

# HIGH COURT OF AUSTRALIA

Wishart

Vs.

Fraser

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

10 April 1941

Rich A.C.J.

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

On the return of the order nisi before this court it was suggested that while the order of the Court of Quarter Sessions confirming the conviction stood it would bar any right to appeal direct from the magistrate's order and that the applicant should apply for special leave to appeal from the order of the Court of Quarter Sessions. That is admittedly a valid order made by the Court of Quarter Sessions exercising Federal jurisdiction. If this court were to deal with the conviction by the magistrate and quash it, the extraordinary result would follow of two orders in existence at the same time—the order of this court and that of Quarter Sessions. The situation in *R. v. Poole; Ex parte Henry*<sup>[1]</sup> was different. There the court prevented a possible clash of orders by refusing to hear an appeal. As a matter of history I may state that the applicant in that case asked the judge of Quarter Sessions for leave to withdraw his appeal, the leave was granted, and the appeal was withdrawn. But, whether concurrent and cumulative remedies are permissible under the *Justices Act 1902* (N.S.W.) or not, that Act cannot govern this court in hearing appeals from courts exercising Federal jurisdiction.

As to special leave the grounds alleged are four in number, viz., that (a) sec. 5 of the *National Security Act 1939-1940* is invalid, (b) reg. 41 of the regulations made under the Act is *ultra vires* the Act, (c) the consent of the Attorney-General to prosecute was not proved, (d) there is no evidence of the charge laid. In support of the first ground it was contended that sec. 5 of the Act purported to delegate the whole power to make laws with respect to the naval and military defence of the Commonwealth and was therefore invalid. A similar contention has been raised in this court and has not been sustained. The decision in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.*

and *Meakes v. Dignan*[\[2\]](#) and the former decisions there referred to finally dispose of this contention, and it follows that sec. 5 is a valid exercise of the power. (b) If the Act is, as I hold it to be, valid, the second objection fails. (c) We are bound to take judicial notice of the Attorney-General's signature, which is written under the consent indorsed on the information. (d) The character of the document speaks for itself. But it was contended that the intention to disseminate disaffection among soldiers which appears on the face of the document had ceased to exist at the end of March and that 25th June 1940, the date laid in the information, is the material date and of the essence of the offence. Since the adjournment I have carefully reread the evidence before the Court of Quarter Sessions. It is proved that the applicant was a part author of the document and joined in duplicating copies of it. Copies were found both in his office and in his bedroom in another dwelling on 25th June, and on this date "a close associate and co-worker of his" had other copies. Copies had been distributed at any rate before the end of March. I have no doubt in holding that the authorship of the document, its possession and retention of possession up to 25th June 1940, its distribution, and the other relevant and admissible evidence before the learned judge of Quarter Sessions fully justified him in inferring that the applicant's intention of himself using the document for the unlawful purpose or of allowing others to use it existed at the end of March and continued up to 25th June 1940. I should add that the date laid in the information is not of the essence of the offence (*R. v. James*[\[3\]](#); *R. v. Dossi*[\[4\]](#)).

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

Starke J.

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

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

The appellant, however, when it was plain that his rule *nisi* must be discharged, moved for special leave to appeal from the judgment of Quarter Sessions (*Judiciary Act 1903-1940*, sec. 39) upon the grounds:—

1.

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

But this argument has been considered and rejected in many cases by this court: See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*<sup>[6]</sup> and the cases there collected.

2.

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

But a consent signed by the Attorney-General appears upon the face of the information. Such an objection is hardly one for special leave to appeal, but it is disposed of by the decision of this court in *Holland v. Jones*<sup>[7]</sup>.

3.

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

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

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

Dixon J.

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

Wishart appealed against the conviction to a Court of Quarter Sessions. But that court confirmed the conviction. Wishart then took steps to invoke the appellate jurisdiction of this court. Under sec. 39 (2) (b) of the *Judiciary Act 1903-1940* an appeal lies of right to this court from the decision of a court of a State exercising Federal jurisdiction, wherever an appeal lies, under State law, from its decision to the Supreme Court. An appeal by way of statutory prohibition lay from the magistrate to

the Supreme Court, but no such appeal lay from the Court of Quarter Sessions. Wishart, in the first instance, ignored the confirmation by that court of his conviction and attempted to appeal from the conviction as of right. When it was objected that the order of the Court of Quarter Sessions confirming the conviction stood in the way of a direct appeal from the magistrate, he then applied under [sec. 73](#) (ii) of the [Constitution](#) and sec. 39 (2) (c) of the *Judiciary Act* for special leave to appeal from the order of the Court of Quarter Sessions.

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

The appeal to this court is given by [sec. 73](#) (ii) of the [Constitution](#) and not by sec. 39 (2) (b) and (c) of the *Judiciary Act*, the operation of which is to distinguish between appeals as of right and appeals by special leave. It is a full appeal on law and fact of the same nature as other appeals to this court in its appellate jurisdiction. When sec. 39 (2) (b) refers to State law, it does so for the purpose only of saying from what decisions given by State courts exercising Federal jurisdiction an appeal shall lie as of right. It does not draw in the law of the State for the purpose of defining the nature or scope of the remedy or the jurisdiction of this court. In the same way, when sec. IV., rule 1, of the *Rules of Court* provides that appeals from inferior courts exercising Federal jurisdiction shall be brought in the same manner and within the same times and subject to the same conditions as are prescribed by the law of the State for bringing appeals to the Supreme Court in like matters, State law is invoked only for the purpose of supplying a procedure for appealing. It does not affect the nature of the appeal: See *Bell v. Stewart*[8]; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[9]; *Dunlop Perdriau Rubber Co. Ltd. v. Federated Rubber Workers' Union of Australia*[10]; *R. v. Hush*; *Ex parte Devanny*[11]; *R. v. Darling Island Stevedoring and Lighterage Co. Ltd.*; *Ex parte Halliday and Sullivan*[12]; *Grayndler v. Cunich*[13]. In the present instance the law of the State relied upon as showing that a right of appeal to the Supreme Court would exist and as providing the procedure is secs. 112 et seq. of the [Justices Act 1902](#) (N.S.W.). It is said that in a matter within State jurisdiction the Supreme Court would regard itself as bound to hear and determine an appeal by statutory prohibition against a conviction by a magistrate notwithstanding that in the meantime an unsuccessful appeal had been taken to a Court of Quarter Sessions and an order confirming the conviction had been made by that court. It is true that for a very long period in the Supreme Court of New South Wales it has been the accepted view that an appeal against a conviction to Quarter Sessions under what is now [sec. 122](#) of the [Justices Act 1902](#) (N.S.W.) might be pursued concurrently with the remedy by way of a statutory prohibition directed to the magistrate. "The remedy by prohibition is different and cumulative" is the short ground upon which an objection to the coexistence of the two remedies was overruled in *Ex parte Marx*[14] by Stephen C.J., *Hargrave and Faucett JJ.*: Cp. *Ex parte Wedlock*[15]; *Ex parte King*[16]. Further, it has been decided that by instituting an appeal to Quarter Sessions against his conviction a defendant does not preclude himself from obtaining a statutory prohibition from the Supreme Court while his appeal to Quarter Sessions is pending (*Ex parte Giles*[17]). The reasons given for that conclusion depend upon the difference in the nature of the remedies: the appeal to Quarter Sessions entitling the defendant to a second investigation of the facts upon oral evidence and a reconsideration of the penalty, while statutory prohibition means only an examination of the propriety of the decision of the magistrate. Accordingly it is the practice of the Supreme Court to decide a rule or order *nisi* for a statutory prohibition notwithstanding that an appeal from the conviction is pending in a Court of Quarter Sessions and for that court to hear an appeal notwithstanding that the Supreme Court has

discharged the rule *nisi* for statutory prohibition. There does not appear to be any reported decision upon the question whether the converse course may be followed and a statutory prohibition obtained in spite of the fact that a Court of Quarter Sessions has in the meantime reheard the charge and confirmed the conviction. To hold that the [Justices Act 1902](#) authorizes such a course appears to be an extension of the reported decisions of the Supreme Court. But assuming that such an extension would or should be made for the purposes of State jurisdiction, the consequence by no means follows that in matters of Federal jurisdiction an appeal may be maintained directly to this court from a magistrate notwithstanding that his decision has been confirmed in Quarter Sessions.

The jurisdiction of Quarter Sessions to hear appeals in matters of Federal jurisdiction arises from the operation which the decision of this court in *Ah Yick v. Lehmert*[\[18\]](#) gave to sec. 39 (2) of the *Judiciary Act 1903-1940*, and it is coextensive with its State jurisdiction. But, as I have already pointed out, the law of the State is not so incorporated in Federal law as either to limit or enlarge the appellate power of this court. It has no other operation than to distinguish in appeals from inferior jurisdictions between those as of right and those by special leave, and to supply a procedure.

The very consideration which led to the decision of the Supreme Court in *Ex parte Giles*[\[19\]](#) is lacking in the case of appeals to this court. For, although such appeals are reheard on the same evidence, they are in the nature of appeals by way of rehearing, and are very different from the limited remedy given by statutory prohibition. But in any case the present question is independent of the distinction between appeals as of right and appeals by leave. It is a question whether this court can ignore a decision of a competent court of Federal jurisdiction confirming an order or conviction of a court below it and, although the order of confirmation is left standing and is not brought before us by way of appeal or otherwise, nevertheless proceed to hear an appeal from the order so confirmed.

To that question there can, I think, be only one answer. It is not denied that the order of the Court of Quarter Sessions was within its jurisdiction and was validly made. While it stands it is a judicial declaration by a competent court exercising Federal jurisdiction establishing the order of the magistrate and preventing its being called in question. If this court made an order setting aside the conviction, there would be two inconsistent judicial orders in operation at the same time, that of the Court of Quarter Sessions confirming the conviction and that of this court discharging it. It would, of course, be open to the legislature to authorize a superior court to deal with an order of an inferior court notwithstanding that an intermediate court had confirmed it and the order of confirmation was not brought up for review. But even if the [Justices Act 1902](#) (N.S.W.) has any such effect in State jurisdiction, at all events so much of it as so operates has no application to appeals to this court from courts exercising Federal jurisdiction.

In *R. v. Poole; Ex parte Henry*[\[20\]](#) an attempt was made to induce this court to hear an appeal from a conviction by a magistrate exercising Federal jurisdiction while an appeal to Quarter Sessions from the same conviction was pending. The court refused to proceed with the hearing of the appeal until the party had abandoned his appeal to Quarter Sessions or that appeal had otherwise been disposed of. The correctness of the view that the two appeals were not mutually exclusive alternatives and that a party was not put to his election between them, but might institute both remedies concurrently, was tacitly assumed for the purposes of the court's decision: Cp. *O'Sullivan v. Morton*[\[21\]](#). No opinion was expressed upon the question whether, if this court did make an order affirming the conviction or any other positive order in reference to the conviction, it would remain possible for the Court of Quarter Sessions to interfere with the conviction. That question had not arisen, but in order to ensure that it would not arise and in order to maintain the position of this

court as a court of final appeal, we refused to hear the appeal until the proceedings in Quarter Sessions were completely disposed of. An undertaking had been offered by the appellant to abandon these proceedings, but the court was not content with an undertaking and insisted that they should be brought to a formal end. Having regard to the appellant's offer to abandon his appeal to Quarter Sessions, there was no likelihood in *Henry's Case*[22] that the question presented by the appeal now before us would there arise, namely, the question what should be done by this court when Quarter Sessions had already confirmed the conviction under appeal to this court.

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

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

The first ground upon which his counsel relied is that sec. 5 of the *National Security Act 1939* (No. 15 of 1939) is invalid. The regulation under which Wishart was convicted rests for its validity upon the general words found at the beginning of that section and perhaps, alternatively, those at the end.

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

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

In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[23] I have expressed my views upon the nature of each of these objections and the place they have under the *Australian Constitution*, and I shall not repeat what I then said. It is enough for me to say (i) that upon principle I have never understood how the theory, which is applied in the United States, that the legislature could not "delegate" at all any authority considered to be legislative could have any place in our *Constitution* (See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[24]), and (ii) that it has been uniformly decided in this court that the distribution of powers in the Commonwealth *Constitution* does not prevent the legislature from confiding to the Executive such a power as that expressed in the words I have set out (See *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[25]).

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

legislative power.

This suggestion cannot be sustained. The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which it must exercise. [Sec. 5](#) is clearly directed to the prosecution of the war and is a valid exercise of the defence power. The whole question is, in my opinion, concluded by the decision of this court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[\[26\]](#) and by the prior decisions of the court upon which that decision was founded.

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

The second ground upon which his counsel relied in support of the application for special leave is that it was not proved that the consent of the Attorney-General had been obtained for the prosecution as required by sub-reg. 2 of reg. 41. In the margin of the actual information is a typewritten consent purporting to bear the Attorney-General's signature. It is said that, as the sub-regulation is not expressed to require a consent in writing by the Attorney-General, the evidentiary provision contained in sec. 9 of the *National Security Act*, which relates to documents issued in pursuance of the regulations, cannot apply and therefore will not authorize the reception of the consent in evidence without proof. As the purpose of the sub-regulation is really to ensure that the written consent required by sec. 10 (4) shall be given for the purpose of reg. 41 by no other person but the Attorney-General, the foundation of this contention is more than doubtful. But in any case the court must take judicial notice of the Attorney-General's signature, and his consent therefore is made to appear (*Holland v. Jones*[\[27\]](#)).

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

In the information 25th June 1940 was the date laid as that upon which he had in his possession with intent to cause disaffection a document the dissemination of which would, to state it briefly, cause disaffection among the troops. The finding that the document was of the required description clearly was justified. It is hardly open to doubt that it was composed with intent to endeavour to cause disaffection among soldiers, to whom it was addressed. Fifteen copies were found in Wishart's possession on 25th June 1940. He admits that he took part in composing the document. But that was in January, and in March circumstances arose which, he said, made it a document which he no longer desired to use. Accordingly he says that in June the document was dead and the copies found were not in his possession for use. He says that they were retained by accident. It is no doubt true that to amount to the offence charged possession of the document must be accompanied by an intention to use it to cause disaffection. But I think it is a certain inference that he had possession of the copies in March and that possession was then accompanied by the required intention. Time is in no way of the essence of the offence, and March is within twelve months of the information: See sec. 21 (1) (b), *Crimes Act 1914-1937*. The proof of the coexistence in March of all the elements of the offence is therefore sufficient to justify the conviction under the information, the variance between the date proved and that alleged being treated as immaterial.

But in any case I am of opinion that the inference was fairly open to the Chairman of Quarter Sessions that Wishart had never completely given up his intention of using the documents he

retained if the opportunity or occasion arose or offered. That inference I think is well founded in probability.

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

McTiernan J.

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

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

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

When the hearing of the appeal to this court was begun, we were informed that the Court of Quarter Sessions had heard and determined the appeal made to that court and had confirmed the conviction: See [sec. 125](#) of the [Justices Act](#). The appeal to Quarter Sessions is a rehearing of the case, and fresh evidence may be adduced. "It is evident that the Court of Quarter Sessions is seised of the whole question of the guilt or innocence of the accused, and is bound to pronounce upon all the issues of fact or questions of law which are necessary for the determination of the question whether the accused ought or ought not to be convicted upon the information" (*R. v. Poole; Ex parte Henry*[28]).

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

The conviction is challenged on the ground that the *National Security Act 1939-1940* is *ultra vires* the Commonwealth Parliament because sec. 5 is an illegal delegation to the Executive of legislative power. The two familiar grounds upon which a law vesting the Executive with power to make regulations has been attacked are, first, that such a law infringes the doctrine of the separation of powers and, secondly, that the nature and extent of the vesting are such that the law is not a good exercise of the power of the Parliament to make laws with respect to any subject entrusted to it by the [Constitution](#). The decisions of this court make the first ground an untenable one. Their effect is summed up by Dixon J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[29] in these words:—"But I think the judgment" (in *Roche v. Kronheimer*[30]) "really

meant that the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character. I, therefore, retain the opinion which I expressed in the earlier case" (*Huddart Parker Ltd. v. Commonwealth*[31]) "that *Roche v. Kronheimer*(1921) [1921] HCA 25; 29 C.L.R. 329. did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the [Constitution](#) does not operate to restrain the power of the Parliament to make such a law." However, the second ground does not necessarily fall with the first. The uncertainty or width of the subject matter with respect to which the Executive is given power to make regulations may prevent the law attempting to confer such power being a law with respect to any subject within the legislative powers of Parliament (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*[33]). [Sec. 5](#) cannot fail for vagueness, for it clearly defines the field within which Parliament has empowered the Executive to make regulations. The section gives very wide powers to the Executive within that field. But it is obviously a valid exercise of the legislative power of the Commonwealth with respect to defence to vest the Executive, which has the duty of executing the defence power, with authority to make regulations within the field marked out by the section.

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

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

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

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

The application to make the order *nisi* absolute is, however, still before us, although in the argument the application for special leave was treated as the substantial matter. There is no decision of the Supreme Court of New South Wales on the question what it would do if an application to make absolute an order *nisi* for prohibition came before it after the conviction against which prohibition was sought had been confirmed by a Court of Quarter Sessions on appeal to it by the applicant. In

the High Court the application to make the order *nisi* absolute is an appeal against the applicant's conviction of the offence charged against him. It puts in controversy the issue whether or not the applicant was guilty of the offence. The Court of Quarter Sessions was, upon the applicant's appeal to it, seised of that question, and its order is an adjudication that the applicant was guilty. The issues raised by the application to make the order *nisi* absolute are the same as those concluded by the order of the Court of Quarter Sessions. The result which should follow from the refusal to give special leave to appeal against that order is that the concurrent appeal should be dismissed by discharging the order *nisi*.

Williams J.

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

I only desire to deal shortly with the fourth ground, namely, that there is no evidence of the charge laid. The appellant admitted that he had copies of the document referred to in the information in his possession in February 1940 with intent to endeavour to cause disaffection amongst soldiers of the Second Australian Imperial Forces, and there is sufficient evidence to show that this intention continued to exist on 25th June. When the police searched the appellant's office and home on that date, they found about fourteen copies of this document together with copies of another document entitled "This Imperialist War" and a mass of communist literature. The appellant said he believed that he had burnt all the copies of this document, but the learned judge was quite entitled to disbelieve him. The evidence showed the appellant was a joint author of the document, the terms of which plainly showed that it was intended for use in order to endeavour to cause such disaffection. He admits that he used it between the date of its composition in January and the end of February for this purpose.

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

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

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

With respect to the application to make the rule *nisi* for prohibition absolute the position is shortly as follows. The appellant was convicted by the stipendiary magistrate on 16th January 1941. On 6th February he applied to me for a rule *nisi* for a statutory prohibition under the [Justices Act 1902](#) (N.S.W.). The application was made within the time allowed by [sec. 112](#) of that Act. In the meantime the appellant had appealed to the Court of Quarter Sessions in accordance with [sec. 122](#) of the Act, so that, in view of the decision of this court in *R. v. Poole; Ex parte Henry*[\[34\]](#), I stood the application over until the appeal had been disposed of. The appellant did not withdraw the appeal but elected to prosecute it. As a result the order of the magistrate was confirmed on 21st March by the learned judge of Quarter Sessions. On the appellant renewing his previous application for the rule *nisi* on 28th March I made an order returnable before the Full Court on 2nd April. As a result of the conviction having been confirmed, the order which is now effective is that of the Court of Quarter Sessions (See [sec. 125](#)), and I agree that there is no longer any order of the magistrate in respect of which a prohibition can be granted.

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

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

Solicitors for the applicant, Glasheen & Co.

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

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

[1] [\[1938\] HCA 63; \(1938\) 61 C.L.R. 1.](#)

[2] [\[1931\] HCA 34; \(1931\) 46 C.L.R. 73.](#)

[3] [\(1923\) 17 Cr. App. R. 116.](#)

[4] [\(1918\) 87 L.J. K.B. 1024.](#)

[5] [\[1939\] HCA 32; \(1939\) 62 C.L.R. 573](#), at p. 589.

[6] [\[1931\] HCA 34; \(1931\) 46 C.L.R. 73.](#)

[7] [\[1917\] HCA 26; \(1917\) 23 C.L.R. 149.](#)

[8] [\[1920\] HCA 68; \(1920\) 28 C.L.R. 419](#), at p. 424.

[9] [\(1931\) 46 C.L.R.](#), at pp. 85, 87, 107.

[10] [\[1931\] HCA 33; \(1931\) 46 C.L.R. 329](#), at p. 338.

[11] [\[1932\] HCA 64; \(1932\) 48 C.L.R. 487](#), at pp. 506, 507.

[12] [\[1938\] HCA 44; \(1938\) 60 C.L.R. 601](#), at pp. 618, 619.

[13] [\(1939\) 62 C.L.R.](#), at pp. 583, 591, 592.

- [14] [\(1868\) 7 S.C.R. \(N.S.W.\) 344.](#)
- [15] (1899) 20 L.R. (N.S.W.) (L.) 353, at p. 356.
- [16] [\(1913\) 30 W.N. \(N.S.W.\) 70.](#)
- [17] [\(1912\) 29 W.N. \(N.S.W.\) 83.](#)
- [18] [\[1905\] HCA 22; \(1905\) 2 C.L.R. 593.](#)
- [19] [\(1912\) 29 W.N. \(N.S.W.\) 83.](#)
- [20] [\[1938\] HCA 63; \(1938\) 61 C.L.R. 1.](#)
- [21] (1911) V.L.R. 235.
- [22] [\[1938\] HCA 63; \(1938\) 61 C.L.R. 1.](#)
- [23] (1931) 46 C.L.R., at pp. 89-102.
- [24] (1931) 46 C.L.R., at pp. 94-96.
- [25] (1931) 46 C.L.R., at p. 101.
- [26] [\[1931\] HCA 34; \(1931\) 46 C.L.R. 73.](#)
- [27] [\[1917\] HCA 26; \(1917\) 23 C.L.R. 149.](#)
- [28] (1938) 61 C.L.R., at p. 6.
- [29] (1931) 46 C.L.R., at pp. 100, 101.
- [30] [\[1921\] HCA 25; \(1921\) 29 C.L.R. 329.](#)
- [31] [\[1931\] HCA 1; \(1931\) 44 C.L.R. 492.](#)
- [32] [\[1921\] HCA 25; \(1921\) 29 C.L.R. 329.](#)
- [33] (1931) 46 C.L.R., at p. 101.
- [34] [\[1938\] HCA 63; \(1938\) 61 C.L.R. 1.](#)

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