[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

SHARKEY

H. C. OF A. 1949.

SYDNEY, *Aug.* 15, 16.

MELBOURNE, *Oct.* 7.

Latham C.J., Rich, Dixon, McTiernan, Williams and Webb JJ.

Constitutional Law (Cth.)—Powers of Commonwealth Parliament—Sedition—Statement orally made to newspaper reporter—Seditious intention—Legislation—Validity—Powers of Commonwealth and States—Limits inter se—Indictable offence—Conviction—Prior to sentence case stated to High Court—Procedure—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (vi.), (xxix.), (xxxix.), 61—*Crimes Act* 1914-1946 (*No.* 12 *of* 1914—*No.* 77 *of* 1946), *ss.* 24A (1) (*b*), (*c*), (*d*), (*g*), 24B, 24D*—*Judiciary Act* 1903-1948 (*No.* 6 *of* 1903—*No.* 65 *of* 1948), *ss.* 38A, 39 (2), 40A, 45, 72, 73.

S. was charged upon indictment that he did utter seditious words, namely, "If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war

* "24A (1) Subject to sub-section (2) of this section an intention to effect any of the following purposes, that is to say—

(*a*) to bring the Sovereign into hatred or contempt;

(*b*) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;

(*c*) to excite disaffection against the Government or Constitution of any of the King's Dominions;

(*d*) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;

(*e*) to excite disaffection against the connexion of the King's Dominions under the Crown;

(*f*) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or

(*g*) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth,

is a seditious intention.

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only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force."

These words were published in a newspaper. M., a reporter on that newspaper, gave evidence that on the telephone he had asked S., the general secretary of the Communist Party, whether he would make a statement for publication with respect to " Communist policy in Australia in the event of the invasion of Australia by Communist forces." S. said that he could speak for the party. M. told S. that Thorez in France had said that if France were invaded Communists in France would welcome the invaders if they came from Soviet Russia. S. said he would prefer to make a prepared statement on the following day, but he discussed the subject with M., who typed out what he considered was a fair précis of the statements made by S. and read it over to S. on the telephone about ten or eleven times. S. altered some paragraphs and deleted others and finally said that he was satisfied with the statement. On the following day S. informed a reporter on another newspaper that he had made a statement to M. and that the statement published was a correct report. M. said that the statement published contained the statements made by S. The jury found S. guilty. The trial judge postponed judgment and sentence and, under s. 72 of the *Judiciary Act* 1903-1948, reserved certain questions for consideration by the High Court.

Held,

(1) by *Latham* C.J., *Rich*, *McTiernan*, *Williams* and *Webb* JJ., that ss. 24A, 24B and 24D of the *Crimes Act* 1914-1946 are a valid exercise of powers conferred upon the Commonwealth Parliament by the Constitution;

(2) It shall be lawful for any person—

(*a*) to endeavour in good faith to show that the Sovereign has been mistaken in any of his counsels;

(*b*) to point out in good faith errors or defects in the Government or Constitution of the United Kingdom or of any of the King's Dominions or of the Commonwealth as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects;

(*c*) to excite in good faith His Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the Commonwealth as by law established; or

(*d*) to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and hostility between different classes of His Majesty's subjects.

24B (1) A seditious enterprise is an enterprise undertaken in order to carry out a seditious intention.

(2) Seditious words are words expressive of a seditious intention.

24C . . .

24D (1) Any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence.

Penalty: Imprisonment for three years.

(2) A person cannot be convicted of any of the offences defined in this or the preceding section upon the uncorroborated testimony of one witness."

(2) by *Dixon* J., (i) that in its application to s. 24B (2) and s. 24D (1), s. 24A (1) (*d*) of the *Crimes Act* is valid; (ii) that so much of s. 24A (1) (*b*) as refers to the Sovereign is valid; (iii) that s. 24A (1) (*g*) is invalid; and (iv) that s. 24B (2) and s. 24D (1) in relation to s. 24A (1) (*d*) or the valid provisions of s. 24A (1) (*b*) are valid;

(3) by the whole Court, that there was evidence from which the jury could conclude that S. had actually uttered the words attributed to him in the published statement and charged in the indictment;

(4) by *Latham* C.J., *Rich*, *McTiernan*, *Williams* and *Webb* JJ., that the words uttered were capable of being expressive of a seditious intention within the meaning of pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A (1) of the *Crimes Act* 1914-1946.

Per Latham C.J.: The provisions of s. 40A of the *Judiciary Act* 1903-1948 when read in conjunction with s. 38A of the same Act do not apply to trials of indictable offences, therefore, under s. 39 (2) of that Act, State Supreme Courts still have jurisdiction in such trials even though a question of the limits *inter se* of constitutional powers is raised in the course of such a trial. The State Court may decide the constitutional question itself or may refer it to the High Court under s. 72 of the Act.

CASE STATED.

Laurence Louis Sharkey was charged in the Central Criminal Court of New South Wales before *Dwyer* J. upon an indictment that on or about 4th March 1949, at Sydney, New South Wales, he did, contrary to s. 24D of the *Crimes Act* 1914-1946, utter seditious words, namely, "If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in Australia use force to prevent workers gaining that power Communists will advise the workers to meet force with force."

Sharkey pleaded not guilty and a jury of twelve was empanelled.

Before the case proceeded, counsel for the accused asked the trial judge to reserve under s. 72 of the *Judiciary Act* 1903-1948,

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the question whether ss. 24A, 24B and 24D of the *Crimes Act* 1914-1946, under which the accused was charged, were *ultra vires* the Commonwealth Constitution.

The evidence tendered by the Crown was to the effect that one John Dickinson McGarry, a newspaper reporter employed on the staff of the Daily Telegraph newspaper, in pursuance of instructions given to him by the editor, on the evening of 4th March 1949, spoke to someone on the telephone and said that he was McGarry of the Daily Telegraph and that he wanted to speak to Mr. Sharkey of the Communist Party. A voice replied, "I am Mr. Sharkey." McGarry then said that he would like to discuss Communist policy in Australia in the event of the invasion of Australia by Communist forces, and he asked Sharkey if he would make a statement for publication. Sharkey replied, "It seems to me that the invasion of Australia by Communist or any other forces is a very hypothetical question and there is no point in answering such a question" and that he preferred that McGarry call upon him the following day when he, Sharkey, would give to McGarry a prepared statement. McGarry informed Sharkey that the Daily Telegraph had a policy of requiring its reporters to read back statements made by public men and that he would be prepared to read back any statement he, Sharkey, might make as many times as he might wish in order that he might make corrections. Sharkey said that on that understanding he would be prepared to make a statement whereupon McGarry read to him a cable the purport of which was a statement by Thorez that if France was invaded Communists in France would welcome the invaders if they came from Soviet Russia, and said that having read that cable to him would he, Sharkey, agree to make a statement about the actions or policy of local communists in the event of invasion of Australia. A discussion on the matter which ensued between Sharkey and himself for about fifteen minutes was taken down in shorthand by McGarry and he told Sharkey that he would type a précis of it and read it back to Sharkey later. McGarry made what he considered to be a fair précis and upon "ringing back"—the third telephone call—told Sharkey that he had done so and that he would read it to Sharkey who could make corrections. Sharkey said "All right." The statement, which consisted of about twenty paragraphs, was then read to Sharkey who altered some paragraphs and deleted others. The statement as amended by Sharkey was retyped and, upon the fourth telephone call, was read to Sharkey. During that conversation, at Sharkey's request, McGarry read the statement to Sharkey about ten or eleven times. Upon the first few readings Sharkey

made slight alterations, as far as McGarry could recollect, and during the last few readings he did not make any alterations. When McGarry had finished reading the statement to him for the last time, Sharkey said he was satisfied. McGarry said the statement as so read and which "satisfied" Sharkey, was as follows:— "Australian Communists would welcome invading Communist forces if those forces were resisting aggression. If Soviet forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet forces pursuing aggressors as the workers welcomed them throughout Europe when Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of the people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in Australia use force to prevent the workers gaining that power, Communists will advise the workers to meet force with force." Sharkey also told McGarry that he, Sharkey, was the general secretary of the Communist Party in Australia and that he spoke for other Communists in Australia.

McGarry could not remember which parts of the statement actually represented the actual words used by Sharkey. The "final" statement was published in the Daily Telegraph newspaper on 5th March 1949.

Eric Schackle, a journalist employed on the staff of the Daily Mirror newspaper, gave evidence that on 5th March 1949 he handed to Sharkey a copy of the Daily Telegraph newspaper containing the statement, and asked Sharkey if he had been correctly reported. Sharkey read the statement and then said, "Yes, that is correct," and, further, that he had not volunteered the statement but had given it at the request of McGarry.

Upon completion of evidence for the Crown, counsel for the accused submitted: (i) that there was no evidence that the accused uttered the words alleged in the indictment; (ii) that there was no evidence of corroboration in accordance with the provisions of the *Crimes Act* 1914-1946; and (iii) that the words alleged to have been uttered in the circumstances in which they were alleged to have been uttered were not capable of being expressive of a seditious intention within the meaning of s. 24A of the *Crimes Act* 1914-1946.

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These questions were argued before *Dwyer* J. in the presence of the jury by counsel for the accused and, without calling upon the Crown Prosecutor, his Honour ruled against the three submissions.

There was no evidence tendered by or on behalf of the accused.

In the course of his summing up the trial judge dealt with pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A (1) of the *Crimes Act* 1914-1946 and said those were four purposes an intention to effect which, the Act said, was a seditious intention.

The jury returned a verdict of guilty.

Dwyer J. postponed judgment, and having admitted Sharkey to bail to appear for sentence when called upon, reserved, under s. 72 of the *Judiciary Act* 1903-1948, upon an application therefor made on behalf of the accused, for the consideration of the Full Court of the High Court, the following question of law :—Whether ss. 24A, 24B and 24D of the *Crimes Act* 1914-1946 are invalid and *ultra vires* the Constitution of Australia. The trial judge, in his discretion, reserved for the consideration of that Court the following further questions of law :—1. Whether there was evidence that the accused uttered the words alleged in the indictment. 2. Whether there was any corroborating testimony in accordance with the provisions of the *Crimes Act* 1914-1946. 3. Whether the words alleged to have been uttered in the circumstances in which they were alleged to have been uttered were capable of being expressive of seditious intention within the meaning of the *Crimes Act* 1914-1946.

The relevant statutory provisions are set forth in the judgments hereunder.

Paterson (with him *Sweeney*), for the accused. Sections 24A, 24B (2) and 24D of the *Crimes Act* 1914-1946 are not within the constitutional power of the Commonwealth Parliament. When the Constitution became law the general power to make laws with respect to criminal matters resided in the States except insofar as the Constitution itself either explicitly or impliedly handed that power over to the Commonwealth (*R.* v. *Bernasconi* (1) ; *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (2)). The meaning of " seditious intention " was considered in *King-Emperor* v. *Sadashiv Narayan Bhalerao* (3). To succeed in this case the Crown must show that the Constitution gives to the Commonwealth Parliament power to pass a law making it a criminal

(1) (1915) 19 C.L.R. 629, at p. 634.
(2) (1913) 17 C.L.R. 644, at pp. 652-655 ; (1914) A.C. 237.
(3) (1947) 74 Ind. App. 89, at p. 96.

offence to utter words which are expressive solely of an intention to create feelings of enmity, that is to say, disaffection, against the Government, irrespective of what the effects of those feelings or words may be: irrespective of any actual effects against the Government other than by uttering words expressive of a seditious intent. There is nothing in pars. (*b*), (*c*) and (*d*) of s. 24A (1) of the *Crimes Act* which enables any court to draw a dividing line. Those paragraphs are too wide because they would draw within the net of criminal law a large number of persons who utter words which have the effect and which are expressive of an intention to excite feelings of enmity against the Government, but do not have the effect of endangering the Government in any way, and, therefore, cannot be brought within the constitutional powers of the Commonwealth. Mere excitement of feelings of enmity in itself does not necessarily endanger the peace, order or good government of the Commonwealth. The Commonwealth has no power to legislate against the excitement of disaffection. Excitement of disaffection does not necessarily involve incitement to violence. There is not any explicit power in the Constitution with respect to crime, except to make laws prescribing penalties for breaches of laws made under s. 51 or s. 52. Paragraphs (*b*), (*c*), (*d*) and (*g*) of s. 24A (1) were mentioned to the jury by the trial judge in his summing-up. A general verdict was returned so it is not known whether the accused was convicted under any one or more of those paragraphs. With regard to pars. (*b*) and (*c*), the Commonwealth Parliament has no power under the Constitution to make it an offence to utter words which are expressive of an intention to excite disaffection against the Government or the Constitution of the United Kingdom, or against either House of Parliament of the United Kingdom, that is, some other Parliament and Constitution; the Commonwealth Parliament and Constitution are not endangered. Similarly, with regard to exciting disaffection against any of the King's Dominions. There is nothing in the Constitution which relates—or connects the Commonwealth Parliament and Constitution with the Government and Parliament of the United Kingdom or with the Government or Constitution of any other of the King's Dominions. It is not a matter of external affairs. Qualifying words are required in order to bring the subject matter within power (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). The statutory provisions now under consideration are not truly incidental to the exercise of Commonwealth executive, legislative or judicial authority, and therefore are not authorized by par. (xxxix.) of s. 51

(1) (1943) 67 C.L.R. 116, at pp. 132, 133.

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of the Constitution (*R.* v. *Hush*; *Ex parte Devanny* (1)). Even if statutory provisions are constitutionally valid, there was not any evidence that the accused uttered the words alleged in the indictment and of which he was found guilty. The evidence given by the principal witness was not evidence of words "uttered" by the accused, but of a précis made by that witness. The jury would not be able fairly to draw the inference that the précis fairly represented what the accused said even though it fairly represented his views. The matter should not have come within the province of the jury unless there was placed before it either the words or the substance of the words used by the accused. Regard should be had to the circumstances under which the alleged utterance was made. The evidence shows that the accused gave his views very reluctantly after being asked and pressed therefor. The words alleged to have been used do not bear the interpretation that Soviet forces were to be aggressors against Australia, or that Australia was an enemy, the troops of which were being pursued back into Australia, but they do bear the interpretation that it was a case in which the Soviet forces would be entering Australia to protect Australia against a common aggressor, and that the Soviet could never be an aggressor. The statement was made simply to express the accused's views on certain questions put to him by the principal witness and in order to state what was the policy of the Communist Party relating to these matters. The utterance was made to one man only. It is manifest that the substantive purpose or intention of the accused was not to arouse disaffection or to excite disaffection against the Government. He endeavoured to show that Australia did not have anything to fear. The onus of proving seditious intention is on the Crown. There must be a criminal intent on the part of the accused: *Russell* on *Crime*, 9th ed. (1936), vol. 1, p. 93. There must be a real intention in the mind of the accused to effect one or more of the purposes specified in s. 24A (1), and the words used must express it. The accused did not have any such intention. The mere use of the words is not sufficient. Much depends on the circumstances under which the words were uttered. There is nothing which could be construed as an intention to incite disaffection against the Sovereign or the Government, or any of the other persons or institutions referred to in s. 24A (1). The concluding part of the statement plainly means that if certain elements in the community started civil war other citizens would resist them. There is nothing unlawful in that. The Commonwealth has no power to legislate generally for the peace, order and good government of the

(1) (1932) 48 C.L.R. 487, at p. 511.

Commonwealth. The words " peace, order or good government of the Commonwealth " in par. (*g*) of s. 24A (1) are so wide as to produce invalidity because they are directed to preventing by the means specified the endangering of the peace, order or good government of the Commonwealth in relation to anything that the Commonwealth chooses to do, whether lawfully or unlawfully.

Bennett K.C. (with him *Henchman*), for the Crown. The evidence shows that the words, or substantially the words, set out in the indictment were actually uttered by the accused and that they were intended to have a wide publicity. The decision of the jury was amply justified. " Utterance " is proved by the admission of the accused that he had been correctly reported. The statement originated with the accused. It was open to the jury to find that his statement must be what he said originally and that the amendments were what he said. The trial judge correctly directed the jury. The words were capable of being regarded as expressive of seditious intention, even though it be conceded that they must be regarded in the light of the circumstances in which they were spoken. Upon the question of seditious intention it is significant that the accused desired that the words should be published in a newspaper. The intention of which the words are expressive depends upon the circumstances of the utterance. The effect upon a person is not of any importance. The important matter is the intention of the accused person, not the effect upon his audience. The intention of the accused was not to convince the reporter so much as to carry conviction to the minds of his readers. The statement was not made reluctantly but deliberately as is shown by his desire to make the statement at a later period of time and by the numerous deletions, corrections and alterations insisted upon by him. He was meticulous in his preparation of the statement. He claimed to have authority to speak for other members of the Communist Party. The whole article amounted to propaganda. The jury was entitled to construe the statement in the light of certain notorious facts, including the then existing international situation, and to arrive at the meaning in the light of general knowledge. The words used are expressive of a seditious intention. They tend to excite disaffection against the Sovereign, as representing his Dominions and Australia in particular, in regard to the stand recently taken with respect to certain international matters. The main danger and the pernicious influence of the article lies more in the assumptions or insinuations that were in it than in the direct statement. The word " aggressor " was used

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ambiguously. It was intended to mean either those who were then in argument with the Soviet upon international matters, or the "Fascists in Australia." The statement that the "Red troops liberated the people from the power of the Nazis" casts a gratuitous insult against the Anglo-American forces. The whole statement is a rather cunningly worded piece of propaganda. The whole article was made in furtherance of his desire to promote class warfare. It was open to the jury to so decide. However hypothetical was the accused's basis of fact, the class distinctions assumed by him throughout were invidious. The article was inflammatory in its nature: it carried with it implied calumniation of the Sovereign, and of the Government in the attitude it had adopted with respect to post-war international affairs. It was an example of rabid class warfare and the type of preaching that would be the direct subject of the law of sedition. In addition to showing an intention to excite disaffection, the statement also manifested an intention to arouse feelings of ill-will and hostility between different classes of His Majesty's Australian subjects so as to endanger peace, order and good government of the Commonwealth. It is not necessary that any actual feelings of illwill and hostility should be aroused. *King-Emperor* v. *Sadashiv Narayan Bhalerao* (1) is not necessarily an authority of assistance to the Court because in that case the word "disaffection" was the subject of a statutory definition. As used in regard to a particular State the word "disaffection" is synonymous with disloyalty, but it can be used with reference to a friendly Power as meaning "unfriendliness." Anyone who excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law, excites or attempts to excite feelings of disaffection, such feelings being necessarily inconsistent and quite incompatible with a disposition to render obedience to the lawful authority of Government and to support that Government against unlawful attempts to resist it (*R.* v. *Amba Prasad* (2)). It is within the scope of the power of the Commonwealth to require its citizens, the subjects of the King within Australia, to refrain from an antagonistic attitude, one of enmity, against any other part of the King's Dominions, e.g., Canada, and the people of that part or parts. The main consideration of the jury, and, apparently, of the trial judge, was doubtless, under par. (*g*) of s. 24A (1). The only question of law that can arise is whether the words used were capable of being expressive of a seditious intention. It was open to the jury to consider pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A (1) or pars. (*b*), (*c*), (*d*) or (*g*), therefore it

(1) (1947) 74 Ind. App., at p. 95. (2) (1897) I.L.R. 20 All. 55.

cannot now be said that it is necessary to sustain the conviction on every ground. Attacks may be insidious but they are nonetheless serious and can affect the existence or the well-being of a State. Therefore, the existence of a State may depend, ultimately, upon the loyalty and goodwill of its people, and, indeed, upon the support of kindred States. The law of sedition is concerned primarily with self-protection: *Archbold's Criminal Pleadings*, 31st ed. (1943), p. 1016; *R.* v. *Tutchin* (1). The fact that the Commonwealth deals with a subject matter with respect to which it has power to make laws has always been regarded as covering things that are incipient to a danger that might arise. The legislature, within the limits of the subject matter as to which it has powers, can deal with objects as well as effects (*R.* v. *Kidman* (2)). The statutory provisions under consideration are sustainable because of the power contained in: (i) s. 51 (xxxix.) coupled with s. 61 of the Constitution; (ii) s. 51 (xxxix.) coupled with all the other powers set out in ss. 51 and 52; (iii) the defence power, par. (vi.), coupled with s. 51 (xxxix.); and (iv) the external affairs power, par. (xxix.), coupled with s. 51 (xxxix.). Prima facie, the Commonwealth is the united people or peoples. The "Commonwealth" referred to in s. 51 of the Constitution in the phrase "peace, order and good government of the Commonwealth" is the entity created by the union of the people in that Commonwealth. There must be found a power vested by the Constitution; then in respect of matters incidental to the execution of that power the Parliament has power to make laws. Section 61 of the Constitution is a clear example of a vesting by the Constitution of power within the meaning of par. (xxxix.). The Executive Government dealt with in chapter II of which s. 61 is a part, is the Government which is the subject matter of legislation in the *Crimes Act*, as to which it is desired to afford a measure of protection. "Maintenance" as there used means the sustaining of the Constitution, not merely as a document, but as a Parliament, a Government, a Judiciary and the various real objects which go to make up the Constitution. It is the duty of the Executive power of the Commonwealth, or the power of the Government to execute and maintain the Constitution. Part of the execution and maintenance of the Constitution refers to the preservation in activity and existence of the institution or organization of a Government. Having regard to ss. 62 and 68 of the Constitution, the law of sedition is concerned with protecting the Sovereign and the Government. The Government is the Sovereign in his Council, the highest executive of the Australian Commonwealth, the power that controls

(1) (1704) 14 State Trials 1095. (2) (1915) 20 C.L.R. 425.

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the defence forces and the authority that may have the ultimate responsibility of declaring and waging war. The effect of s. 51 (xxxix.) coupled with s. 61 was discussed in *R.* v. *Kidman* (1). It is admitted that there is no power to make laws *in vacuo*, merely on that subject; that is parallel to the position that obtained in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (2) and *Ex parte Walsh and Johnson*; *In re Yates* (3). Although there is no power in the Commonwealth to make laws on the subject of the criminal law generally, the matter of self-protection involves invoking other powers (*R.* v. *Kidman* (4)). To carry out its powers under the Constitution, the Government must be sustained in its good name and have the loyalty and friendship of its subjects. Under par. (xxxix.) and s. 61 there is complete justification for the enactment of the whole of s. 24A of the *Crimes Act*, other than, perhaps, the provisions in relation to the other Dominions of the King for which reliance is placed on the external affairs power. The statement in *R.* v. *Hush*; *Ex parte Devanny* (5) beside analysing and recognizing the power which arises from par. (xxxix.), also recognizes that the Commonwealth powers of legislation may step in or be put into effect validly at a stage prior to the actual danger operating; before the damage is done. For the preservation of our Government and institutions, the governments and institutions of our sister nations, and internal harmony between classes, the Parliament has power to prevent such danger ever operating in an effective way and for this purpose to pass a law as to sedition. To excite disaffection is to affect the Commonwealth in relation to all its powers of legislation and the execution of all its laws (*R.* v. *Kidman* (6); *R.* v. *Hush*; *Ex parte Devanny* (5)). The matter of ill-will and hostility of classes is a matter which goes to the whole existence of the Commonwealth and of its Government, and to destroy the seeds of civil war when they first appear is a legitimate exercise of power. That is the purpose of s. 24A (1) (*g*) of the *Crimes Act*. That paragraph is not too widely expressed. These statutory provisions extend the common law (*Stephen's Digest of Criminal Law*, 7th ed. (1926), pp. 92, 93; *Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 302, 303; *R.* v. *Burns* (7)). Section 51 of the Constitution does not merely mean power to make laws for the peace, order or good government of a geographical area; such areas are not the subject

(1) (1915) 20 C.L.R., at pp. 448-450.
(2) (1913) 17 C.L.R. 644; (1914) A.C. 237.
(3) (1925) 37 C.L.R. 36.
(4) (1915) 20 C.L.R., at p. 450.
(5) (1932) 48 C.L.R., at pp. 505, 506.
(6) (1915) 20 C.L.R., at p. 449.
(7) (1886) 16 Cox C.C. 355.

of peace, order and good government, it is the united people in them; a fictitious entity, and that same meaning is to be found in s. 24A of the *Crimes Act*. The words in par. (*g*) of s. 24A (1) mean: to promote feelings of ill-will and hostility between different classes of the people of the Commonwealth. The defence power is not limited to military and naval defence; those are words merely of explanation and are not restrictive of the meaning of s. 51 (vi.). The defence power can be availed of to meet insidious forms of internal attack (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). The external affairs power conferred by s. 51 (xxix.) of the Constitution is a very wide power (*R.* v. *Burgess*; *Ex parte Henry* (2); *Roche* v. *Kronheimer* (3); *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (4)). It includes power to deal with what is now called "inter-Commonwealth relations," and extends to sustaining a Government of another Dominion and its principal institutions. This is important in relation to pars. (*b*), (*c*) and (*d*) of s. 24A (1) of the *Crimes Act*. With the exception of the matter of the Parliament of the United Kingdom, there is evidence to support a charge under each of the categories. The Court should confine its consideration to the four questions of law submitted in the case stated.

Paterson, in reply. Sections 24A, 24B and 24D of the *Crimes Act* are invalid. It is not denied that the Commonwealth has power to make laws to protect itself, but, giving the word "disaffection" its proper meaning, those sections go beyond what is necessary to protect the Commonwealth. The meaning of the word "incidental" and what self-protection really covers were dealt with in *Ex parte Walsh and Johnson*; *In re Yates* (5). There is no corroboration that the words set out in the indictment were the words actually uttered by the accused.

Cur. adv. vult.

Oct. 7.

The following written judgments were delivered:—

LATHAM C.J. The duty of the Court in this matter is to determine questions of law which arose on a trial of Laurence Louis Sharkey before the Supreme Court of New South Wales for an offence against s. 24D of the *Crimes Act* 1914-1946. Sharkey was found guilty and *Dwyer* J., acting under the Commonwealth *Judiciary Act* 1903-1948, s. 72, postponed judgment and sentence and

(1) (1943) 67 C.L.R., at pp. 132,133.
(2) (1936) 55 C.L.R. 608, at pp. 644, 645.
(3) (1921) 29 C.L.R. 329, at pp. 338, 339.
(4) (1908) 5 C.L.R. 818, at p. 842.
(5) (1925) 37 C.L.R., at pp. 118-120.

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reserved four questions of law for the consideration of the High Court. It is the function of the High Court to hear and determine these questions and the Court may, in a case such as the present, where judgment has been postponed, set aside a verdict and order a verdict of not guilty to be entered, order a new trial or make such other order as justice requires—*Judiciary Act* 1903-1948, s. 73.

Section 24D of the *Crimes Act* provides that "Any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence." Sharkey was charged with uttering specified words which were alleged to be seditious. Section 24B (2) provides that "Seditious words are words expressive of a seditious intention." Section 24A (1) is as follows:—"Subject to subsection (2) of this section an intention to effect any of the following purposes, that is to say—(*a*) to bring the Sovereign into hatred or contempt; (*b*) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom; (*c*) to excite disaffection against the Government or Constitution of any of the King's Dominions; (*d*) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth; (*e*) to excite disaffection against the connection of the King's Dominions under the Crown; (*f*) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or (*g*) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth, is a seditious intention." Section 24A (2) provides that it shall be lawful for any person to do certain things in good faith in pointing out mistakes of the Sovereign or errors or defects in Governments or Constitutions &c., or to excite His Majesty's subjects to attempt to procure by lawful means alteration of the laws and to seek to remove matters producing or having a tendency to produce feelings of ill-will and hostility between different classes of His Majesty's subjects.

1. In this case the validity of these provisions has been challenged, and the first question reserved by *Dwyer* J. for the consideration of this Court is—"Whether ss. 24A, 24B and 24D of the *Crimes Act* 1914-1946 are invalid and *ultra vires* the Constitution of the Commonwealth of Australia?"

Section 24A has no operation apart from ss. 24B and 24D. Sections 24A and 24B define the offence created by s. 24D. Section 24A

specifies kinds of evidence which are to be treated as sufficient to prove a seditious intention. If words express such an intention (s. 24B) the person uttering them is guilty of the offence created by s. 24D. Thus the question of validity which arises is whether s. 24D is valid in so far as it creates offences which can be shown to have been committed by the evidence specified in ss. 24A and 24B.

In this case the Crown relied only upon pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A (1) and the jury was directed exclusively with reference to these paragraphs. Thus, strictly, only the validity of these paragraphs comes into question. In my opinion, substantially the same considerations, so far as validity is concerned, apply to all the pars. of s. 24A (1).

In *Burns* v. *Ransley* (1) a case heard recently at Brisbane, I have stated my opinion as to the meaning of "disaffection" in s. 24A, and I do not here repeat my reasons for that opinion. In that case I also gave reasons for my opinion that the provisions of these sections which relate to the protection and maintenance of the existing Commonwealth Government and the existing departments and officers of the Government in the execution of their powers are valid. The reasoning upon which this conclusion is based applies equally in respect of all the matters referred to in the various paragraphs of s. 24A, all of which, in my opinion, are related to the legal and political organization of the Commonwealth.

Paragraph (*a*) refers to the Sovereign. The Commonwealth of Australia is described in the preamble to the *Commonwealth of Australia Constitution Act* 1900, an Act passed by the Imperial Parliament, 63 & 64 Vict. c. 12, as an "indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established." Section 51 (xxxix.) of the Constitution confers power upon the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." Laws which are directed to the protection and maintenance of the legal and political organization of the Commonwealth and of the Commonwealth in its legal and political relations may properly be enacted under this power.

The Sovereign is part of both the legal and the political constitution of the Commonwealth. Section 1 of the Commonwealth

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Constitution expressly vests the legislative power of the Commonwealth in a Federal Parliament consisting of the King, a Senate and a House of Representatives. The executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as the King's representative—Constitution, s. 61. To use the words of Dean Roscoe Pound, "The sovereign is the symbol of an ordered society." These facts support par. (*a*) of s. 24A and also the provision in par. (*b*) with respect to exciting disaffection against the Sovereign.

The Government and Constitution of the United Kingdom and the Houses of Parliament of the United Kingdom are also part of the legal and political constitution of the Commonwealth and the preservation of their integrity and authority is part of the protection and maintenance of the Commonwealth itself. As already stated, the Commonwealth Constitution is a statute enacted by the Parliament of the United Kingdom, and the *Statute of Westminster* 1931 adopted by the Commonwealth Parliament by the *Statute of Westminster Adoption Act* 1942 still preserves the legislative powers of the Parliament of the United Kingdom with respect to the Commonwealth. Section 4 of the *Statute of Westminster* provides that no Act of the Parliament of the United Kingdom passed after the commencement of the statute shall extend or be deemed to extend to part of the law of the Dominion unless it is expressly declared in that Act that the Dominion has requested and consented to the enactment thereof. This section expressly recognizes the legislative authority with respect to the Commonwealth of the Crown and Parliament of the United Kingdom and provides for the manner in which that authority is to be exercised. Accordingly, the prohibition of the utterance &c. of words intended to effect the purpose of exciting disaffection against the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom (par. (*b*) of s. 24A) are laws which are authorized by s. 51 (xxxix.) of the Constitution.

The Commonwealth of Australia is a political organization which is associated with other Dominions by political conventions which are recognized both by the King's Dominions and internationally. The relations of the Commonwealth with all countries outside Australia, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs, a subject with respect to which the Commonwealth Parliament has power to pass laws—Constitution, s. 51 (xxix.). The preservation of friendly

relations with other Dominions is an important part of the management of the external affairs of the Commonwealth. The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions. This fact is sufficient to authorize the provision contained in par. (*c*) of s. 24A in relation to the offence created by s. 24D.

Paragraph (*d*) of s. 24A refers to exciting disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth. This is a matter with which I have already sufficiently dealt in *Burns* v. *Ransley* (1).

Paragraph (*e*) relates to the exciting of disaffection against the connection of the King's Dominions under the Crown. What has been said with reference to par. (*c*) applies also to par. (*e*).

Paragraph (*f*) relates to exciting His Majesty's subjects to attempt to procure the alteration otherwise than by lawful means of laws of the Commonwealth. This provision is plainly connected with the protection of the authority of the Commonwealth itself and its agents and is justified by the Constitution, s. 51 (xxxix.).

Paragraph (*g*) provides that it shall be a seditious intention to "promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth." This provision has been attacked on the grounds that the power of the Commonwealth, whether legislative, executive or judicial, is limited by the Constitution, and it is contended that the words contained in par. (*g*) refer generally to peace, order and good government in relation to any matter whatever within the geographical limits of the Commonwealth. If the words are so construed, it is argued, the provision is beyond the legislative power of the Commonwealth. The Commonwealth Parliament has no general power to preserve peace, order and good government by the enactment of criminal law (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (2)). Thus par. (*g*) operating, in conjunction with ss. 24B and 24D, to create a criminal offence of endangering by seditious words peace, order and good government in relation to any matter whatever in Australia, is, it is argued, beyond Federal legislative power.

I can see no reason why the words should be construed in the manner suggested. The reference in par. (*g*) to endangering the

(1) (1949) 79 C.L.R. 101.

(2) (1914) A.C. 237; (1913) 17 C.L.R. 644.

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peace, order or good government of the Commonwealth should be read as a reference to that peace, that order and that government which the Commonwealth may lawfully protect, maintain or undertake; that is, to peace, order and good government as lawfully established under the Constitution. In my opinion there is no ground whatever for treating these words as intended to cover everything, lawful or unlawful, which the Commonwealth by any of its organs may attempt to accomplish. The "good government" of the Commonwealth can only be a government in accordance with law. Similar considerations apply to the words "peace and order." In the reasons for judgment in *Burns* v. *Ransley* (1) I have referred to the significance and importance of preventing such disloyalty as would "endanger the peace, order and good government of the Commonwealth"—words which, in my opinion, should be understood in the sense stated.

For these reasons I am of opinion that the question whether ss. 24A, 24B and 24D of the Act are invalid should be answered in the negative.

2. The second question submitted to this Court is "Whether there was evidence that the accused uttered the words alleged in the indictment?"

The charge was that the accused on 4th March 1949 at Sydney did utter seditious words, namely:—"If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force."

These words were published in the "Daily Telegraph" newspaper on 5th March 1949 as a statement by Sharkey. The accused called no witnesses. The evidence for the prosecution was that J. D. McGarry, a reporter on the "Daily Telegraph," spoke to Sharkey on the telephone and asked him whether he would make a statement

(1) (1949) 79 C.L.R., at p. 106.

for publication with respect to "Communist policy in Australia in the event of the invasion of Australia by Communist forces." Sharkey was the General Secretary of the Communist Party and said that he could speak for the party. The reporter told Sharkey that Thorez in France had said that if France was invaded Communists in France would welcome the invaders if they came from Soviet Russia. Sharkey said that he would prefer to make a prepared statement on the following day, but he discussed the subject with McGarry, who typed out what he considered was a fair précis of the statement made. He read it over to Sharkey on the telephone about ten or eleven times. Sharkey altered some paragraphs and deleted others and finally said that he was satisfied with the statement. The reporter gave evidence that the statement which was published contained "the statements that Mr. Sharkey made." On the following day Sharkey said to E. Schackle, a reporter of the "Daily Mirror," that the report in the "Daily Telegraph" was a correct report and that he had made a statement to McGarry which was the article which appeared in the "Daily Telegraph."

It was contended for the accused that this evidence did not show that Sharkey had actually uttered the words contained in the statement and that it was consistent with all the evidence that Sharkey had only answered questions with "yes" or "no," but had never actually said the words which were attributed to him in the statement. This in my opinion was plainly a matter for the jury. There was the direct evidence of McGarry that Sharkey actually made the statements which were reported in the "Daily Telegraph" and the evidence of Schackle (who spoke to Sharkey about the report on the following day) that he (Sharkey) had been correctly reported and had made the statement to McGarry which appeared in the "Daily Telegraph." Accordingly there was evidence from which the jury could conclude that Sharkey had actually uttered the words which were attributed to him in the published statement.

3. The third question is "Whether there was corroborating testimony in accordance with the provisions of the *Crimes Act* 1914-1946."—see s. 24D (2). This question was not argued. It is plain that the evidence of Schackle was testimony which corroborated the material evidence given by McGarry.

4. The fourth question is "Whether the words alleged to have been uttered in the circumstances in which they were alleged to have been uttered were capable of being expressive of a seditious intention within the meaning of the *Crimes Act* 1914-1946."

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The intention to which s. 24A refers is an intention which exists in the mind of the person who utters &c. the words alleged to be seditious.

It is submitted for the accused that his only intention was to state his views, or his party's views, upon the issue which would arise in the event of an invasion of Australia by forces of the Soviet Union, and that an expression of opinion upon such a matter could not show any intention to effect any purpose other than that of expression of the opinion.

In my opinion this argument should not be accepted. Whenever a person utters words with an intention to effect a particular purpose he expresses an opinion of some kind with respect to the purpose which he intends to effect. The two categories are not mutually exclusive.

It is further contended that the words set out in the indictment do not show any intention to excite disaffection against the Sovereign or the Government of the Commonwealth or, indeed to effect any of the purposes referred to in pars. (*b*), (*c*), (*d*) or (*g*) of s. 24A—the paragraphs upon which the Crown relied.

It was for the jury to determine the intention of the speaker in the circumstances in which the words were spoken. The accused was speaking as the general secretary of the Communist Party upon the subject of the action which ought to be taken by Australians in the event of an invasion of Australia by Soviet troops. The statement made was directed towards the recommendation and approval of a particular course of action in the event stated. It was not the statement of an abstract theoretical opinion. It was a statement made by the accused "officially" recommending what he described as the policy of the Communist Party. Thus it was a statement which was intended to effect a purpose and was not a set of abstract intellectual propositions which had no relation to action by any person or persons.

But it is further contended that even if the words should be held to show an intention to effect a purpose, the purpose intended did not fall within any of pars. (*b*), (*c*), (*d*) or (*g*) of s. 24A (1).

The intention of the accused was to recommend Australian workers to welcome Soviet troops in the event of Australia being invaded by Soviet troops. This event was described by the speaker as a very unlikely event. He said that he could not see Australia being invaded by Soviet troops. But the substance of his carefully worded exhortation was that if Soviet troops did enter Australia they ought to be welcomed by the workers of Australia as, it was said, the workers of Europe had welcomed Soviet troops—i.e. as

liberators. It is true that the initial words of the statement are "If Soviet forces in pursuit of aggressors entered Australia, Australian workers would welcome them." It was open to the jury to regard this statement as amounting to more than a prediction of probability and, when read in conjunction with the rest of the statement, as urging that Australian workers should welcome Soviet troops which entered Australia. It is said that the reference in the sentence quoted is only to the entry of Soviet forces into Australia "in pursuit of aggressors" and that such words could not be interpreted as intended to excite any persons to disaffection against the Government of Australia or to fall within any of the relevant paragraphs of s. 24A. But the definition of "aggressors" in the case supposed could well be supplied by the Soviet forces themselves and it was open to the jury to take the view that in the opinion of the Communist Party any country, including in particular Australia to which the statement referred, which fought against Russia would be an aggressor, so that Russia should be supported against any enemy, including Australia as a possible enemy. The statement of the speaker's belief that the Soviet would go to war only if she were attacked could fairly be construed as meaning that any country fighting against Russia would be an aggressor.

Sharkey's statement was, as the evidence clearly showed, very carefully prepared. It was not made casually and without purpose. The jury could reasonably take the view upon the evidence that he intended and desired to present and recommend a policy involving disloyalty to Australia and so to excite disaffection, but to make his statement in such words as to create also a certain amount of confusion which could provide grounds for argument which might enable him to escape legal liability for what he was really doing. The jury could interpret the statement as meaning and as intended to mean that if Australia became involved in war with Russia, the workers ought to support Russia as against Australia. It was open to the jury to infer that the real intention and object of the accused was to excite disaffection under the guise of a statement with respect to a future event which he elected to describe as "very remote and hypothetical". The jury were entitled to take the view that if the event were honestly and sincerely regarded as "very remote and hypothetical" there could have been no reason for making the statement and that the real reason for making the statement was to excite disaffection, not only in the event of war between Australia and Russia, but also independently of and in advance of the actual occurrence of such a war. Intention—which is a matter of inference

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from words or conduct—is not by any means necessarily to be judged upon the face value of words used. The earnest advice of a pretendedly disinterested bystander to an excited crowd in possession of a victim " Don't duck him in the horse trough " can be interpreted, quite reasonably in some circumstances, as an incitement to the action which the speaker professes to discourage. The words spoken by Sharkey were uttered in March 1949 at a time of acute tension between Soviet Russia and powers with which Australia is most closely associated. The jury was entitled to take that notorious fact into consideration. The jury could, if it thought proper, reject as dishonest and insincere the references to the Soviet forces pursuing aggressors into Australia and to the permanently peaceful policy of Soviet Russia. The substance of Sharkey's statement could in my opinion properly be found by a jury to be that the Australian people should welcome a Russian invasion with non-resistance, because any resistance would amount to aggression. Such a policy would invite acceptance of conquest by a foreign power and would involve the repudiation of the whole existing legal and political organization of the Commonwealth, thus showing an intention falling within the description of each of the pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A of the *Crimes Act*. In all these circumstances it should, in my opinion, be held that the words spoken were capable of being expressive of a seditious intention within the meaning of s. 24A (1) under each of the pars. (*b*), (*c*), (*d*) and (*g*).

Accordingly in my opinion the fourth question should be answered —yes.

The question as to whether parts of the *Crimes Act* are valid Commonwealth legislation is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. It is suggested that when this question was raised upon the trial of Sharkey in the Supreme Court the matter was automatically transferred to the High Court under s. 40A of the *Judiciary Act*. If this was the case the subsequent proceedings in the trial were taken without jurisdiction : there was no power to reserve questions under s. 72 of the Act for the consideration of the High Court, and the trial of Sharkey should have proceeded before a judge of the High Court and a jury. The result would be that no decision should be given upon the questions reserved and that the trial should simply be started over again in the High Court.

In my opinion this is not the true view of s. 40A when it is read in conjunction with s. 38A, which was passed at the same time, in 1907. Section 40A (1) provides as follows :—" When, in any cause pending in the Supreme Court of a State, there arises any question as to the

limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court."

Section 38A provides that in matters (*other than trials of indictable offences*) involving any question however arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States. This provision, therefore, does not exclude, in trials of indictable offences, the jurisdiction of the Supreme Courts of the States as to questions of the limits *inter se* of constitutional powers. Section 39 (2) of the Act vests in the courts of the States jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, but subject to the exclusions for which ss. 38 and 38A provide. Original jurisdiction may be conferred on the High Court in all matters arising under the Constitution or involving its interpretation—Constitution, s. 76 (i). It therefore follows that the Supreme Courts of the States under s. 39 (2) still have jurisdiction in trials of indictable offences, even though a question of the limits *inter se* of constitutional powers is raised in the course of such a trial, because the exclusive provisions of s. 38A do not apply to such trials.

If s. 40A automatically removed to the High Court a trial of an indictable offence in which such a question arose, the exception expressed in the words " other than trials of indictable offences " in s. 38A would have no force or effect whatever. Accordingly, upon a consideration of the two sections together it should be held that s. 40A was not intended to apply to trials of indictable offences. (The reasons for such a provision with respect to criminal trials in a State Court can readily be suggested. Unless there were such an exception, persons charged with indictable offences could, by raising constitutional points, delay their trials in some cases for many months. The State court may decide the constitutional question itself or may refer it to the High Court under s. 72 of the *Judiciary Act*.)

This view is supported by the second part of s. 38A which goes out of the way to state the intended consequence of the part of s. 38A which I have already quoted. This consequence is expressed in the following words—" so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any *such*

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matter, either as a Court of first instance or as a Court of Appeal from an inferior Court." The word " such " refers back to " matter (other than trials of indictable offences)." The consequence is that the Supreme Court of a State shall not have jurisdiction to entertain or determine certain matters. But this provision is subject to the exception of trials of indictable offences. Therefore the intention is that in the case of trials of indictable offences the Supreme Court *shall* have jurisdiction to entertain and determine the whole matter including any question of the limits *inter se* of constitutional powers. I call attention to the word " *determine*."

Thus I do not think that s. 40A removed this particular case into the High Court.

No question relating to s. 40A was raised or argued in the proceedings in this case in the High Court. When questions are reserved under s. 72 of the *Judiciary Act* the High Court should restrict itself to the consideration of those questions, but there is a necessary limitation upon this general proposition, namely, that the High Court must be satisfied of its jurisdiction to entertain the questions, and that therefore, if it appeared that the Supreme Court had no authority to reserve the questions, the High Court should not determine them. But in my opinion what has been said provides a reply to any suggestion that the Supreme Court had no jurisdiction to entertain and determine the charge against Sharkey or to reserve questions under s. 72.

In the course of argument it was suggested that, as the prosecution relied upon four of the paragraphs of s. 24A for the purpose of supporting a single count of uttering seditious words, the Crown should have been compelled to specify and rely upon only one paragraph of s. 24A (1) in respect of one count. Paragraphs (*a*), (*b*), (*c*) and (*d*) all contain several alternatives, and the logical result of the suggestion would be that the Crown should have been required to limit the charge to one count relating to one alternative or to make a number of separate charges.

The indictment specified the precise words which were alleged to have been used by the accused. He therefore knew exactly what the charge was that he had to meet. If the uttering of those words was proved, it was a matter for argument as to whether they fell within any one or more of the paragraphs of s. 24A (1). The question was not fully argued as to whether the charge should have been laid or put before the jury in some other form and I abstain from expressing any concluded opinion upon it. It is sufficient for present purposes to say: (1) that it is the duty of the Court upon this proceeding to answer the specific questions which have

been reserved for its consideration under s. 72 of the *Judiciary Act* 1903-1948 and not any other questions: (2) that this procedure does not provide a general criminal appeal: and (3) that it is the duty of the Court, for the purpose of exercising the powers conferred upon it by s. 73 of the Act, to determine what order should be made as a consequence of the answers given. In my opinion the proper order to make is to answer the questions in the manner stated, namely the first question in the negative and the others in the affirmative, and to remit the case to *Dwyer* J. with those answers.

RICH J. The facts in this matter are already in statement and I proceed to the consideration of the questions submitted to us by the case stated.

In *Burns* v. *Ransley* (1) the validity of ss. 24A (1) and 24B (2) of the *Crimes Act* 1914-1946 was questioned and I held them to be valid. In the same case I also stated my opinion as to the meaning of the word "disaffection" in s. 24A. I adhere to what I said in that case, but would add a few words on the interpretation of par. (*g*) of s. 24A (1). I think that a reasonably precise meaning may be given to it. It relates to a definite intention or purpose of promoting ill-will and hostility so as to encourage mutiny and to cause dissension between different sections of the community and endanger the government of the country according to law. I therefore conclude that s. 24A (1) (*g*) is valid. In my opinion the learned trial judge was entitled to charge the jury as he in fact did. And as there was evidence to support the jury's finding on this charge the verdict cannot be impeached.

The second question submitted for our consideration is whether the accused uttered the words alleged in the indictment which were published in the "Daily Telegraph." The evidence as to these reported statements is precise and warrants the finding of the jury that Sharkey actually uttered the words alleged in the indictment.

The third question was not pressed. The evidence of Schackle corroborated the evidence of McGarry.

With regard to the fourth question, I think the jury were justified in concluding that the intention—the design, object or purpose—of Sharkey was to excite, inspire or kindle disaffection and in that respect his utterances were capable of being expressive of a seditious intention within the meaning of the *Crimes Act*.

I therefore answer the first question in the negative and the remaining questions in the affirmative and would remit the case to *Dwyer* J. accordingly.

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DIXON J. Upon a trial on indictment before *Dwyer* J. the accused was found guilty of the offence of uttering seditious words. Thereupon *Dwyer* J. stated this case under s. 72 of the *Judiciary Act* 1903-1948. The indictment was filed in the Supreme Court of New South Wales on behalf of the Commonwealth and the charge was laid under s. 24D (1), s. 24B (2) and s. 24A of the Federal *Crimes Act* 1914-1946. The charge was that the accused on 4th March 1949 at Sydney did utter seditious words, namely—"If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force." We were informed that particulars were given under the indictment both of the person to whom the words were uttered and of the forms of seditious intention relied upon. The person to whom the words were alleged to have been uttered was one J. D. McGarry a newspaper reporter employed on the staff of the Daily Telegraph. The forms of seditious intention were those stated in pars. (*b*), (*c*), (*d*) and (*g*) of sub-s. (1) of s. 24A. It appeared in evidence that the accused was an official of the Communist Party in Australia—General Secretary—and that in that capacity McGarry had sought from him a statement for publication in the newspaper concerning a cable reporting something said by M. Maurice Thorez a French Communist. The conversation was over the telephone. McGarry informed the accused that a cable to the newspaper said that Thorez had made this statement: "If the Red Army came to France in pursuit of aggressors, French workers would behave towards it as did the workers of Poland and Rumania." He requested the accused to discuss Thorez' statement and the Communist policy. At first the accused said he would prefer to give him a prepared statement on the following day, but afterwards he consented, on receiving an assurance that what he said would be read back to him as many times as he wished and that only what

he finally approved would be published and that it would be published in full. A running conversation then ensued over the telephone in which McGarry made notes of what the accused said. From the notes he put together a statement which he read back to the accused. It was corrected and re-read several times and finally the accused gave his approval of the text. The newspaper did not publish the statement in full but what was printed included the sentiments complained of in the indictment. It might have been supposed that the accused would be charged not with uttering the words to McGarry, but with printing and publishing them in the newspaper. For he would appear to have authorized this publication in the newspaper. But whether because the newspaper did not publish the whole statement, as had been stipulated, or because the committing magistrate decided against a charge of publishing the seditious words in the newspaper, the indictment was framed as a charge of orally uttering the words, that is, to McGarry.

The exact text set out in the indictment was what McGarry read to the accused; as a precise text the accused did not utter it to McGarry, but McGarry read it to the accused. However there was evidence that it was composed from statements made by the accused in the early part of the telephone interview with McGarry and I think there was enough to entitle the jury to find that at the earlier stage the substance of what the indictment charges was said by the accused to McGarry.

It is, however, another question whether the statements support a charge of seditious utterance under Federal law. That question does not depend entirely on the meaning and application of the provisions of the *Crimes Act* and the interpretation which might be placed on the utterance proved. The validity of the provisions of ss. 24A, 24B and 24D was attacked in this case as it was in the case of *Burns* v. *Ransley* (1). The ground of the attack is that they relate to matters outside Federal power. Section 24D creates the offence of writing, printing, uttering or publishing seditious words. Section 24B defines seditious words as words expressive of a seditious intention. Section 24A defines, exhaustively, as I think, a seditious intention to be an intention to effect any of certain purposes which it proceeds to set out in lettered paragraphs. We are concerned with the four paragraphs, relied upon in the particulars, because the four forms of intention were left to the jury. They are the following purposes :—" (*b*) to excite disaffection against the

(1) (1949) 79 C.L.R. 101.

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Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom; (*c*) to excite disaffection against the Government or Constitution of any of the King's Dominions; (*d*) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth; . . . (*g*) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth." In the case of each of these purposes, the question is whether the Parliament might validly make it the basis of the crime of seditious publication.

I do not doubt that the legislative power of the Commonwealth extends to making punishable any utterance or publication which arouses resistance to the law or excites insurrection against the Commonwealth Government or is reasonably likely to cause discontent with and opposition to the enforcement of Federal law or to the operations of Federal government. The power is not expressly given but it arises out of the very nature and existence of the Commonwealth as a political institution, because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter that is incidental to the exercise of all its powers. But the legislative power is in my opinion still wider. The common law of seditious libel recognizes that the law cannot suffer publications the purpose of which is to arouse disaffection against the Crown, the Government or the established institutions of the country, although they stop short of counselling or inciting actual opposition, whether active or passive, to the exercise of the functions of government. In the United States it seems to be acknowledged that, apart from the First Amendment, Federal positive legislative power extends not only to suppressing utterances and writings which are intended, and may be expected, to cause interference with the execution of Federal powers but also to penalizing publications directed to bringing "into contempt scorn contumely or disrepute" the constitution, the form of government or the flag. The guarantee of freedom of speech contained in the First Amendment may restrain the latter, but not in time of war: see *Willoughby, The Constitutional Law of the United States*, 2nd ed., (1929) vol. 2, pp. 1200, 1202. The prevention of attempts to excite hostility where obedience is necessary for the effective working of government appears to be recognized as a proper purpose of the legislation of the Government concerned. I therefore regard it as clearly within power to penalize utterances and publications

expressing a purpose of exciting disaffection against the Sovereign, the Government or Constitution of the Commonwealth or either House of the Parliament of the Commonwealth.

The validity is more doubtful of so much of par. (*b*) as includes among seditious intentions a purpose to excite disaffection against the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom. When the provision was enacted the ultimate legislative authority of the Parliament at Westminster was exercisable with reference to the Commonwealth and that may have provided a theoretical basis for a law safeguarding the institution against disaffection. The *Statute of Westminster* has, however, since provided against the exercise-ability of the power unless with the consent and request of the Commonwealth as one of the Dominions: s. 4. This weakens such a theoretical basis. But even so the constitutional relations of Australia as part of the British Commonwealth with the established Government of the United Kingdom are such that it may be considered that a law to safeguard the Constitution and Parliament of the United Kingdom from disaffection is a law upon a matter incidental to the protection and maintenance of the Australian Federal polity itself. I think that par. (*b*) is within power. In any case there is the power to make laws with respect to external affairs. Perhaps only under that legislative power can par. (*c*) be supported. The paragraph makes the purpose of exciting disaffection against the Government or Constitution of any of the King's Dominions a seditious intention.

But I do not think that we are called upon to decide upon so much of s. 24A (1) as includes the Constitution of the United Kingdom and of other Dominions and the House of Parliament of the United Kingdom and the Governments of other Dominions. For I think that it is impossible to treat the utterance set forth in the indictment as expressive of an intention to effect the purpose of causing disaffection against those constitutions or institutions, and the jury could not reasonably find that such an intention was disclosed by the words. In his summing-up the learned judge appeared to lay more emphasis upon the purpose described by par. (*g*) than upon the three other forms of purpose that he left to the jury. I think that it was open to the jury to find that the words set out in the indictment are expressive of an intention to effect a purpose to promote feelings of ill-will and hostility between different classes of His Majesty's subjects. Whether the jury might also find that the further element or condition expressed by the words "so as to endanger the peace, order or good government of the

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Commonwealth " was satisfied may depend perhaps on the meaning to be attached to those words. But I do not think that the constitutional validity of par. (*g*) can be sustained. Apart from the last words of the paragraph, the words to which I have referred, it is framed in accordance with the language used in article 93 of Sir *James Fitzjames Stephen's Digest of Criminal Law*, language adopted in the draft Criminal Code recommended in 1879 by the Commission over which he presided. I do not know that the authority is very satisfactory upon which the view rests that at common law every utterance expressive of an intention to promote feelings of ill-will and hostility between different classes of people is a misdemeanour. I notice that in the report of the trial of *R.* v. *Burns* (1), *Cave* J. commented upon the vagueness of the criterion. The summing-up of *Deasy* J. in the Irish case of *R.* v. *Pigott and Sullivan* (2) was read to his Lordship, where the expression used was " excite animosity among different classes of Her Majesty's subjects." *Cave* J. observed that the intent alleged must mean to promote feelings of ill-will calculated to lead to public disorder. In his charge to the jury his Lordship said that he would rather prefer to say that the intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects might be a seditious intention according to the circumstances and of those circumstances the jury were to be the judges in that case.

Unless in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared, ill-will and hostility between different classes of His Majesty's subjects are not a matter with respect to which the Commonwealth may legislate. Such feelings or relations among people form a matter of internal order and fall within the province of the States. It was doubtless because this was seen to be the case that the curious words " so as to endanger the peace, order or good government of the Commonwealth " were added to those of Sir *Fitzjames Stephen*. But before entering upon the question whether they can be used to bring the " ill-will and hostility " to which they relate within the ambit of Federal legislative power, I shall say more specifically why, unless the added words can be so used, the paragraph falls outside the scope of Federal legislative authority.

Just as " none of " the enumerated subjects with respect to which the Parliament may make laws " relate to that general

(1) (1886) 2 T.L.R. 510, at p. 514; 16 Cox C.C. 355.

(2) (1868) 11 Cox C.C. 44.

control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth " (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1)), so none of such subjects relate to public order, to the control of what is written, spoken or published, to the limits upon freedom of expression, to the maintenance of the King's peace or to social order. Section 119 of the Constitution provides that the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. The reference to invasion explains the words " and of the several States " in s. 51 (vi.), the defence power. But what is important is the fact that, except on the application of the Executive Government of the State, it is not within the province of the Commonwealth to protect the State against domestic violence. The comments made by *Quick & Garran* in *Constitution of the Australian Commonwealth* bring out clearly the distinction between matters affecting internal order and matters, which though in one aspect affecting internal order, concern the functions or operations of the Federal Government :—" The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive. If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers " : *Constitution of the Australian Commonwealth* by *Quick & Garran*, at p. 964.

The power to legislate with respect to incidental matters has always been applied flexibly and liberally, as it must in a Constitution, but it cannot authorize legislation upon matters which are prima facie within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote. Is a sufficient connection with the operations, functions,

(1) (1914) A.C., at p. 255 ; 17 C.L.R. 644, at p. 654.

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security or other concern of the Federal Government shown or indicated by the words " so as to endanger the peace, order or good government of the Commonwealth " ? I find myself at a loss to know what specific element in the crime these words describe. They are obviously taken from s. 51, but the conjunction " and " is changed to " or." When s. 51 says " The Parliament shall . . . have power to make laws for the peace, order and good government of the Commonwealth, with respect to— " the section employs traditional words used in many constitutions to confer plenary powers over named territories. They occur in s. 91 of the *British North America Act* 1867, and no doubt this was their more immediate source. But there the words serve a purpose. For if a measure does not fall within the matters assigned by s. 92 to the Provinces, the Parliament of the Dominion, under the general power to make laws for the peace, order and good government of Canada, may obtain authority to enact it (*Russell* v. *The Queen* (1)). There is a long list in *Quick & Garran* on the *Constitution of the Australian Commonwealth*, at pp. 511, 512, of Imperial Acts conferring constitutions on Colonies and Dominions containing the same or similar words. The list begins with the *Quebec Act* 14 Geo. III c. 83, s. 12, and ends with the *British North America Act* 1867. To the list there should be added the *South Africa Act* 1909, s. 59 of which enacts that the Parliament of the Union shall have full power to make laws for the peace, order and good government of the Union. In s. 51 of the Commonwealth Constitution the words appear to have been understood as giving a plenary character, within their ambit, to the powers over the specific subject matters afterwards enumerated (cf *D'Emden* v. *Pedder* (2) and *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (3), per *Higgins* J.). In *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (4), Lord *Haldane* seems to imply the same thing :—" The section [i.e. s. 51] commences by declaring that the Parliament of the Commonwealth shall, subject to the new Constitution, have power to make laws for the peace, order, and good government of the Commonwealth. But this power is not conferred in general terms. It is, unlike the corresponding power conferred by s. 91 of the Canadian Constitution Act of 1867, restricted by the words which immediately follow it. These words are ' with respect to,' and then follows a list of enumerated specific subjects ". The words " of the Commonwealth " may operate to confine the exercise of

(1) (1882) 7 App. Cas. 829, at p. 836.
(2) (1904) 1 C.L.R. 91, at pp. 110-113.
(3) (1920) 28 C.L.R. 129, at p. 165
(4) (1914) A.C., at p. 255; (1913) 17 C.L.R., at pp. 653, 654.

the legislative powers in respect of the matters which follow to Australia territorially or by reference to "the Commonwealth." But otherwise there is nothing restrictive in the entire phrase, the amplitude of which is itself restricted, as the foregoing passage shows, by the enumeration which follows. Which of the various meanings of the word "Commonwealth" should be given to the word in the context is perhaps open to dispute. ". . . the term is in fact used in several senses connected so closely that it is peculiarly important to distinguish them. First, it is as already explained, the territorial community, the 'single entity,' the 'new State or nation,' established under the Act (e.g., secs. iii and iv.). Secondly, it describes the territory occupied by that community (e.g., sec. 95). Thirdly, it describes the Federal Government or some appropriate organ thereof. It is in this sense that prohibitions to make laws of various kinds (e.g., secs. 99, 100, 114, 116) are to be understood; they are addressed to the Parliament as the legislative organ of Federal Government; the prohibition does not bind the Commonwealth as a political organism, for the Constitution may be amended by the Commonwealth": Sir *W. Harrison Moore, Commonwealth of Australia*, 2nd ed., at p. 73. Probably the word should be understood in s. 51 territorially or, what has much the same result, as referring to the community united as a nation. When the disjunctive "or" is substituted for "and," it seems to make no real alteration in the meaning of the phrase. It points perhaps to the necessity of considering separately or distributively the elements that go to make up the welfare of the people. But that is all. The words are in my opinion incapable of any definite meaning which would provide the necessary connection with the subjects of Federal power, with the administration of the Federal Government or with the security of any of its institutions. They are as large as the practically identical words in s. 51 which are larger than the enumerated legislative powers of the Parliament. It is true that in America currency has been given to the expression the "peace of the United States." *Brewer* J. spoke of the power of the Government of the United States to command obedience to its laws and hence to keep the peace to that extent (*Ex parte Siebold* (1)). In *In re Neagle* (2), *Miller* J., perhaps taking up these words, said,—"That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the

(1) (1879) 100 U.S. 371, at p. 395 [25 Law. Ed. 717, at p. 725].

(2) (1890) 135 U.S. 55, at p. 73 [34 Law. Ed. 1, at p. 69].

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United States which the sheriff of the county does to the peace of the State of California ; are questions too clear to need argument to prove them." The proposition seems to be little else than a striking way of saying that an opposition to the execution of the law of the United States or any violence exhibited to officers of the United States in the course of their duty may be lawfully met under Federal authority with any necessary force and that the common-law duties of officers of the law and no doubt of the citizen to render assistance attach in the same way as they do under State law. The result is that, as in *In re Neagle* (1), the justification of a Federal officer who has used force for the purpose is considered to arise under Federal law.

But even if any meaning is to be attached to the words " peace of the Commonwealth " in par. (*g*) analogous to that which in the United States may be attributed to the " peace of the United States," it would fall short of providing a sufficiently specific connection with the subjects of Commonwealth power. What is the element for which you are to look in the definition of the crime ? What is the specific connection with the affairs of the Federal Government which must exist in fact and must be endangered by the seditious words ? It is impossible to define it. Perhaps the question should be asked in a different form. For it may be that the words " so as to " attach to the purpose and in that case the inquiry would be what precisely is it that the speaker must intend to endanger by what he says. Or it may be that the words " so as to " attach to the feelings of ill-will and hostility the speaker means to excite. Then the inquiry would be what is it that such feelings are expected to endanger if they are excited. But whatever may be the grammar of the expression, it describes no definite thing or state of fact capable of connecting the utterance with a subject of Commonwealth power or any of the affairs of the Commonwealth.

I think that par. (*g*) as a description of one of the forms of seditious intention constituting a necessary element in the crime is not within the power of the Commonwealth Parliament to enact.

The result of what I have said is to leave for consideration the question whether it was open to the jury to find that the words alleged in the indictment, so far as the jury were satisfied that they were uttered to McGarry, were expressive of an intention to effect the purpose of exciting disaffection against the Sovereign or against the Government or Constitution of the Commonwealth or against either House of Parliament of the Commonwealth. I think that the Houses of Parliament may be put aside. There is nothing in

(1) (1890) 135 U.S. 55 [34 Law. Ed. 1].

the statement that adverts to the Houses of Parliament or seems to have anything to do with the legislature as a distinct organ of government.

But I am not prepared to say that it would not be open to a jury to find that the words set out in the indictment disclose a purpose of turning people from, disaffecting them against, the Crown, the Commonwealth Constitution and Government. We are not in the present case judges of fact. On this question, which is one of fact, we cannot decide whether the words alleged in the indictment to have been uttered were expressive of an intention to effect the purpose of exciting disaffection against the Sovereign, the Commonwealth Constitution or Government. Our province is to decide whether upon the evidence a conclusion against the accused on this issue would be unreasonable. That means that, given a correct interpretation of the provisions of the law, while the meaning with which the words said to be seditious were spoken is for the jury to decide, it is for the court to say whether it would be reasonable to find in them an intention to effect the precise purpose stated. But in deciding this question, which is called a question of law, we must concede to a jury the power to draw all the inferences as to purpose open upon the words when applied to the circumstances in which they were uttered, including public events that may be sufficiently notorious. Looking at the whole utterance alleged in the indictment I think it is possible for a jury to conclude that the words do disclose a purpose of exciting disaffection against the Crown, the Constitution and the Government of the Commonwealth. I base this opinion upon the possibility of its being considered (i) that the reference to the Soviet forces pursuing aggressors is related to the statement that the Soviet will go to war only if attacked and (ii) that both together are intended to convey that in a war between the British Commonwealth and the Soviet the former would be aggressors and Australian workmen would welcome and support a Soviet force in Australia in such a war, and (iii) that the reference to Communists advising workers to use force is intended to be understood (notwithstanding the mention of " Fascists ") as advice to the workers to use violence to overcome the use of force to uphold and enforce the law, so as to gain power unconstitutionally.

Much may be said against this interpretation and the inference founded upon it of a purpose to arouse disaffection against constitutional government, and I am not to be taken as saying that it should be adopted by a jury. But I think that it is not so unreasonable that it may not be submitted for the consideration of a jury.

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The case stated by *Dwyer* J. reserves specific questions for the Court. One, which is contained in par. 7 of the case, asks whether ss. 24A, 24B and 24D of the *Crimes Act* 1914-1946 are invalid. I answer the question that in its application to s. 24B (2) and s. 24D (1), s. 24A (1) (*d*) is valid and so much of s. 24A (1) (*b*) as refers to the Sovereign is valid and that s. 24A (1) (*g*) is invalid, that s. 24B (2) and s. 24D (1) in relation to s. 24A (1) (*d*) and to the aforesaid provisions of s. 24A (1) (*b*) are valid and that otherwise the validity of the said sections does not arise. One difficulty about this question is that the matter about which it inquires was raised at an early stage of the trial. It involves a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States. Section 40A, unlike s. 38A, contains no exception of trials of indictable offences. Unless the exception is to be imported into it from s. 38A, which would be a very strong course, s. 40A required the Supreme Court to proceed no further, after the question was raised. But, since for reasons I am about to state, I think the verdict must be set aside, I need not dwell on this difficulty.

Paragraph 8 of the case stated contains three questions. The third of them asks—"Whether the words alleged to have been uttered in the circumstances in which they were alleged to have been uttered were capable of being expressive of seditious intention within the meaning of the *Crimes Act* 1914-46." I answer this question that they are capable of being expressive of the intentions to effect the purpose of exciting disaffection against the Sovereign or against the Government or Constitution of the Commonwealth but not otherwise. This answer, combined with the answer to the earlier question means that the accused is entitled to have the verdict set aside. The particulars under the indictment alleged seditious intentions under s. 24A (1) (*b*), (*c*) and (*d*) which the words were not capable of expressing and the seditious intention described by par. (*g*) which I decide to be void. The latter appears to have been much relied upon. These were all submitted to the jury and the verdict of guilty may have been founded on any one of them. The jury were encouraged to found it on par. (*g*). The powers of this Court in a case stated under s. 72 are given by s. 73. The Court may amongst other things set aside the verdict and order a verdict of not guilty or order a new trial. I think the verdict must be set aside. I have hesitated as to an order for a new trial upon this indictment because it is confined to the utterance of the words orally to one man and he obtained the statement as a matter of business. But as matter for a jury remains, I suppose an order for a new trial is the regular course.

I would remit the cause under s. 45 of the *Judiciary Act* 1903-1948. The first and second questions in par. 8 of the case stated upon this view cease to be of any importance, but if they are to be answered, I would answer them in the affirmative.

McTIERNAN J. The first question is concerned with the matter of legislative power. In my opinion the answer to this question should be that none of the sections, namely ss. 24A, 24B and 24D, is beyond the legislative powers of the Commonwealth.

The offences created by these sections are offences against the Commonwealth, consisting of the expression of seditious words directed against the Sovereign, the Government, the Parliament and the internal public tranquillity of the Commonwealth. So far as this description covers the offences I think that the legislative power to pass these sections is to be found in s. 51 (xxxix.) of the Constitution.

Section 24A (1) refers to the Constitutions and Governments of other Dominions. To the extent to which the sections punish the expression in Australia of dissatisfaction of a seditious character with those Constitutions and Governments, I think that the sections are justified by the power vested by s. 51 (xxix.) to legislate with respect to external affairs. This expression has a wider meaning than strictly foreign affairs. It covers the relations between the Government of this country and the Government of another Dominion. These relations could be affected if seditious offences against the Government or Constitution of another Dominion were committed here with impunity. The power to legislate with respect to external affairs extends to the punishment in Australia of such offences.

Upon its reasonable and proper interpretation, s. 51 (xxxix.) necessarily extends to make criminal and punishable as crimes, acts accompanied by violence which strike at the Constitution, the established order of Government and the execution and maintenance of the Constitution and Commonwealth law. The abovementioned sections of the *Crimes Act* make criminal acts which strike in the same direction but they are acts not necessarily accompanied by violence or leading to open violence. But for the purpose of limiting the scope of the legislative power conferred by s. 51 (xxxix.) to punish offences against the State, no rational distinction can be drawn between offences accompanied by violence and offences not accompanied by violence but displaying a seditious purpose.

Section 61 of the Constitution vests power in the Executive Government to execute and maintain the Constitution and the laws

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made under it. Section 51 (xxxix.) gives power to make laws with respect to any matter incidental to the execution of this power. The principle upon which the sections of the *Crimes Act* now in question may be related to s. 51 (xxxix.) may be illustrated by the following statement made by Sir *James Fitzjames Stephen*— "The first and most general object of all political associations whatever is to produce and to preserve a state of things in which the various pursuits of life may be carried on without interruption by violence, or, according to the well-known expression of our law, to keep the peace. Every crime is to a greater or less extent a breach of the peace, but some tend merely to break it as against some particular person or small number of persons, whereas others interfere with it on a wider scale, either by acts which strike at the State itself, the established order of Government, or by acts which affect or tend to affect the tranquillity of a considerable number of persons, or an extensive local area."—*The Criminal Law of England*, (1883) vol. 2, p. 241.

The Commonwealth has no power to pass laws for the punishment of crime generally. But it has power to punish offences against itself. For example, the Commonwealth has no power to pass a general Act for the punishment of criminal defamation. But its constitutional authority extends to punishment of any person who criminally defames an officer of the Commonwealth in relation to his office. A seditious offence is in its nature an offence against the State. Where the State is the Commonwealth it has power to punish a seditious offence against itself. Accordingly it has power to pass a law for the punishment of any person who writes, prints, utters or publishes any seditious words against the Sovereign, the Constitution or the Parliament or words of that character directed against the public internal tranquillity of the Commonwealth.

The answers to the second and third questions depend entirely upon the evidence. I have carefully read the evidence and I am satisfied that there is evidence upon which the jury could reasonably find that the accused uttered the words alleged in the indictment or words having the same meaning and that there was corroborative testimony on this issue.

The remaining question is in these terms—"Whether the words alleged to have been uttered in the circumstances in which they were alleged to have been uttered were capable of being expressive of seditious intention within the meaning of the *Crimes Act* 1914-1946 (*sic.*)." The words in themselves, apart from the circumstances, are capable of being expressive of such an intention: for example, an intention to excite disaffection against the Sovereign

and the Government of the Commonwealth (s. 24A (1) (*d*)) or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth (s. 24A (1) (*g*)). The question is, however, whether when the circumstances in which the words were uttered are taken into consideration the words are capable of being expressive of such an intention. In my opinion the circumstances do not necessarily rebut the inference of a seditious purpose which the words are capable of importing. It is open to the jury taking the words with the circumstances to infer that the supposition with which they begin was used as an occasion to make an appeal based upon class feeling to the workers of Australia calculated and meant to excite them to enmity and disaffection from the Sovereign and the Government of Australia and to promote feelings of ill-will and hostility between them and the rest of the Australian people so as to endanger the peace, order and good government of the Commonwealth. I think the last question should be answered :—Yes.

I should remit the case to the learned trial judge with the above-mentioned answers.

WILLIAMS J. I would answer the first question of law reserved for the opinion of the Full Court under s. 72 of the *Judiciary Act* 1903-1948 in the negative and the remaining three questions in the affirmative.

Sections 24A, 24B and 24D of the *Crimes Act* 1914-1946 are, in my opinion, a valid exercise of the constitutional powers of the Commonwealth Parliament. The only provision as to the validity of which I have any doubt is s. 24A (1) (*g*) which provides that an intention to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth, is a seditious intention. The difficulty is to determine what is meant by the Commonwealth. If it means the Commonwealth as a geographical unit, the provision would be too wide because laws directed to prevent the promotion of ill-will and hostility between different classes of His Majesty's subjects would fall within the sphere of State legislative power except to the extent to which the promotion of such feelings could detrimentally affect the exercise of the executive legislative or judicial powers of the Commonwealth. But the word "Commonwealth" is capable of meaning the Commonwealth as the body politic in the sense in which it is used in the Act to constitute the Commonwealth of Australia. I am of opinion that this meaning should be given to the word in s. 24A (1) (*g*) of the *Crimes Act*. The

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words " so as to endanger the peace, order or good government of the Commonwealth " then limit the generality of the preceding words and confine the seditious intention to an intention to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth as a body politic. One of the functions of the Commonwealth as a body politic is that conferred upon the Commonwealth Parliament by s. 51 (vi.) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to defence. The words uttered by Sharkey are capable of meaning that in a war between the British Commonwealth and its allies and Soviet Russia, the former would be the aggressors and Australian workers would be on the side of the latter and would welcome Soviet troops if they entered Australia in pursuit of the troops of the British Commonwealth and its allies. Such a statement could plainly be intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the defence of the Commonwealth.

I feel some difficulty on one aspect of the summing-up about which no question has been asked. His Honour told the jury that they could convict Sharkey if they found an intention to effect any of the purposes in s. 24A (1) (*b*), (*c*), (*d*) or (*g*). Only those purposes of which there was reasonable evidence should have been left to the jury. The words uttered by the accused were most reasonably capable of being evidence of an intention to effect the purpose in (*g*) and his Honour so directed the jury. The question is whether the words uttered were reasonably capable of being evidence of an intention to effect the purposes in (*b*), (*c*) and (*d*). On consideration I am of opinion that the words were so capable. They were not uttered with respect to a possible war between Soviet Russia and the Commonwealth alone, but with respect to a possible world war between Soviet Russia and the British Commonwealth and its allies. It is for the Sovereign to declare such a war but His Majesty or his representative would only do so in conformity with the wishes of the Governments and Parliaments of the United Kingdom and Dominions. To say that in such a war the United Kingdom and the other Dominions, in addition to Australia, would be aggressors and Soviet troops pursuing the troops of such aggressors into Australia would be welcomed by Australian workers would be reasonably capable of being evidence of an intention to effect the purposes defined in (*b*), (*c*) and (*d*).

In these circumstances it is unnecessary finally to decide what the duty of this Court would be where, on the materials before it,

it appeared that the trial had miscarried in a matter not covered by the questions. As at present advised I have no doubt that the powers conferred upon the Court by s. 73 of the *Judiciary Act* are ample to authorize it to consider such a matter and make an appropriate order, with or without going through the formality of sending the case back to be amended or re-stated.

WEBB J. These are questions reserved under s. 72 of the *Judiciary Act*. The defendant Sharkey was indicted under s. 24D of the Commonwealth *Crimes Act* for uttering seditious words. He was tried in the Supreme Court of New South Wales before *Dwyer* J. and a jury and convicted, but judgment and sentence were postponed pending the determination of the questions reserved. The uncontradicted evidence for the prosecution disclosed that on 4th March 1949 a Crown witness named McGarry, a newspaper reporter employed by the Sydney "Daily Telegraph" newspaper, received instructions from the editor to endeavour to communicate with some representative of the Communist Party in Sydney in order to obtain a statement of the policy to be followed by local communists in the event of the invasion of Australia, following statements that had been made by Communist leaders in other parts of the world, and more particularly by the French Communist leader, Maurice Thorez, who had in the previous week made the statement that "If the Red Army came to France in pursuit of aggressors, the French workers would behave towards it as did the workers of Poland and Rumania." In pursuance of these instructions McGarry telephoned the defendant Sharkey, who was the general secretary of the Communist Party in Australia, and said "I would like to discuss Communist policy in Australia in the event of the invasion of Australia by Communist forces. Would you make a statement for publication?" Sharkey replied that it seemed to him that the invasion of Australia by Communist or other forces was a very hypothetical question and that there was no point in answering such a question. He added, however, that he preferred McGarry to call on him on the following day, that is, on 5th March 1949, when he would give a prepared statement. McGarry said that his newspaper had a policy of requiring its reporters to read back statements made by public men and that he would be prepared to read back any statement Sharkey might make as many times as Sharkey wished in order that Sharkey might make corrections. Sharkey said he would be prepared to make a statement on that understanding. McGarry then read to Sharkey the statement already referred to as having been made by Thorez, and then asked

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Sharkey whether he would agree to make a statement about the action or policy of local communists in the event of the invasion of Australia. Sharkey and McGarry conversed over the telephone for about fifteen minutes and McGarry took shorthand notes of the conversation. McGarry then said to Sharkey: "I will type a précis of this and read it back to you later." In a further telephone conversation McGarry read to Sharkey a précis of the statement. As he did so Sharkey altered some paragraphs and deleted others. McGarry re-typed the amended statement and in the last telephone conversation read the corrected statement to Sharkey ten or eleven times at Sharkey's request. Sharkey made slight alterations and, after it was read to him for the last time, said he was satisfied with it. In reply to a question by McGarry, Sharkey said he could speak for the other members of the Communist Party. The statement with which Sharkey said he was satisfied was as alleged in the indictment, omitting immaterial parts. The evidence for the prosecution also disclosed that an article appeared in the "Daily Telegraph" on 5th March 1949 headed "'Welcome' for Red Troops" and contained the substance of Sharkey's statement as alleged in the indictment, and that Sharkey admitted to a "Daily Mirror" reporter, Schackle, that he was correctly reported in the "Daily Telegraph" article. No evidence was called for the defence. The Crown Prosecutor submitted, and the learned judge in his summing up put to the jury for their consideration, that the words charged were "uttered" by Sharkey within the meaning of s. 24D and were expressive of an intention of the kinds specified in pars. (*b*), (*c*), (*d*) and (*g*) of s. 24A (1). He added: "These words expressive of an intention of promoting ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth may be expressive of a seditious intention." Later in his summing up he asked the jury whether they considered that ill-will and hostility endangering the peace, order or good government of the Commonwealth were apt to be stirred up. Apart from asking them to bear in mind the arguments of counsel he made no further reference to the application of pars. (*b*), (*c*) or (*d*) of s. 24A (1): he gave the jury no indication of the reason why Sharkey's words might be regarded as being capable of being held to be expressive of an intention to excite disaffection of the kinds referred to in those paragraphs. He instructed the jury that the corroboration was required to be in a material particular and that Schackle's evidence could be regarded as such corroboration. Before us it was conceded by Mr. *Paterson*,

counsel for Sharkey, that there was evidence of corroboration, as I too think was the case, and so this question need not be further considered. At the conclusion of his summing up the learned judge asked counsel whether they desired him to add anything, but neither counsel asked for any further direction or re-direction. However Mr. *Paterson*, as reported, had before the summing up submitted, " in view of the evidence and the circumstances under which they were uttered, if they were uttered, the words are not capable of being expressive of a seditious intention within the meaning of s. 24A." If the learned judge thought the words were not capable of being found to be expressive of a seditious intention within any of the pars. (*b*), (*c*), (*d*) or (*g*) it was his duty so to direct the jury and he was not relieved of that duty by the failure of counsel for Sharkey to ask for a further direction or re-direction after the summing up.

As to the validity of ss. 24A, 24B and 24D : there is, I think, much to be said for the view that there is a common law of Australia, including the provisions relating to sedition as they existed in English law when the first settlers came to this country (cf. *R.* v. *Kidman* (1)). However, for the reasons given by the Chief Justice, I think the Commonwealth Parliament had power under paragraphs (xxix.) and (xxxix.) of s. 51 of the Commonwealth Constitution, to enact all three sections. Mr. *Bennett*, counsel for the Commonwealth, submitted that par. (vi.) of s. 51 also conferred power to do so ; but I find it unnecessary to rely on the defence power, although that power may be wide enough to protect Australia against attacks in peace as in war, from within as well as from without, and against incitement to such attacks. If the defence power extends in time of war to the internment of any " dis-affected or disloyal " person without trial, as *Lloyd* v. *Wallach* (2) decided, it may appear reasonable to hold that the power authorizes the creation of an offence of sedition for the commission of which an offender may be tried and imprisoned on conviction after trial. In the course of the argument Mr. *Bennett* stressed the necessity for a power to nip in the bud the tendency to undermine the State, and the Chief Justice suggested that in order to protect the Government against violent overthrow it might be necessary to prevent the incitement of feelings that may lead to that. I agree. At all events it is for the Parliament to select the means of achieving legitimate ends and in so doing to be guided if it sees fit by the experience of centuries in creating an offence of sedition with changes to meet the existing legal and political organization of Australia,

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

(2) (1915) 20 C.L.R. 299.

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both internally and externally. The part of the Imperial Parliament in this organization plainly appears from the Act of Settlement and other legislation regulating the succession to the Crown of the United Kingdom under which Australia is associated with the United Kingdom and the other Dominions. as well as from the *Commonwealth of Australia Constitution Act*, and the *Statute of Westminster* and the Australian legislation adopting it. Pending lawful changes, the House of Lords and the House of Commons are essential parts of the political and legal organization of Australia. The power reserved to the Imperial Parliament to legislate for Australia, if so desired by Australia, is a sufficient indication of this. No one can say when it will be necessary to resort to this power. I emphasize more fully the position of the Imperial Houses of Parliament because Mr. *Bennett*, without assigning any reason for his attitude, would not press that the words uttered by Sharkey could be held to be expressive of any intention to excite disaffection against either House of the Parliament of the United Kingdom within par. (*b*) of s. 24A (1), although he submitted that otherwise pars. (*b*), (*c*) and (*d*) applied to these words, as well as par. (*g*).

Then as to the facts that the jury could find on the evidence: it was open to them to find that Sharkey was the general secretary of the Communist Party in Australia and spoke for its members; that he was asked whether he would make for publication in the "Daily Telegraph" a statement on Communist policy in Australia in the event of an invasion of Australia by Communist forces; that after consideration he agreed to do so, and then, after much deliberation, made the statement set out in the indictment, and that this was compiled from shorthand notes of what he said. I think the jury could find on this evidence that the statement contained words uttered by Sharkey. As to whether these words were, in the circumstances, expressive of a seditious intention, seeing they were used in reply to a request for a statement on Communist policy in the event of an invasion of Australia by Communist forces, the whole of the reply could be taken to bear on that policy, including the sentence, "If the Fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force." This could be taken to reveal that the so-called Fascists were a numerous and powerful class of Australians and were identical with the aggressors, or some of the aggressors, referred to earlier in the reply, whom the Soviet forces would pursue. The repeated reference to "invasion" in this careful reply could be regarded as an intimation that the Soviet forces would come as enemies, and that if invasion occurred Australians would be the

aggressors. The jury could also find that nothing had happened, or was likely to happen, in Australia, that warranted such a reply, but on the other hand they could attribute it to happenings in Europe in and about March 1949, including the Berlin blockade and the airlift to counter it, and the joint operations and activities of the nations opposing Russia in Germany, including those of the British Commonwealth, and to the association of Australia with that opposition, stigmatized as aggression against the Soviet. I think the jury could find that this reply was uttered with the intention of promoting feelings of ill-will and hostility of the kind specified in par. (*g*) of s. 24A (1), and, although the reply does not mention the Sovereign, or any House of Parliament, or Constitution, or Government, I think the jury could also find that a welcome to Soviet troops invading any part of the British Commonwealth in any contingency would be calculated to excite disaffection to the full extent set out in pars. (*b*), (*c*) and (*d*) and was so intended.

I would answer the questions as proposed by the Chief Justice and remit the case to the Supreme Court with those answers.

Questions in case answered—Paragraph 7, *Question* 1, *No*; *Paragraph* 8, *Question* 1, *Yes*; *Question* 2, *Yes*; *Question* 3, *Yes*. *Conviction affirmed. Case remitted to Dwyer J.*

Solicitor for the accused, *Harold Rich.*

Solicitor for the Crown, *George A. Watson*, Crown Solicitor for the Commonwealth.

J. B.