disposal of the Admiralty: the act charged was done upon an Australian ship of war on the high seas and the "circumstantial letter" (King's Regulations, 1936, Ch. IX., Art. 434) reporting the circumstances was forwarded to the rear-admiral. He had authority in these circumstances to direct the assembly of a court-martial pursuant to his Australian commission; his English commission, I think, was inapplicable, for it only extended to persons belonging to the Royal Navy. The officer to whom the direction to assemble a court-martial was given was an officer of the Royal Navy, though serving upon a ship of war belonging to the Dominion of New Zealand. Two other members of the court-martial were also officers of the Royal Navy, though serving upon the same ship of war belonging to the Dominion of New Zealand. The two remaining members of the court-martial were officers of the Royal Australian Navy. All these officers were, it seems, under the command of the rear-admiral. Apart, however, from this it appears from the King's Regulations and Admiralty Instructions 1937, vol. 2, App. XXVI., that in time of war when Dominion ships and men have been placed at the disposal of the Admiralty the *Naval Discipline Act* applies exactly in the same manner as to officers and men of the Royal Navy and the usual routine is to be followed without any modifications. This does not control the construction of the Acts but it shows that the naval forces at the disposal of the Admiralty are treated, for disciplinary purposes, as one force, though the authority to assemble courts-martial may not all proceed from the same source.

But I would rather that this case had been decided upon a formal return to a writ of habeas corpus than upon the rule nisi. The case is of grave consequence to the convicted men and of first rate importance to all men of the Australian naval forces placed at the disposal of the Admiralty. The argument before us did not raise many of the matters which I have discussed and the evidence is far from satisfactory in relation to the command and authority of the rear-admiral, the constitution of the court-martial, and the qualifications of the officers who composed it. A formal return would require the return of the warrant under which the convicted men are detained and show that they were held under the lawful sentence of a competent court. The warrants themselves

would not be sufficient. The return to a writ of habeas corpus does not require minute correctness if the substance of the facts are stated; it must, however, contain the truth of the matter and convey sufficient information to the court to enable it to see the grounds of the validity of the detention of the persons detained (*Canadian Prisoners' Case* (1); *Leonard Watson's Case* (2); *R.* v. *Suddis* (3); *Souden's Case* (4); *Nash's Case* (5)). The return does not require verification but is treated as true and its sufficiency alone is examined as on a demurrer (*Canadian Prisoners' Case* (6)). The nature of the return required depends upon the circumstances of the case. A return that a person was held under commitment by Parliament for contempt or under the sentence of a superior court according to the course of the common law or of a court of known jurisdiction is comparatively simple, but more detail is required in the case of tribunals such as courts-martial, as is illustrated by the *Canadian Prisoners' Case* (7) and *Brenan and Galen's Case* (8). And it is a vexed question, according to *Short and Mellor, The Practice of the Crown Office*, 2nd ed. (1908), p. 329, in cases in which the *Habeas Corpus Act* 1816 (56 Geo. III., c. 100), sec. 30, is inapplicable, whether affidavits may be admitted for the purposes of showing defects in jurisdiction, "but the weight of authority seems to be in favour of admitting affidavits." If that statement be accurate it would be very relevant to courts-martial, for their decisions are not open to any appeal. But against it may be cited *Case of the Sheriff of Middlesex* (9); *R.* v. *Dunn* (10); *In the Matter of Clarke* (11). However this may be, the party who makes the return does so at his peril. If a return be false a remedy is by action. And Lord *Denman* suggested that in a clear case affidavits might be made the foundation of a motion to quash the return and clearly they may be used in support of proceedings to commit for making a false return whereby, I suppose, a true return might be forced (*Canadian Prisoners' Case* (12)).

(1) (1839) 3 St. Tr. N.S., at col. 1014, and, *in arguendo*, at cols. 997, 998; 5 M. & W. 32 [151 E.R. 15].
(2) (1839) 9 A. & E. 731 [112 E.R. 1389].
(3) (1801) 1 East. 306 [102 E.R. 119].
(4) (1821) 4 B. & Ald. 294 [106 E.R. 945].
(5) (1821) 4 B. & Ald. 295 [106 E.R. 946].
(6) (1839) 3 St. Tr. N.S., at cols. 1010, 1014 et seq.; (1839) 9 A. & E., at pp. 781, 782 [112 E.R., at p. 1410].
(7) (1839) 3 St. Tr. N.S., at col. 1014; 5 M. & W. 32 [151 E.R. 15].
(8) (1847) 10 Q.B. 492 [116 E.R. 188].
(9) (1840) 11 A. & E. 273, at pp. 292, 297 [113 E.R. 419, at pp. 426-428].
(10) (1840) 12 A. & E. 599, at p. 609 [113 E.R. 939, at pp. 944, 945].
(11) (1842) 2 Q.B. 619, at p. 634 [114 E.R. 243, at pp. 248, 249].
(12) (1839) 3 St. Tr. N.S., at cols. 1028, 1014, 1027; 9 A. & E., at pp. 787, 797, 805-808 [112 E.R., at pp. 1412, 1416, 1419, 1420].

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It is unnecessary for me to discuss the rule nisi so far as it seeks in the alternative a writ of prohibition, for habeas corpus in this case is a sufficient and appropriate remedy.

Lastly, I would point out that the *Defence Act* 1903-1941, sec. 98, though abolishing the sentence of death, except in certain cases, did not substitute any other sanction. It may be that penal servitude is substituted by force of other provisions: See *Naval Defence Act* 1910-1934, sec. 5; *Defence Act* 1903-1941, Part VIII. and *Army Act*, 44 & 45 Vict. c. 58; Australian Military Regulations and Orders, Statutory Rules 1927, No. 149, reg. 202, p. 327. But it would seem desirable to make clear the position of the naval forces in cases in which the provision of sec. 45 of the *Naval Discipline Act* 1866 is inapplicable.

The rule nisi fails upon the grounds submitted to us during the argument and should accordingly be discharged.

McTIERNAN J. The principal ground upon which this application, which is made either for a writ of prohibition or a writ of habeas corpus, is based, is that the naval court-martial which tried and convicted the applicants for murder, had no authority under the law made by the Commonwealth for the government of its naval forces, to sentence the applicants to death for that crime. The circumstances in which the court-martial was convened and the forms observed in convening it appear clearly from the affidavits filed in this Court in this motion and need not be repeated.

It also appears that the murder for which the applicants were sentenced to death was committed on the high seas and that their trial, conviction and sentence by the court-martial took place on H.M.A.S. *Australia* while it was in a port.

The discipline of the Commonwealth naval forces is provided for by secs. 36 and 42 (4) of the Commonwealth *Naval Defence Act* 1910-1934. Sec. 36 says that the Imperial Acts known as the *Naval Discipline Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's naval forces shall apply to the Commonwealth naval forces, but subject to the Commonwealth *Naval Defence Act* and to any modifications and adaptations of these Imperial Acts, Regulations and Instructions which may be prescribed by regulations under this Commonwealth Act. Sec. 36 therefore makes the application of this body of Imperial naval law to the Commonwealth naval forces subject to, among other sections of the Commonwealth Act, sec. 5. This section states that the provisions of the Commonwealth *Defence Act* 1903-1934 which are specified in

the section shall "subject to this Act" (the *Naval Defence Act* 1910-1934) continue to apply in relation to the naval forces of the Commonwealth. The references to the *Defence Act* include sec. 98. It provides that no member of the defence force of the Commonwealth shall be sentenced to death by any court-martial except for certain offences which do not include murder.

But before the alleged murder was committed the Governor-General had made an order under sec. 42 of the Commonwealth *Naval Defence Act* transferring the vessels, officers and men of the Commonwealth naval forces to the King's naval forces. The applicants are bound by this order. The existence of the Commonwealth naval forces as a local naval unit completely under the control of the Commonwealth is by sec. 42 harmonized with the Imperial relations of the Commonwealth; sec. 42 (4) is a special provision which is intended to govern the officers and men of the Commonwealth naval forces while transferred to the King's naval forces or to those of another Dominion. The sub-section says that, subject only to the conditions of the transfer (if the Governor-General thinks fit to impose any conditions), the officers and men shall, while so transferred, be subject to the laws and regulations governing the King's naval forces or those of the Dominion to which they are transferred, so far as those laws and regulations are applicable. The sub-section does not exhibit the intention that the application of these laws and regulations should be subject to the *Naval Defence Act* and local modifications and adaptations. It is because sec. 36 of the Commonwealth *Naval Defence Act* is expressed to be "subject to this Act", and sec. 5 of the Act introduces sec. 98 of the *Defence Act*, that the discipline provided by sec. 36 is subject to the prohibition against the death sentence for murder. But sec. 5 does not say unconditionally that the provisions of the *Defence Act*, which include sec. 98, shall continue to apply to the naval forces. It says that those provisions shall "subject to this Act" continue to apply to those forces. Sub-sec. 4 of sec. 42 makes no such saving of the provisions of the *Naval Defence Act* as that made by sec. 36. The transfer under sec. 42 not being subject to any condition, the effect brought about by sub-sec. 4 of sec. 42 is that from the time of transfer the officers and men transferred, who include the applicants, became subject to the laws and regulations governing the King's naval forces so far as they were applicable. These laws included the Imperial *Naval Discipline Act* 1866 as amended, sec. 45 of which provides that every person subject to this Act who shall be guilty of murder shall suffer death. This Act did not apply by its own

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McTiernan J.

force to members of the Commonwealth naval forces as such. It is necessary to inquire whether in consequence of the Order made by the Governor-General under sec. 42 of the Commonwealth Act (Naval Defence) the members of these forces became subject to the Imperial *Naval Discipline Act* 1866. Have they been made subject to that Act by sec. 42 of the Commonwealth *Naval Defence Act*? The operation of this section is not confined by the territorial limits of the Commonwealth (*Sickerdick* v. *Ashton* (1)—cf. *Semple* v. *O'Donovan* (2)); and sec. 5 of the *Commonwealth of Australia Constitution Act* does not prevent its being in force on ships belonging to the Commonwealth naval forces while they are under the control of the Commonwealth, for they are not the Sovereign's ships of war within the meaning of the section, a distinction which, it may be observed, is maintained by sec. 3 of the Commonwealth *Navigation Act* 1912. But the application of the provisions of the Imperial *Naval Discipline Act* 1866 as amended to the Commonwealth *naval forces* serving on His Majesty's Australian ships of war does not depend wholly upon the operation of sec. 42. By enacting sec. 36 and sec. 42 (4) of the Commonwealth *Naval Defence Act* the Commonwealth Parliament fulfilled the conditions necessary for the operation of sec. 1 of the Imperial *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911—See also definition of "The *Naval Discipline Act*" in sec. 3 of the Commonwealth *Naval Defence Act*. The result of the operation of sec. 1 of this Act is that the Imperial *Naval Discipline Act* 1866 as amended, which applies to the King's naval forces, also applies by force of the Commonwealth *Naval Defence Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 as if the reference in the former Imperial Act to His Majesty's naval forces included the naval forces of the Commonwealth which the Governor-General transferred to His Majesty's naval forces.

In the case of any officers or men who are not transferred to the King's naval forces, the application of the Imperial *Naval Discipline Act* 1866 as amended to them is subject to the conditions expressed in sec. 36 of the *Naval Defence Act* and to the modifications and adaptations mentioned in sec. 1 (1) (*a*) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911. In the case of the officers and men transferred to the King's naval forces pursuant to sec. 42, the intention of sec. 42 (4) is that, subject to the conditions of the transfer, they are to be subject to the laws and regulations governing the King's naval forces. These laws and regulations include the *Naval Discipline Act* 1866 as amended

(1) (1918) 25 C.L.R. 506.

(2) (1917) N.Z.L.R. 273.

by subsequent Imperial Acts. By the transfer the ships, men and officers of the Commonwealth naval forces transferred to His Majesty's naval forces were placed at the disposal of the Admiralty. They come therefore within the operation of the proviso to sec. 1 of the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911. The result is that the *Naval Discipline Act* 1866 as amended applies without any modifications or adaptations to the officers and seamen, who include the applicants, of the Commonwealth naval forces transferred under sec. 42 to the King's naval forces. The case is free from the difficulties which might have arisen if the transfer under sec. 42 had been made subject to conditions. Sec. 45 of the *Naval Discipline Act* 1866 as amended provides that every person subject to this Act who shall be guilty of murder shall suffer death. For these reasons the prohibition against the sentence of death contained in sec. 98 of the military *Defence Act* does not invalidate the sentence imposed on the applicants. In my opinion the principal ground upon which the writ of prohibition or of habeas corpus is sought therefore fails.

The other ground on which a writ of prohibition is sought is that the prosecuting officer, in addressing the members of the court-martial, expressed strongly his personal conviction that the applicants were guilty, and that it was a violation of natural justice for him to make that address to the members of the court-martial, several of whom were subordinate to him in rank. The version of the address, as read to this Court, shows a departure from the standard of fairness proper to a crown prosecutor in a trial before a judge and jury. But it is not shown that any member of the court-martial acted as if under the direction of the prosecuting officer or failed in his duty to act judicially. There is no suggestion that the applicants were denied the right to present their case and to be fully heard. There does not seem to me to be any ground upon which to hold that there was any denial of natural justice.

As the grounds upon which the remedies are sought fail, it is unnecessary to deal with the questions affecting the applicability of either remedy which is sought in these proceedings and the jurisdiction of this Court to grant it.

The question whether the sections of the Acts providing for the trial and sentence of members of the Forces by court-martial are *intra vires* the Commonwealth Parliament was not argued. I see no reason to doubt that those provisions are a valid exercise of the powers vested in the Parliament by sec. 51 (vi.) and (xxxix.).

The order nisi should be discharged.

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WILLIAMS J. From 15th to 18th April 1942 a court-martial sat on board H.M.A.S. *Australia*, a warship forming part of the Commonwealth naval forces wholly manned by Australian ratings, then in port, to try two seamen, E. J. Elias and A. R. Gordon, on a charge that they then being persons subject to the Imperial *Naval Discipline Act* murdered another seaman, J. J. Riley. On 12th March 1942, when the murder was alleged to have taken place, the ship was on the high seas beyond Australian territorial waters. The court-martial found both the accused guilty and sentenced them to be hanged.

On 22nd April they were placed under the custody of the officer in charge of His Majesty's State Penitentiary, Long Bay, Sydney.

On 27th April, on the application of the prisoners, I made an order nisi against the members of the court-martial, the Sheriff of New South Wales and the Officer-in-Charge of the Penitentiary returnable before the Full Court, to show cause why a writ of habeas corpus or alternatively a writ of prohibition should not be issued upon the ground that the court-martial had no power to sentence the applicants to death by reason of sec. 98 of the *Defence Act* 1903-1941; and upon such other grounds as might be allowed by the Full Court.

When the matter came on for hearing, counsel for the respondents objected that the Court had no jurisdiction to entertain the application, so that I shall deal with this point first, because, if it were sound, it might be inadvisable to express an opinion on the merits.

Sec. 33 of the *Judiciary Act* 1903-1940 provides, *inter alia*, that this Court may direct the issue of writs of habeas corpus, but it has been held that it can only do so where the writ is claimed in aid of a matter in which the Court has original or appellate jurisdiction (*Jerger* v. *Pearce* (1); *Ex parte Williams* (2)). This is not an appeal, so that the only question is whether the Court has original jurisdiction. Under sec. 30 of the *Judiciary Act* the Court has original jurisdiction in all matters arising under the Constitution or involving its interpretation.

A constitutional question arises when its determination becomes necessary upon the ascertained or asserted facts of the case (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3)). The jurisdiction of this Court once vested is not lost by reason of the rejection of the constitutional point (*Ex parte Walsh and Johnson*; *In re Yates* (4); *R.* v. *Carter*; *Ex parte Kisch* (5); *Hopper* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (6)). In the last-mentioned case *Latham* C.J. said: "The fact that the

(1) (1920) 28 C.L.R. 588, at p. 590.
(2) (1934) 51 C.L.R. 545, at pp. 548, 551, 552.
(3) (1925) 36 C.L.R. 442, at p. 451.
(4) (1925) 37 C.L.R. 36.
(5) (1934) 52 C.L.R. 221.
(6) (1939) 61 C.L.R. 665.

constitutional objection has failed does not deprive the Court of jurisdiction if the 'facts relied on were bona fide raised, and were such as to raise' the question" (1). The Imperial *Naval Discipline* (*Dominion Naval Forces*) *Act* only came into force in the Commonwealth upon provision to that effect being made by the Commonwealth Parliament. Where the Imperial Parliament passes such an Act, the question arises whether the Commonwealth Parliament has power under the Constitution to adopt the Imperial Act, and, if it has not, whether the Act, in the absence of some express provision to that effect, was intended to enlarge the powers of the Commonwealth Parliament beyond those conferred by the Constitution to enable it to do so. But in view of the elaborate provisions in the Constitution itself which must be observed to effect such a change, the Court would be very slow to read such an implication into the Imperial Act where to do so would enlarge the powers of the Commonwealth at the expense of the States. In the present case the Commonwealth is empowered by sec. 51 (vi.) of the Constitution to make laws with respect to 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. Other sections of the Constitution, as pointed out in *Farey* v. *Burvett* (2), make this power exclusive to the Commonwealth. As this power would appear to have been ample to authorize the Commonwealth Parliament to adopt the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911, subject to modifications and adaptations to suit local conditions when its forces and ships had not been placed, and without such modifications and adaptations when they had been placed, at the disposal of the Admiralty, no question arises whether this Act contains an implied enlargement of the powers of the Commonwealth Parliament under the Constitution; but, if it did, no power of the Commonwealth would be enlarged at the expense of the States. As the establishment of courts-martial is necessary to assist the Governor-General, as Commander-in-Chief of the Naval and Military Forces of the Commonwealth, to control the forces and thereby maintain discipline, I think it must follow that the Commonwealth Parliament, like Congress, can legislate for such courts, although constitutional questions could arise as to the extent of the jurisdiction in the case of ordinary criminal as opposed to offences against discipline and duty which could be conferred upon them, but, as it would usually be impossible to separate such offences, a generous view would have to be taken on such questions.

(1) (1939) 61 C.L.R., at p. 673.

(2) (1916) 21 C.L.R., at pp. 451, 452.

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Williams J.

Dr. *Louat* did not raise the constitutional question to which I have briefly referred, but several considerations, apart from those mentioned by my brother *Starke*, of which I need only mention two, show that it requires careful consideration. The first is that by adopting the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 the Commonwealth has agreed to be bound not by the *Naval Discipline Act* at the date of the adoption but by the Act as amended from time to time; and the second is that, since the Act applies to ships, waters and naval establishments everywhere and to all places on shore outside the United Kingdom (sec. 46), the anomalous position arises that while a member of the Commonwealth naval forces can only be tried by a civil court for one of the offences specified in sec. 45 committed on shore in the United Kingdom he can be tried by court-martial for such an offence committed on Australian soil. If Dr. *Louat* had done so it would, I think, have been decided against him, but its existence is sufficient to give this Court jurisdiction.

The objection to jurisdiction therefore fails, and the application must be disposed of on its merits.

For this purpose it will be necessary to refer to two Australian and two Imperial statutes relating to naval discipline. The Australian statutes are the *Defence Act* 1903-1941 and the *Naval Defence Act* 1910-1934; and the Imperial statutes the *Naval Discipline Act* 1866, as subsequently amended, and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911, the preamble to which states it to be an Act to declare the effect of the *Naval Discipline Act* when applied by the legislatures of self-governing Dominions to the naval forces raised by such Dominions.

The *Naval Defence Act*, sec. 5, provides that certain sections and Parts of the *Defence Act* shall, *subject to this Act*, continue to apply in relation to the naval forces. Of these sections and Parts, I need only refer to secs. 88 and 98, which occur in Part VIII. relating to courts-martial. They provide, so far as material: sec. 88, that *except so far as is inconsistent with this Act* the laws and regulations for the time being in force in relation to the composition, procedure and powers of courts-martial in relation to the King's Regular Naval Forces shall apply in the case of the naval forces; sec. 98, that no member of the defence force shall be sentenced to death by any court-martial except for mutiny and certain other offences which do not include murder.

By an order of the Governor-General in Council made on 7th November 1939, all the vessels of the Commonwealth naval forces

and the officers and seamen on the books of these vessels were transferred unconditionally and for an unlimited period to the King's naval forces.

The *Naval Discipline Act* 1866, sec. 45, provides that every person subject to the Act who shall be guilty of murder shall suffer death.

The *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911, provides :—sec. 1 : (1) Where in any self-governing Dominion provision has been made for the application to the naval forces raised by the Dominion of the *Naval Discipline Act* 1866, as amended by any subsequent enactment, that Act, as so amended, shall have effect as if references therein to His Majesty's Navy and His Majesty's ships included the forces and ships raised and provided by the Dominion, subject however—(*a*) in the application of the said Act to such forces and ships and the trial by court-martial of officers and men belonging to these forces, to such modifications and adaptations, if any, as may have been or may be made by the law of the Dominion to adapt the Act to the circumstances of the Dominion, including such adaptations as may be so made for the purpose of authorizing or requiring anything, which under the said Act is to be done by or to the Admiralty or the secretary of the Admiralty, to be done by or to the Governor-General or by or to such person as may be vested with the authority by the Governor-General in Council. Provided that, where any forces and ships so raised and provided by a self-governing Dominion have been placed at the disposal of the Admiralty, the said Act shall apply without any such modifications or adaptations as aforesaid ; (2) This Act shall not come into operation in relation to the forces or ships raised and provided by any self-governing Dominion, unless or until provision to that effect has been made in the Dominion.

The *Naval Defence Act* provides as follows :—sec. 35.—The Governor-General may, for the purpose of naval service, place any part of the naval forces on board any ship of the King's Navy, and any members of the naval forces while so placed shall be subject to the laws and regulations to which the members of the King's naval forces on the ship are subject ; sec. 36.—The *Naval Discipline Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's naval forces shall, subject to this Act and to any modifications and adaptations prescribed by the regulations, apply to the naval forces ; sec. 42.—The Governor-General may transfer to the King's naval forces any vessel of the Commonwealth naval forces and any officers or seamen of the Commonwealth naval forces, the transfer to be for such periods and subject to

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such conditions as the Governor-General thinks desirable; and, subject to the conditions of transfer, all officers and seamen of the Commonwealth naval forces shall while so transferred be subject to the laws and regulations governing the King's naval forces so far as these laws and regulations are applicable.

The *Naval Discipline Act* and the *Naval Discipline* (*Dominion Naval Forces*) *Act* therefore are only brought into force by sec. 88 of the *Defence Act* so far as not inconsistent with that Act, and, by sec. 36 of the *Naval Defence Act*, subject to that Act and to any modifications and adaptations prescribed by the regulations; but, as the sections and parts which have been adopted from the *Defence Act*, including secs. 88 and 98, are made subject to the *Naval Defence Act*, if there is any inconsistency between sec. 88 of the former and sec. 36 of the latter Act, sec. 36 would prevail.

It is clear from sub-sec. 2 of sec. 1 of the *Naval Discipline* (*Dominion Naval Forces*) *Act* that the right is reserved to a self-governing Dominion to decide whether the *Naval Discipline Act* shall come into operation in relation to the forces and ships raised and provided by the Dominion. It is therefore necessary to ascertain the proper construction of sec. 36 of the *Naval Defence Act* to ascertain to what extent the *Naval Discipline Act* has been brought into force. Notwithstanding the exact correspondence between the words "modifications and adaptations" in sec. 36 of the *Naval Defence Act* and the same words in sec. 1 (1) of the *Naval Discipline* (*Dominion Naval Forces*) *Act*, I am of opinion that the phrase, and particularly the word "modifications" when used with respect to the application of the English Act, was intended to include modifications of the substantive disciplinary provisions of the English Act to suit local conditions operating in any Dominion, such as an objection to a court-martial being authorized to inflict capital punishment for what is essentially a civil offence, as well as adaptations of its procedural provisions for this purpose. As sec. 98 of the *Defence Act* abolished the sentence of death prescribed by sec. 45 of the *Naval Discipline Act* and the Commonwealth Parliament does not appear to have provided any substituted sentence, it seems to follow, apart from the position that arises under secs. 35 and 42 of the *Naval Defence Act*, that a member of the Commonwealth naval forces cannot be tried by court-martial for the crime of murder on the high seas. But he could be tried for such a murder by a civil court in England or by an Australian court in the same way as if he had committed a crime within local territorial waters and he would be liable to the same sentence as he would have been if the offence had been committed within the local jurisdiction (*Admiralty Offences* (*Colonial*) *Act* 1849; *Courts* (*Colonial*) *Jurisdiction Act* 1874).

Of the two Australian statutes, the *Defence Act* is subject to the *Naval Defence Act*; while sec. 36 of the *Naval Defence Act* makes the adoption of the *Naval Discipline* (*Dominion Naval Forces*) *Act* subject to its provisions; and sec. 42 of the *Naval Defence Act* makes transferred ships and forces subject to the laws and regulations governing the King's naval forces so far as they are applicable. Such a series of subjections of Acts to other Acts hardly simplifies the solution of the question in issue. But it would seem that the proviso to sec. 1 (1) of the *Naval Discipline* (*Dominion Naval Forces*) *Act* was inserted to protect what appears to be the general policy of the Admiralty that when forces raised by the self-governing Dominions, the colonies or India are placed at its disposal, then, whether they are serving alongside seamen of the Royal Navy in a ship of the Royal Navy, or in a vessel provided by a self-governing Dominion, colony or India, or they are wholly manning such a vessel themselves, they shall be subject to the *Naval Discipline Act*, just as seamen of the Royal Navy who serve on vessels provided by a self-governing Dominion or India which have not been placed at the disposal of the Admiralty are subject to the laws and customs for the time being applicable to the ships and naval forces of such self-governing Dominion or India: See *Naval Discipline Act*, sec. 90B; *Colonial Naval Defence Act* 1931, secs. 1 (3) and 2 (2) (*a*); *Government of India Act* 1935, sec. 105 (2). There is nothing inconsistent with local conditions for seamen comprised in the Commonwealth naval forces which have been placed at the disposal of the Admiralty to become liable to be sentenced to death by a court-martial for murder, when this liability is imposed by sec. 35 upon the members of such forces who have been placed on a ship of the Royal Navy.

Sec. 42 appeared in the *Naval Defence Act* 1910, whereas the *Naval Discipline* (*Dominion Naval Forces*) *Act* was not adopted until 24th December 1912, when sec. 36 of the principal Act was amended by the *Naval Defence Act* 1912, which inserted after the words "*Naval Discipline Act*" the words "and the *Naval Discipline* (*Dominion Naval Forces*) *Act* 1911." The Commonwealth Parliament therefore had already provided for its naval forces being transferred to the Admiralty before the *Naval Discipline* (*Dominion Naval Forces*) *Act* was passed by the Imperial Parliament. When sec. 36 of the *Naval Defence Act* was amended in this way no alteration was made to sec. 42 which, subject to the conditions of transfer, had the effect of incorporating such Imperial laws and regulations as were applicable to transferred forces into Australian legislation. The relevant Imperial laws and regulations would be those which

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were in force at the date of the transfer or came into force whilst the transfer was still operative. The question therefore arises as to what Imperial laws and regulations relating to the King's naval forces had been made applicable by Imperial legislation to Commonwealth naval forces placed at the disposal of the Admiralty on 7th November 1939. As the *Naval Discipline (Dominion Naval Forces) Act* provides that after its adoption by the Commonwealth Parliament references in the *Naval Discipline Act* to His Majesty's Navy shall be deemed to include the naval forces of the Commonwealth, the *Naval Discipline Act* would be one of the Imperial Acts which would be applicable to forces transferred under sec. 42 of the *Naval Defence Act*. By virtue of sec. 87 of the *Naval Discipline Act* members of such transferred forces would be triable and punishable under its provisions.

Since the *Naval Discipline (Dominion Naval Forces) Act* was intended to apply to the Commonwealth naval forces once it has been adopted by the Commonwealth Parliament, any Commonwealth legislation which attempted to restrict the full effect of the proviso would be repugnant to the provisions of an Imperial Act extending to the Commonwealth and to the extent of such repugnancy be and remain absolutely void and inoperative (*Colonial Laws Validity Act* 1865, sec. 2); but, by virtue of that section and the Commonwealth *Acts Interpretation Act* 1901-1937, sec. 15A, sec. 98 of the *Defence Act* would still be valid to the extent to which it was intended to operate under the *Naval Defence Act* except so far as it is inconsistent with the proviso. There is however no repugnancy between the *Naval Defence Act* where forces are transferred under sec. 42 and the proviso to the *Naval Discipline (Dominion Naval Forces) Act*, at any rate where these forces have been placed at the disposal of the Admiralty unconditionally, because sec. 42 itself makes these forces subject to Imperial statutes and removes them from the operation of sec. 98. Dr. *Louat* contended that the effect of the order made by the Governor-General in Council on 7th November 1939 was merely to place the Commonwealth vessels and forces at the disposal of the Admiralty for operations; but, for this purpose, an order under sec. 37 (1) of the *Naval Defence Act* would have been sufficient, so that I am of opinion the order had the effect of placing the vessels and forces at the disposal of the Admiralty within the meaning of the proviso to the *Naval Discipline (Dominion Naval Forces) Act*.

It appears that Rear-Admiral Crace, who was authorized to convene courts-martial both by the Admiralty in respect to His Majesty's ships employed in the Australian squadron for the trial of persons

belonging to the Royal Navy and by the Governor-General for the trial of officers and ratings of His Majesty's Australian ships, convened the court-martial under his Australian authority. It was necessary both under the proviso to the *Naval Discipline* (*Dominion Naval Forces*) *Act* and under sec. 42 of the *Naval Defence Act* that a court-martial to try members of the Commonwealth naval forces placed at the disposal of the Admiralty should be constituted in accordance with sec. 58 of the *Naval Discipline Act*. Rear-Admiral Crace was the officer commissioned by the Admiralty to convene the court-martial under this section. The court was constituted and the accused were tried, convicted and sentenced according to the procedure laid down by and in the exercise of the powers conferred upon courts-martial by the Act. Rear-Admiral Crace could have convened the court under the authority conferred upon him by his commission from the Admiralty, but there was nothing inconsistent with the *Naval Discipline Act* in the Governor-General also commissioning him to convene courts-martial for the trial of officers and ratings of His Majesty's Australian ships or in his exercising this authority, so long as in doing so he complied with the requirements of the *Naval Discipline Act*, as the Australian law, for the reasons already given, is the same as and operates concurrently with the Imperial law. Even if he did err as to the source of an authority which he undoubtedly possessed his mistake in no way affected the personnel of the court or its proceedings, so that all the conditions on which the right of the court-martial to exercise jurisdiction depended were in fact fulfilled. His mistake under such circumstances would be in a non-essential matter which would not amount to want of jurisdiction (*Moore* v. *Attorney-General for the Irish Free State* (1)). Counsel for the applicants attempted to raise the further ground that the proceedings at the trial were such that there had been a violation of natural justice, but it is sufficient to say that I am satisfied the applicants had a fair trial so that there is no substance in this point.

As the applicants therefore were lawfully sentenced to death each order nisi should be discharged.

Application refused. Both rules nisi discharged. No order as to costs.

Solicitors for the applicants, *D. R. Hall & Co.*

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

J. B.

(1) (1935) A.C. 484, at p. 498.