

THE COMMON LAW AND THE EXECUTION OF INSANE CRIMINALS¹

By J. D. FELTHAM*

'With which the King was greatly offended, and said that then he should be under the law—which was treason to affirm, as he said. To whom I said that Bracton saith quod Rex non debet esse sub homine, sed sub Deo et lege.'

Prohibitions del Roy (1608) 12 Coke Rep. 636-665.

The Events

On 8 December 1961, after a trial of five days in the Supreme Court of Victoria, one Tait was found guilty of the murder of an eighty-two year old woman. The trial judge, Dean J., passed sentence of death.² Tait did not deny that he was responsible for the woman's death and his defence rested upon a plea of insanity. Psychiatric evidence was called by both Tait and the Crown. The jury, directed as to the M'Naghten rules which govern the defence of insanity in the State of Victoria, by its verdict of guilty rejected this defence.

Tait appealed to the Victorian Court of Criminal Appeal and this appeal was dismissed on 22 February 1962.³ He then applied to the High Court of Australia for special leave to appeal and this application was rejected on 17 May 1962. Tait then remained in the condemned cell to await the decision whether the Governor, on the advice of the Executive Council, would exercise the royal prerogative of mercy in his case, or commute his sentence.⁴ In such matters it is the Victorian convention that the Governor, representing the Queen, should act on the advice of his Executive Council which in its turn reflects a deliberative decision by the Victorian Cabinet of responsible Ministers. On 6 August 1962 it was announced that the Executive Council declined to exercise the prerogative of mercy or commute and that 22 August was fixed as the date for execution.⁵

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¹ In the preparation of this article I am indebted for their advice and assistance to Professors D. P. Derham and P. Brett who appeared among the counsel for Tait on his criminal application. They made available to me their papers, from which much of the argument and history discussed below is drawn. I have also drawn heavily upon Burns, *The Tait Case* (M.U.P., 1962) to refresh my memory of the sequence of events. The Tait Case has already been discussed by Dr. Colin Howard, Howard, 'Time and the Judicial Process' (1963) 37 *Australian Law Journal* 39, and Howard, 'The Principle of Fair Trial' [1963] *Criminal Law Review* 603.

² Crimes Act 1958, s. 3.

³ *The Queen v. Tait* [1963] V.R. 520. This report gives considerable details of facts of the crime, the course of the trial and the personal history of Tait.

⁴ Crimes Act 1958, ss. 496, 497, 505.

⁵ Crimes Act 1958, s. 485.

The government in the fifteen previous cases of capital convictions since its assumption of office in 1955 had invariably recommended the commutation of the sentence, and its decision in the case of Tait led to an immediate reaction of agitation in the community against capital punishment. This reaction was directed both to the general value of capital punishment, and its expedience in the particular case of Tait.

On 13 August Cabinet agreed to allow and finance a further petition by Tait to the Judicial Committee of the Privy Council for leave to appeal against his conviction. As a consequence the execution date was postponed to 24 September, and then subsequently stayed for an unspecified time to allow hearing of the application to the Privy Council. On 2 October the Judicial Committee refused leave to appeal and the Executive Council on 28 September fixed 22 October as the date for Tait's execution.

In the meantime a serious concern had arisen among a smaller body of the public, including psychiatrists who had examined Tait before his original trial, as to his present mental condition and fitness for execution. This concern turned upon the alleged existence as part of the common law of Victoria of a rule forbidding the execution of an insane man. It was argued that while Tait had failed to establish that he was suffering from the degree of insanity at the time of his offence necessary to give him a defence under the severe M'Naghten rules, his mental condition was now such as to preclude his execution by virtue of the common law rule referred to above.

The Executive took the position that the fitness of Tait for execution was a matter to be decided by the Executive on the advice of prison psychiatrists retained by it. It was further announced that the advice of the Psychiatrist Superintendent of the prison in which Tait was confined, and of a consultant psychiatrist to the New South Wales Department of Justice called in for an independent opinion, was that Tait was at present sane in any relevant legal or medical sense. In view of these matters the Executive refused applications by Tait's legal advisers for access to Tait for the purpose of examination by psychiatrists nominated by them. The Executive also refused an application for an independent medical inquiry into Tait's mental condition.

In these circumstances Tait's advisers turned to the courts in an attempt to obtain a judicial inquiry into Tait's medical condition at that time, and to implement the alleged common law rule against the execution of an insane man. On 11 October an application by way of petition was made by one D. H. F. Scott to the Supreme Court of Victoria seeking from the Court in its lunacy jurisdiction an order that a Master of the Court be directed to inquire concern-

ing the alleged lunacy of Tait and that the inquiry be heard before a jury. The petition was supported by affidavits of two psychiatrists who had examined Tait before his original trial. They swore that as a result of those examinations they were of the opinion that Tait was insane at the time of the petition and a proper person to be taken charge of and detained under care and treatment. The application was opposed by the Crown. The application was heard by Gowans J., who on 15 October delivered judgment dismissing the petition.⁶

The argument for the petitioner can be seen from the two main questions held by Gowans J. to have arisen for his decision.

The first is the question as to whether there operates in Victoria a limitation upon the power of the State to execute a man condemned to death under sentence duly imposed for murder, and suggested to be insane, which recognises a right in the condemned man to obtain a suspension of execution of the penalty by some judicial process. The second is the question whether, assuming there is such a right enforceable by or on behalf of the condemned in such circumstances, a stranger can invoke the jurisdiction for the protection of lunatics inherited by this Court from the Lord Chancellors of England, to direct an inquiry to the existence or otherwise of the suggested insanity.⁷

In his judgment Gowans J. recognized the existence at common law of a limitation upon the power of the State to execute an insane person. He held that such a limitation was recognized and provided for in England by the Criminal Lunatics Act 1884, sections 2 (1), (4), and 3⁸, and in Victoria by the provisions of the Mental Hygiene Act

⁶ *Re Tait* [1963] V.R. 532.

⁷ *Ibid.* 533.

⁸ The Criminal Lunatics Act 1884, provides:

S. 2 (1) 'Where a prisoner is certified, in manner provided in this section, to be insane, a Secretary of State may if he thinks fit, by warrant direct such prisoner to be removed to the asylum named in the warrant, and thereupon such prisoner shall be removed to and received in such asylum, and, subject to the provisions of this Act relating to conditional discharge and otherwise, shall be detained therein, or in any other asylum to which he may be transferred in pursuance of this Act, as a criminal lunatic until he ceases to be a criminal lunatic.'

S. 2 (4) 'In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner; and they, or the majority of them, may certify in writing that he is insane.'

S.3 'Where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison, to be dealt with according to law.'

1958, section 69 (1) and (2).⁹ In his view, whatever may have been the precise operation of the rule at common law, it had merged in the provisions of section 69:

and there had not survived in Victoria from the time of their first enactment any right in the condemned man to obtain on a suggestion of insanity a suspension of the execution of the penalty by a judicial process. It is for the Executive, and the Executive alone, to act through the provisions of the Statute.¹⁰

Gowans J. went on to consider whether, assuming he was wrong in his answer to the first question, the lunacy jurisdiction might properly be invoked to obtain the necessary order for an inquiry. This jurisdiction is conferred upon the Supreme Court by section 16 of the Supreme Court Act 1958¹¹ and the machinery for the initiation and regulation of inquiries was provided for by section 111 of the Mental Hygiene Act 1958 and the Lunacy Rules 1916. Gowans J. held that the Court had a discretion to grant or refuse an inquiry upon a consideration of whether it was really necessary for the benefit of the lunatic, with reference to his mental health and his property. In this case Tait's person was in legal custody under sentence of death; he had no estate fit to be called by that name and moreover sections 550-551 of the Crimes Act 1958 made provision for the appointment of a curator of the property of a convicted person. Gowans J. did not consider an inquiry as to insanity could properly be ordered for the purpose of disposing of the custody of Tait's person in face of the provisions of section 69 of the Mental Hygiene Act 1958, which in his view entrusted both the decision as

⁹ See n. 5, *infra*.

¹⁰ [1963] V.R. 535.

¹¹ The Supreme Court Act 1958, provides:

S. 16 'The Court shall have equitable jurisdiction within Victoria and its dependencies, and such power and authority to do exercise and perform all acts matters and things necessary for the due execution of such equitable jurisdiction as was possessed by the Lord High Chancellor of England in the exercise of similar jurisdiction within the realm of England on or before the sixth day of January One thousand eight hundred and fifty-two (a); and also to do all such other acts matters and things as could and might be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging at or before such date, and to appoint guardians and committees of the persons and estates of infants and of natural-born fools lunatics and persons deprived of understanding and reason by the act of God and unable to govern themselves or their estates; and for that purpose to inquire into hear and determine by inspection of the person the subject of such inquiry, or by examination on oath or otherwise of the party in whose custody or charge such person is or of any other person or persons, or by such other ways and means by which the truth may be best discovered; and to act in all cases whatsoever as fully and amply to all intents and purposes as the said Lord High Chancellor or the grantee from the Crown of the persons and estates of infants and lunatics natural-born fools and persons deprived of understanding as aforesaid might lawfully have done at such date.'

'(a) This is the date of the commencement of the Act 15 Vict. No. 10.'

to his insanity and the direction as to his custody to the Chief Secretary.¹²

Scott, the petitioner, immediately lodged notice of appeal and on 17 October a hearing of the appeal before the Full Court of the Supreme Court¹³ commenced. While argument was still being heard in the latter appeal, on 19 October counsel appearing for Tait himself moved before Dean J., who conducted the original trial, that a judicial inquiry be conducted as to Tait's soundness of mind, and that execution of the sentence be stayed pending the result of that inquiry, or at least pending the determination of the application for such an inquiry and any appeals therefrom. Dean J. did not hear this application but considered it more convenient that he should refer it to the Full Court, then hearing Scott's appeal. In doing so, he purported to act under section 44 of the Supreme Court Act 1958.¹⁴

Again on 19 October at the request of the Full Court, the Executive Council deferred Tait's execution to a date to be fixed. Immediately upon the conclusion of argument in Scott's appeal in which judgment was reserved, the Full Court commenced to hear argument on Tait's application to Dean J. in the Court's criminal jurisdiction. This application was again based on the premises that the common law rule forbidding the execution of insane persons was part of the law of Victoria, and that a person under sentence of death and suggested to be insane had the right to a judicial inquiry and if insanity were established a suspension of execution by a judicial process. But it diverged from Scott's petition in the assumption that the appropriate machinery for enforcing such a right lay in the Supreme Court's criminal jurisdiction.

Counsel for Tait argued that the authority for execution was the Court's own order inherent in the judgment and sentence of Dean J., that the trial judge had the power to grant a reprieve or stay of execution and that it was mandatory for him to do so when a person sentenced to death was insane at the time fixed for his execution. Counsel contended that it was within the trial judge's power and appropriate, if a *prima facie* case of insanity was established, to order that a judicial inquiry into Tait's sanity be conducted. In support of the application reliance was placed upon the affidavits of

¹² His Honour considered this to be a necessary inference from *Re Pearce* (1843) 8 Jur. 89.

¹³ Lowe, Smith and Pape JJ.

¹⁴ The Supreme Court Act 1958 provides:

S. 44 'Subject to any Rules of Court, any Judge of the Court sitting in the exercise of its jurisdiction may at the request of one of the parties but (except the contrary is expressly enacted) not otherwise, reserve any case or any point in a case for the consideration of the Full Court, or direct any case or point in a case to be argued before the Full Court; and the Full Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.'

the two psychiatrists who examined Tait before his trial. They swore to their belief that Tait was and continued to be insane.¹⁵ The Crown again opposed this application, arguing that the common law rules no longer operated in Victoria. No evidence was filed by the Crown to contravert the affidavits filed on Tait's behalf. After hearing the argument the Full Court again reserved its judgment.

On 30 October at 10.30 a.m. the Full Court delivered judgment in both the Scott appeal¹⁶ and Tait's application reserved by Dean J.¹⁷ In the Scott appeal Lowe J. delivered the first judgment. As to the first of Gowans J.'s grounds for decision, that the common law rule had merged in the provisions of section 69 of the Mental Hygiene Act 1958, he stated that he would deal with this argument in his judgment on the Tait application. But he pointed out that there was no implication that the Chief Secretary was under any duty to exercise his powers under section 69. That section merely made lawful, action which apart from such authority, might be thought to constitute a trespass to the person. As to the propriety of invoking the Court's lunacy jurisdiction, Lowe J. upheld the judgment of Gowans J. He pointed out that the granting of a commission in lunacy is discretionary, the Court being governed by consideration of what is necessary for the protection of the person and property of the alleged lunatic. But there was no justification for the ordering of an inquiry as an end in itself, or in particular, to defer the execution of a felon under sentence of death. 'The object of the application—Tait—is in the custody of the law pursuant to the sentence of death imposed on him and there is no reason to suppose that either for the protection of his person or to protect others from his actions there is need to appoint a committee of his person.'¹⁸ His property was minimal and the Crimes Act¹⁹ provided power to take care of it. Thus the appointing of a committee would be futile and it was proper for the Court to refuse to order an inquiry the result of which would be futile.

The judgment of Pape J. travelled similar ground. It had been argued that Tait's person required protection from an allegedly illegal act of the Executive in carrying out the sentence of death, but Pape J. held that this was not the kind of protection which proceedings in lunacy were concerned to provide. 'The protection envisaged is that required for the protection of the alleged lunatic against himself, and is not directed to his protection against the carrying out of a sentence duly imposed by a competent court. . . .'²⁰ The appointing of a committee after a finding in lunacy would be

¹⁵ A more detailed consideration of their evidence will be made below.

¹⁶ *Re Tait* [1963] V.R. 532, 537.

¹⁷ *Tait v. The Queen* [1963] V.R. 547.

¹⁸ [1963] V.R. 539.

¹⁹ Crimes Act 1958, s. 551 *et seq.*

²⁰ [1963] V.R. 545.

futile. He did not consider that a modified form of order appointing a committee to make representations to the Executive could with propriety be made.

The judgment of Smith J. approached the matter on very different lines. He first held that the affidavits filed by the petitioner established a clear *prima facie* case of insanity. Nevertheless an inquiry would not be ordered unless it were shown to be necessary or expedient for the benefit or protection of the alleged lunatic either in matters affecting his personal safety, well being or happiness, or in relation to his property. The petitioner had argued that if an inquiry were ordered and insanity found, then the finding could be used as the basis for an application to implement the common law rule that an insane person should not be hanged, *i.e.* an application to the trial judge or to the Executive for commutation or to the Chief Secretary to act under section 69 of the Mental Hygiene Act. But Smith J. held that the only legitimate use of an inquiry in the lunacy jurisdiction was to provide a foundation for some further order in that jurisdiction. He recognized that the normal orders appointing committees of the estate or person were inappropriate in that the estate was minimal and custody of Tait's person must in any event remain with the Crown. But Smith J. considered that the Court in its lunacy jurisdiction could adapt its orders to the circumstances of each case, seeking to serve best the interests of the lunatic. He did not consider it beyond the Court's jurisdiction to appoint a committee by an order which directed that he should not interfere with the lawful control of Tait but authorized him to apply to the trial judge, the Executive or the Chief Secretary. However, Smith J. did not consider such elaborate procedures in the lunacy jurisdiction were necessary in order to enable Tait to make the applications in question. Tait might make such applications without any order from the Court. Thus Smith J. considered that no case had been made for an order in the lunacy jurisdiction and he concurred in dismissing the appeal.

The Court then turned to Tait's own application in the criminal jurisdiction. In this matter Lowe and Pape JJ. delivered a joint judgment. They commenced by considering the purported reference of the matter by Dean J. to the Full Court under section 44 of the Supreme Court Act 1958.²¹ They held that despite the unambiguous language of section 44 a series of binding authorities established that no appeal lay to the Full Court in criminal matters.²² Since the Court had no power to deal with a criminal matter by way of

²¹ See n. 14, *supra*.

²² *Re Thompson* (1893) 19 V.L.R. 286; *Re Marshall* (1901) 27 V.L.R. 816; *Re Medley* (1902) 28 V.L.R. 475; *The King v. Watt* [1912] V.L.R. 225; and *Williamson v. Director of Penal Services* [1959] V.R. 205.

appeal, neither could it deal with it by reservation under section 44. Section 34 (1) (e) of the Supreme Court Act 1958²³ was of no avail as no point had been reserved. Nor could it help for the Court to constitute itself a Full Court hearing criminal appeals under Part VI of the Crimes Act 1958 for such a Court hears only appeals. Thus it was necessary for the application to go back again to Dean J. to be heard according to law. While they recognized that the question at issue was now the responsibility of Dean J., all the judges of the Full Court nonetheless made known their opinions on the matters argued for such assistance as they might prove to the trial judge.

Lowe and Pape JJ. recognized that there was ample authority²⁴ (set out by Smith J. in his judgment on the Scott appeal) to establish that at common law even after a conviction for murder there remained a power in the court which ordered execution to withdraw the sentence for a period of time and thus to delay execution. It appeared that in the case of a convicted woman being pregnant and in the case of a convicted prisoner becoming *non compos* after judgment the judge was bound *ex necessitate legis* to grant a reprieve. It had been argued for Tait that these principles of common law had been introduced in Victoria by the legislative ancestor of section 15 of the Supreme Court Act 1958²⁵ and remained part of the law in the absence of any express provision removing them.

The Crown had argued that the provisions of the Crimes Act 1958 and its ancestors must be treated as a code which completely regulated trial, verdict, judgment and execution of judgment and that this code did not allow of any operation of reprieve outside its

²³ The Supreme Court Act 1958 provides:

S. 34 (1) 'The Full Court shall hear and determine . . . (e) all motions on points reserved whether civil or criminal.'

²⁴ *Coke Inst.* 4; Hale, *P.C.*, i. 34-35; Hawkins, *P.C.*, i. ch. 1 ss. 3 and 4 (8th ed.); Blackstone *Commentaries*, 388-389; Chitty, *Criminal Law* (2nd Ed.), 761; 8th *Report of the Commissioners on Criminal Law* (1845) c. IX s. 5; Stephen's *Commentaries*, (3rd ed.), 508-510; (21st ed.) 18, 286; Kenny (17th ed.) 84, 588; Russell, (11th ed.) 110; Archbold, (34th ed.) 221; *Solesbee v. Balkcom* (1949) 339 U.S. 9; 94 Law Ed. 604, *per* Frankfurter J. (dissenting).

²⁵ The Supreme Court Act 1958, provides:

S. 15 '(1) The Court shall have cognisance of all pleas civil criminal or mixed, and (subject to any enactment now in force to the contrary) shall have jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in Victoria and its dependencies as the Courts of Queen's Bench Common Pleas and Exchequer at Westminster or any of them had by the common law in England at or previously to the commencement of the Act No. 502; (a) and the Judges of the Court shall (subject as aforesaid) have and exercise such and the like jurisdiction and authority in Victoria as the Judges of the Courts of Queen's Bench Common Pleas and Exchequer in England or any of them had and exercised by the common law before such date and as shall be necessary for carrying into effect the several jurisdictions powers and authorities committed to the Court, and such Court and the Judges thereof shall also continue to have and exercise all powers jurisdiction and authority conferred upon them by any enactment in force after the commencement of the said Act.'

'(a) The Act No. 502 came into operation on 4 January 1875.' The English *Judicature Act* 1873 did not come into operation until 1 November 1875.

provisions. Against this it had been argued for Tait that this Act was the most recent of a series of consolidations of the statutory provisions relating to crimes²⁶ and that the history of each of the sections relating to the sentence for murder and its execution²⁷ showed that it had been enacted for reasons quite unconnected with the common law power to reprieve.

Lowe and Pape JJ. adopted as their guide for the interpretation of a consolidating statute a statement by Isaacs, Gavan Duffy and Rich JJ. in a joint judgment in *Maybury v. Plowman*,²⁸ which is in similar terms to statement by Isaacs J. in other cases.²⁹ This statement runs:

... We attach no importance in the present case to the fact that the *Crimes Act* is a consolidation. It takes effect from the day it passed, and its true construction depends on its language as applied to the subject matter considered as at that date: See *Bennett v. Minister for Public Works (N.S.W.)*.³⁰ In *Administrator of Bengal v. Prem Lal Mullick*,³¹ Lord Watson for the Judicial Committee, said: 'The respondent maintained this singular proposition, that, in dealing with a consolidating Statute, each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed'.³²

It seems apparent that reliance is thus placed by Lowe and Pape JJ. on Lord Watson's words in *Bengal v. Prem Lal Mullick* to rebut the argument for Tait that the history of the particular sections consolidated in the Crimes Act should be examined to discover whether by implication they abolished the common law as to reprieves for insanity.

Lowe and Pape JJ. then turned to the Crimes Act 1958, to consider whether it on its face had by express words or necessary implication superseded the common law rules. They held that the various Parts of that Act were intended to cover the whole field to which they applied and left no room for the common law to operate in addition. Thus Part III of the Act dealing with procedure and punishment was held to be a code intended to cover the whole field. They considered 'that, in the absence of any provision preserving

²⁶ Crimes Act 1958, No. 6231, Crimes Act 1957, No. 6103, Crimes Act 1928, No. 3664, Crimes Act 1915, No. 2637, Crimes Act 1890, No. 1079, Criminal Law and Practice Statute 1864, No. 233.

²⁷ In particular ss. 3, 472, 485 and 505. ²⁸ (1913) 16 C.L.R. 468.

²⁹ *Bennett v. Minister of Public Works (N.S.W.)* (1908) 7 C.L.R. 372, 382; *Attorney-General (N.S.W.) v. Hill* (1923) 32 C.L.R. 112. ³⁰ (1908) 7 C.L.R. 372, 382.

³¹ L.R. 22 I.A. 116. ³² [1903] V.R. 551.

the operation of the common law, the relevant law in relation to crimes so far as the Act deals with the matter either expressly or by necessary implication is that contained in the Crimes Act, supplemented possibly by other statutory provisions.' They summarised the provisions of sections 3, 472, 474, 496 and 505 of the Act and held that, insofar as it was necessary to go beyond the sections to understand their meaning, the warrant for doing so was in the sections themselves and not by a resort to the common law. They pointed to the express power to reprieve given by sections 474, 446 and 572. They showed that while section 505 expressly preserves the royal prerogative of mercy, there is no general provision for the saving of the common law so far as not inconsistent with the Act. They concluded that the common law as to reprieves for insanity after judgment which was not mentioned by the Act no longer operated in Victoria, pointing out that no Victorian precedent for such an application could be found.

The joint judgment considered it significant that the Atkin Committee of 1922 in its report³³ on the defence of insanity in criminal trials in England treated the judicial functions as ceasing on verdict and sentence. The judgment concluded with a rather polemical reference to the undesirability of procedures which allow a delay in the execution of sentence.

Smith J. delivered a vigorous dissent from the opinion of the majority. He first examined the common law power of a court to reprieve after sentence of death was pronounced, *i.e.* 'to suspend the operation of the sentence pronounced so that it ceased temporarily to be an authority which could be acted upon'.³⁴ He held that:

where a prisoner who had been sentenced to death was alleged to be insane the judge might swear a jury to determine the question and if they found the offender to be insane or the fact were otherwise established to the judge's satisfaction the offender could not be executed before recovery and accordingly the judge was bound to grant a reprieve to the ensuing session.³⁵

He found that the evidence before the court made out a clear *prima facie* case of insanity.

He pointed out that the common law jurisdiction relating to reprieves was vested in the Supreme Court upon its original establishment.³⁶ He then dealt with the argument of the majority judg-

³³ Cmd 2005, Appendix IV to 'The Trial of Ronald True' in the Notable British Trials Series.

³⁴ [1963] V.R. 554.

³⁵ *Ibid* 544-5, relying upon Chitty, Criminal Law (2nd Ed.), Ch. 19; 8th Report of Commissioners on Criminal Law, chapter IX, section 5; Stephen's Commentaries (21st Ed.), iv, 18, 286.

³⁶ Comparing Supreme Court Act 1958, ss. 15, 20 and 23; Judicature Act 1883, Act 761, ss. 4, 6 and 38; Judicature Act 1874, Act 502, ss. 2 and 9; Supreme Court (Constitution) Act 1852, Act 15 Vict. No. 10, s. 11.

ment that Part III of the Crimes Act constituted a code which excluded all rules of the common law not expressly saved. In the view of Smith J. the Act assumed the existence of the general body of the common law relating to crime and punishment and was not intended to occupy the whole field. He asked cogently:

If it were otherwise where, it may be asked, would one find the rules dealing with such matters as the demand to be made of the prisoner before he is sentenced, the form of capital sentence for crimes other than murder, the necessity for the prisoner to be present, what is to be done if the prisoner pleads non-identity, what form of authority is necessary to justify the carrying into execution of a sentence, and who is responsible for the custody of a prisoner after sentence and what is the extent of his duties to the Crown and to the prisoner?³⁷

He next considered an argument that sections 3, 472, 485 and 505 of the Crimes Act 1958, and section 58 of the Juries Act 1958, when read in conjunction showed an intention to exclude entirely the common law power to reprieve. He dealt with this argument by examining the history of each of those sections to find whether when first enacted any of them showed any intention to exclude the common law rules governing reprieves on the ground of insanity. After an examination of their history, which will be considered in detail below, he concluded that none of them expressly or by implication said anything to exclude the common law power to reprieve on the ground of insanity.

Smith J. turned to the argument accepted by Gowans J. that the common law power had been completely abolished by section 69 of the Mental Hygiene Act 1958, or its ancestors. He considered that this purely permissive section merely gave statutory authority for the removal of insane persons from gaols to more appropriate places of detention, 'such removal being something which, in the absence of lawful warrant, would have involved a contravention of the Habeas Corpus Act of 31 Car. 2, C.2 section 8'.³⁸ He pointed out that in England, where the comparable statutory provision is not merely permissive but casts a duty on a Secretary of State, the general view is that the common law power to reprieve remains unaffected.³⁹

He turned to certain policy arguments raised by the Crown in support of its argument on construction. He considered that the power to reprieve was limited to capital cases and could not be used to terminate sentences of imprisonment. He did not consider the power would lead to repeated applications and postponements of execution, pointing to the experience when the power was in use in England and today in South Australia. It had been argued that

³⁷ [1963] V.R. 555. ³⁸ [1963] V.R. 558.

³⁹ Stephen's Commentaries (21st ed.), iv, 18, 286; Russell (11th ed.), 110; Kenny (17th ed.), 84, 588; Archbold (34th ed.), 221.

exercise of the power would lead to a head on collision between judicial and executive power. But Smith J. pointed out that the executive had no power to order that an offender sentenced to death should hang; execution depended on the court's order by way of sentence of death. The executive's only powers were to pardon or commute or to supplement an existing sentence by fixing a time and place for execution. The court and the executive might form different views of the facts in deciding whether to exercise their powers but there could be no conflict of power.

Smith J., holding that the common law jurisdiction was still exercisable by the Supreme Court, went on to consider whether it was proper to exercise it in this particular case. It was argued by the Crown that the jurisdiction was exercisable only where insanity arose after judgment, and in this case the affidavits testified that Tait was certifiably insane from a time prior to his trial. Smith J. considered that the rule was often stated in a form which suggested that it dealt with insanity arising after judgment. But he could not believe that, if a court was satisfied of insanity, it would decline to reprieve merely because insanity existed before judgment. There was no ground for such a distinction.

The Crown also argued that, because the jury rejected Tait's defence of insanity and no suggestion had been made of unfitness to plead, Tait was estopped from now contending that he was insane. But Smith J. pointed out that there could be no estoppel as to Tait's present mental condition and that in any event the insanity which entitled an offender to a reprieve was not confined to the forms of legal insanity required to establish a defence to the charge or unfitness to plead. This led him also to reject the Crown's argument that the insanity requisite to bring the common law rule into operation was the kind of obvious frenzy or imbecility which would have been recognized in Coke's time. Smith J. considered that the jurisdiction could not be confined by difficulties of proof which no longer existed and pointed out that the rule that the trial judge could call in aid a jury showed that the jurisdiction was not confined to cases of obvious insanity. On the evidence before the Court, Smith J. concluded:

that a case has been made out requiring an exercise by the Court of the common law jurisdiction to reprieve, at least to the extent necessary to enable Tait's condition to be investigated by or on behalf of the Court.⁴⁰

Finally Smith J. concurred with Lowe and Pape JJ. that the purported reference under section 44 of the Supreme Court Act was

⁴⁰ [1963] V.R. 560.

invalid. He found this not by virtue of the authorities cited by the majority, but on an examination of the history of the legislation. Section 44 originated in section 25 of the Judicature Act 1883, (No. 761). Section 38 of that Act provided that subject to the Second Schedule thereto and any Rules of Court the practice and procedure in all criminal causes and matters whatsoever in the court, including the practice and procedure with respect to Crown Cases Reserved, should be the same as the practice and procedure in similar causes and matters before the commencement of the Act. In the view of Smith J. the general language of section 25 was qualified by section 38 and rendered inapplicable to criminal proceedings.

Thus after the judgments of the Full Court were delivered on the morning of 30 October, it was necessary for Tait's application in the criminal jurisdiction to go back to the trial judge, Dean J. for hearing. Lowe J. indicated that Dean J. would hear it at 10.30 a.m. the next morning. Meanwhile, Scott prepared to seek special leave to appeal from the judgment of the Full Court from the High Court of Australia.

But at 3.30 p.m. in the afternoon of 30 October it was announced that the Executive Council had fixed 8 a.m. on 1 November as the time and date for the execution of Tait. This action while legal proceedings were still taking place injected further high drama into the affair. It also revealed an amazing disregard by the Executive for the usual conventions regulating the relations of the Judiciary and the Executive. At the request of Tait's counsel Dean J. announced that he would hear the criminal application in the evening of 30 October. At the same time Scott's solicitors filed a notice of motion for special leave to appeal with the High Court Registrar and were told that the High Court (not then sitting in Melbourne) would convene in Melbourne to hear that application at 10.30 a.m. on 31 October.

Before Dean J., on the evening of 30 October, the arguments to the Full Court were recapitulated with dispatch and at 10.20 p.m. Dean J. delivered judgment.⁴¹ He commenced by expressing his embarrassment at having to decide a novel problem of criminal law under the present circumstances without 'the opportunity of reserving my decision and giving full consideration to these important questions of law, such as they deserve'.⁴² However he dismissed Tait's application on three grounds. First on the question whether the provisions of the Crimes Act excluded the old common law power of a court to reprieve on the ground of insanity, he decided to follow the judgment of Lowe and Pape JJ. In particular Dean J. relied upon section 485 of the Crimes Act as taking the power to reprieve out of

⁴¹ *Tait v. The Queen* [1963] V.R. 561.

⁴² *Ibid.*

the hands of the court and leaving it in the control of the executive. He did not consider that undue regard should be paid to the history by which the section came to its present form. Secondly, Dean J. considered that section 69 of the Mental Hygiene Act had taken away the common law power. He considered that the power of the Chief Secretary under that section was inconsistent with the continued existence of any power whereby the court or a judge could from time to time grant reprieves in the same circumstances, *i.e.* the insanity of a man under sentence of death. Finally Dean J. held that even if he had the common law power, he would not in his discretion exercise it in this case. Dean J. took into account the demeanour of Tait at his trial which led him to believe 'that by any definition of insanity which would be used in ordinary speech the accused was not insane at the time of trial'.⁴³ However, some of Dean J's observations, *e.g.* 'He did not roll around as one would expect if he was not in full possession of his faculties',⁴⁴ and his reference to the remarks of Dixon J. (as he then was) in *The King v. Porter*,⁴⁵ may lead one to wonder whether Dean J. was not applying a standard at least as severe as the M'Naghten rules. In any event Dean J. was not satisfied by the uncontroverted medical evidence and held that no case was made out of insanity at the present time.

Upon the dismissal of the criminal application Tait's solicitors also lodged with the High Court notice of motion for special leave to appeal against the judgment of Dean J. At 10.30 a.m. on 31 October, less than twenty-four hours before the time fixed for execution, the High Court of Australia⁴⁶ sat to hear the applications by counsel for Scott and Tait. Counsel in both cases moved preliminary applications for an adjournment of proceedings and a stay of the execution of Tait. The grounds were the absence of a proper opportunity for counsel to submit a fully prepared argument and secondly the impossibility in the circumstances of the High Court hearing a calm and dispassionate argument and of its reserving its judgment if it desired to do so. Even if the High Court had a clear view against the applicants, it was submitted that the public impression would remain that they had been 'bundled through the High Court to keep an appointment with the hangman'. It was submitted, adopting an observation of Dixon C.J., that the High Court had an inherent power, incidental to its power to grant special leave to appeal in criminal cases, to grant a stay of execution in order to preserve the subject matter of the appeal, Tait, pending a decision. The Crown opposed the applications for an adjournment

⁴³ *Ibid.* 563,

⁴⁴ *Ibid.*

⁴⁵ (1936) 55 C.L.R. 182, 187.

⁴⁶ Dixon C.J., Kitto, Taylor, Menzies and Owen JJ. The High Court proceedings are reported *sub. nom. Scott v. The Chief Secretary of the State of Victoria; Tait v. The Queen* (1962-1963) 36 A.L.J.R. 330; (1962) 108 C.L.R. 620.

and a stay of execution on the ground that it was essential in the public interest that the matter should be finalised. After hearing argument on the preliminary applications, the Court rose for twenty minutes to consider them. Upon the resumption of the Court at 12.17 p.m. Dixon C.J. announced,

We are prepared to grant an adjournment of these applications without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so that the authority of this court may be maintained and we may have another opportunity of considering it. We shall accordingly order that the execution of the prisoner fixed for tomorrow morning be not carried out but be stayed pending the disposal of the applications to this court for special leave and of any appeal to this court in consequence of such applications.⁴⁷

After discussion with the Solicitor-General appearing for the Crown as to his difficulties in giving an immediate undertaking without instructions that the order would be obeyed, the Court added to the order: 'We will order that the Chief Secretary and the Sheriff and his deputy or deputies be restrained accordingly.' The court then adjourned the hearing of the applications to 6 November at Sydney.

On 5 November it was announced that the Executive had commuted Tait's sentence to one of imprisonment for life. It was further announced that certificates had been issued under the Mental Health Act 1959 that his mental health had been substantially impaired and that he had been committed to a mental hospital. Herein a new complication entered the matter for at midnight on 31 October, the night before the morning fixed for Tait's execution, a new Act to consolidate and amend the law relating to mental health, the Mental Health Act 1959, came into operation, repealing the provisions of the Mental Hygiene Act 1958. Section 52 of the new Act,⁴⁸ replacing section 69 of the Mental Health Act 1958, was

⁴⁷ (1962) 108 C.L.R. 624.

⁴⁸ The Mental Health Act 1959 provides:

S. 3 'In this Act unless inconsistent with the context or subject-matter—

"Intellectually defective" means to be suffering from an arrested or incomplete development of mind.

"Mentally ill" means to be suffering from a psychiatric or other illness which substantially impairs mental health. . . .'

S. 52 '(1) If any person while lawfully imprisoned or detained in any gaol or other place of confinement appears to be mentally ill or intellectually defective it shall be lawful for the Chief Secretary upon receipt of certificates in the prescribed form from two medical practitioners to direct by duplicate order under his hand that such person shall be removed as a security patient to some State institution as the Chief Secretary thinks proper and appoints.

(2) Every person so removed whether before or after the commencement of this Act as a security patient shall be detained in some State institution until it is certified either by the chief medical officer alone or by the superintendent of such institution and some other medical practitioner that such person no longer need be treated in an institution, whereupon the Chief Secretary shall if such person

expressed in terms broader and more generous to the subject than its predecessor, e.g. the word 'insane' was replaced by 'mentally ill or intellectually defective'.

When the High Court resumed the hearing of the applications for special leave on 6 November, the question arose whether the Executive had simply acted under section 52 of the Mental Health Act 1959, which might involve Tait being returned for execution if he regained sanity. The Crown announced that the sentence of death had also been commuted to life imprisonment pursuant to sections 496 and 497 of the Crimes Act 1958.⁴⁹ The Court then announced that if Tait was not to be executed, it would dismiss the applications for special leave to appeal since the questions of law involved would become purely hypothetical. It adjourned the applications until it was satisfied that the final steps in commutation required by section 497 were taken and then dismissed the applications without expressing any opinion on the matters of law involved.

The Criminal Application

In view of the division of opinion in the Full Court it is proposed to review the arguments whether the common law rules establishing the power of the courts to grant a judicial inquiry into the sanity of a prisoner under capital sentence and to reprieve him if insanity be proved are still operative as part of the law of the State of Victoria.

remains subject to be continued in custody issue his order in duplicate to the superintendent of such institution directing that such person be discharged from the institution and removed to the gaol or other place whence he had been taken or to some other gaol or place of confinement to be dealt with according to law or if under sentence of death to undergo such sentence or if such person does not remain subject to be continued in custody the Chief Secretary shall direct that he be discharged and he shall be discharged accordingly.'

⁴⁹ The Crimes Act 1958 provides:

S. 496 'The Governor, in all cases in which he is authorized on behalf of Her Majesty to extend mercy to any offender under sentence or judgment of death, may extend mercy on condition of such offender being imprisoned or imprisoned and kept to hard labour or being detained and kept to hard labour as herein provided on public works for life or for such term as he thinks fit and may also if he thinks fit fix a minimum term during which the offender shall not be eligible to be released on parole; and also may direct that such offender shall be kept in solitary confinement for any portion of such time or term not other than or more than those for which solitary confinement may be awarded under this Act; and in every such case the Governor may if he sees fit exercise in addition in respect of such person the powers vested in the court by section four hundred and seventy-seven and the word "sentence" in the said section shall for this purpose mean the direction given by the Governor in that behalf.'

S. 497 'Such extension of mercy shall be signified by the Chief Secretary to any judge of the Supreme Court, who shall thereupon allow such offender the benefit of a conditional pardon and make an order that such offender be dealt with according to the tenor and condition of such pardon; and such allowance or order shall be considered as and have the effect of a valid sentence made and passed by the court before which such offender was convicted, and shall be entered on the records of the court accordingly.'

It was accepted by all members of the Full Court that the authorities referred to above establish the existence of a common law rule that an insane person should not be executed and that the tribunal which ordered execution by its sentence of death was bound, if insanity was established, to grant a reprieve or stay of execution of sentence until the ensuing session. The Report of the Criminal Law Commissioners (1845) in Chapter IX, section 5, article 10, puts it thus: 'Where an offender becomes insane after judgment pronounced against him, execution against him is to be respited; provided the fact be found by means of an *ex officio* inquiry by jury, or otherwise sufficiently appear.' The obvious implication of this passage is that the trial judge, if a *prima facie* case of insanity is made out to him, is entitled to order a judicial inquiry into the existence of the alleged insanity.

It was conceded by the Crown and accepted by all the judges of the Full Court that this common law jurisdiction to reprieve was vested in the Supreme Court upon its original establishment. Smith J. gathered the relevant legislation: Act 15 Vict. No. 10, section 11; Act 502, sections 2 and 9; Act 761, sections 4, 6 and 38; Supreme Court Act 1958, sections 15, 22 and 23.⁵⁰

⁵⁰ Act 15 Vict. No. 10, The Supreme Court (Constitution) Act 1852, which established the Supreme Court of Victoria provided s. 11, 'that the said court shall have jurisdiction to enquire of, hear and determine within the said Colony of Victoria and its dependencies, all treasons, felonies, misdemeanours, and offences of what nature or kind soever, and wheresoever committed, which can or may be enquired of, heard and determined in Her Majesty's Court of Queen's Bench at Westminster or in the Central Criminal Court in London.'

In Act 502, the Judicature Act 1874, an Act reorganizing, *inter alia*, the administration of criminal justice, there appeared in s. 2 for the first time the equivalent of s. 15 (1) of the Supreme Court Act 1958. S. 9 provided: 'In and for the central bailiwick there shall be a court to be called "The Central Criminal Court" and in and for every other bailiwick there shall be a court to be called a Court of Assize; and such courts respectively shall have jurisdiction in and throughout the bailiwick in and for which they are respectively held and they shall be courts of oyer and terminer and gaol delivery, and shall proceed in the like form and manner as courts of oyer and terminer and of assize in England, and shall stand in the same relation to the Supreme Court as such last-mentioned courts were and stood in relation to the Court of Queen's Bench at Westminster at the commencement of this present session of Parliament.'

In Act 761, the Judicature Act 1883, s. 4 transferred to the Supreme Court the jurisdiction vested in or capable of being exercised by the Central Criminal Court or by any Court of Assize.

In s. 38 there appeared the provision which is the ancestor of s. 23 of the Supreme Court Act 1958.

The Supreme Court Act 1958 provides:

S. 15 (1) 'The Court shall have cognisance of all pleas civil criminal or mixed, and (subject to any enactment now in force to the contrary) shall have jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in Victoria and its dependencies as the Courts of Queen's Bench Common Pleas and Exchequer at Westminster or any of them had by the common law in England at or previously to the commencement of the Act No. 502; (a) and the Judges of the Court shall (subject as aforesaid) have and exercise such and the like jurisdiction and authority in Victoria as the Judges of the Courts of Queen's Bench Common Pleas and Exchequer in England or any of them had and exercised by the common law before such date and as shall be necessary for carrying into

The central question then arises. Have the common law rules and jurisdiction been abrogated by statute in Victoria? If so, by what statute and when? The Crown suggested several answers, (a) Part III of the Crimes Act 1958, as a comprehensive code covering the field of criminal procedure and punishment, (b) particular sections in that Act and other legislation or their legislative ancestors,⁵¹ and (c) section 69 of the Mental Hygiene Act 1958, or its legislative ancestor.

The judgment of Lowe and Pape JJ. appears to have accepted answer (a). But this conclusion is not easy to accept. No doubt 'the relevant law in relation to crimes *so far as the Act deals with the matter either expressly or by necessary implication* is that contained in the Crimes Act. . . .'⁵² But since the Act does not expressly mention our common law rule, is it a necessary implication that it has been abrogated? How can the majority approach be reconciled with their own statement: 'This is not to say that where the Act makes no provision, *e.g.* for the crime of creating a public mischief or misprision of felony, the common law cannot be called in aid?'⁵³ The approach is scarcely consistent with the statement of the Full Court⁵⁴ in *The Queen v. Cox*⁵⁵ that a court of general sessions has an inherent power to adjourn a hearing when a matter comes before it. The attention of the Court was drawn in that case to the provisions of section 360 of the Crimes Act 1958, (appearing in Part III of the Act). This section confers upon a Court of General Sessions the power at any stage of the proceedings whenever it is so provided in

effect the several jurisdictions powers and authorities committed to the Court, and such Court and the Judges thereof shall also continue to have and exercise all powers jurisdiction and authority conferred upon them by any enactment in force after the commencement of the said Act.'

(a) The Act No. 502 came into operation on 4 January 1875. The English *Judicature Act* 1873 did not come into operation until 1 November 1875.

S. 20 'Save as by this Act or by any Rules of Court otherwise provided, all forms and methods of procedure which before the commencement of *The Judicature Act* 1883 were in force in the Central Criminal Court or in Courts of Assize or in the Court of the Chief Judge of Courts of Mines under or by virtue of any law general order or rules whatsoever, and which are not inconsistent with this Act or with any Rules of Court, may continue to be used and practised in the Court in such and the like cases and for such and the like purposes as those to which they would have been applicable if *The Judicature Act* 1883 had not been passed.'

S. 23 Subject to any express enactment to the contrary and to any Rules of Court made or for the time being in force the practice and procedure in all criminal causes and matters whatsoever in the Court, shall be the same as the practice and procedure in similar causes and matters before the first day of July One thousand eight hundred and eighty-four: Provided that writs of error and the powers and practice existing in the Supreme Court prior to the commencement of the *Criminal Appeal Act* 1914 in respect of motions for new trials or the granting thereof in criminal cases shall except so far as the contrary is expressly enacted be deemed by that Act to have been abolished.'

⁵¹ In particular ss. 3, 472, 485 and 505 of the Crimes Act 1958, and s. 58 of the Juries Act 1958.

⁵² [1963] V.R. 552 (author's italics).

⁵³ [1963] V.R. 552, cf. *The King v. Kataja* [1943] V.L.R. 145; *The Queen v. Crimmins* [1959] V.R. 270.

⁵⁴ Herring C.J., Lowe and Little JJ.

⁵⁵ [1960] V.R. 665, 667.

the Act or whenever otherwise in the interest of justice it is expedient to do so, to direct that the trial shall be postponed. The Court stated;⁵⁶ 'Nor do we think that this power' (the inherent power to adjourn) 'is affected by the enabling provision of section 360 of the Crimes Act 1958. . . .'

The 'covering the field' approach is the more difficult to accept in the face of the matters of procedure and punishment listed by Smith J.,⁵⁷ in which common law rules unrecognized by the Crimes Act operate in the everyday practice and procedure of the Supreme Court in criminal matters. The majority approach would lead to the conclusion that there is little difference in principle between the proper approach to the construction of the consolidating Crimes Acts of Victoria, New South Wales,⁵⁸ South Australia,⁵⁹ and that appropriate to the comprehensive Criminal Codes of Queensland, Western Australia and Tasmania.⁶⁰

It is submitted that the Crimes Act 1958, is a consolidation in the traditional sense of that word and not a code. In other words, it is an Act intended by Parliament to gather together for convenience of reference a variety of statutory enactments passed at a multitude of different times and for a multitude of different purposes but engrafted upon the common law and intended to exist side by side with it. It does not purport to set out the whole of the Victorian criminal law in the manner requisite for the existence of a true code.⁶¹ Is this not demonstrated by the way in which the Act deals with a multitude of crimes, for example, murder⁶² and rape,⁶³ by merely stating that whosoever is convicted of such a crime shall be liable to a defined penalty? The definition of the offence and the possible defences are left to the operation of the common law.

It is submitted that the proper approach to the construction of such a consolidating Act is that followed by the High Court of Australia in *Nolan v. Clifford*.⁶⁴ In that case the question at issue was whether the words 'any such crime' in section 352 (2) (a)⁶⁵ of

⁵⁶ *Ibid.* ⁵⁷ [1963] V.R. 555. ⁵⁸ Crimes Act 1900 (N.S.W.).

⁵⁹ Criminal Law Consolidation Act 1935 (S.A.).

⁶⁰ Compare the approach of Barry, Paton and Sawyer: *An Introduction to the Criminal Law in Australia*, 1948 (1st ed.).

⁶¹ Cf. the Bills of Exchange Act 1909-1958 (Cth.) and the Goods Act 1958 (Vic.).

⁶² Crimes Act 1958, s. 3. ⁶³ *Ibid.* s. 44. ⁶⁴ (1904) 1 C.L.R. 429.

⁶⁵ The Crimes Act 1900 (N.S.W.) provides:

S.352 (1) 'Any constable or other person may without warrant apprehend,

(a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,

(b) any person who has committed a felony for which he was not been tried, and take him, and any property found upon him, before a Justice to be dealt with according to law.

(2) Any constable may without warrant apprehend,

(a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,

the Crimes Act 1900 (N.S.W.), a consolidating act, referred to the antecedent 'a felony' or to all the offences mentioned in section 352 (1) (a) and (b). All three judges approached the question by examining the common law as to the power of a constable to arrest without warrant a person whom he suspected on reasonable grounds of having committed a crime. They held that at common law this power was confined to the case of felonies. They then considered the alterations to the common law made by earlier statutes and held that they did not confer a power to arrest on reasonable suspicion for a misdemeanour, unless a warrant had been issued, nor for any offence punishable on summary conviction. Griffith C.J. continued:

That being the state of the law, . . . the law was consolidated in 1900. This is described as an Act to consolidate the Statutes relating to Criminal Law. There is nothing to indicate that the legislature intended to make any substantial alteration in the law. It is entitled an Act to consolidate the Statutes. There is nothing to suggest that they intended to make an important alteration in the common law on a matter materially affecting the liberty of the subject. If, notwithstanding that, the Act did contain provisions which could only bear one construction, we should, as pointed out in another case, be obliged to give effect to the plain words of the statute; but, *prima facie*, there is nothing indicating that this Act was intended to make an important alteration in the common law on a point affecting the liberty of the subject.⁶⁶

Thus approaching the statute, Griffith C.J. concluded:

It might be that, if I were left to my own speculations as to what the framers intended, I should come to a different conclusion, but, applying judicial rules of interpretation, I cannot do otherwise than hold that the common law with regard to arrest upon suspicion for offences other than felony has not been altered by the section.⁶⁷

Barton and O'Connor JJ. approached the statute on the same lines and came to the same conclusion. Barton J. observed:

If it is true that very clear terms are necessary to take away common law rights, then the necessity for such terms must become all the stronger when the general intention of the Act is merely to repeal and re-enact existing provisions.⁶⁸

There appears no ground for making any differentiation between the nature of the Crimes Act 1900 (N.S.W.), and the Crimes Act 1958 (Vic.) in respect of their status as consolidating acts. Both presuppose the continued existence of wide areas of the common law

(b) any person lying, or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony, and take him, and any property found upon him, before a Justice to be dealt with according to law.²

⁶⁶ (1904) 1 C.L.R. 447.

⁶⁷ *Ibid.* 447-448.

⁶⁸ *Ibid.* 450.

as to crimes. But a clear differentiation can be made between them and a true code such as the Bills of Exchange Act, which, like Athena, springs fully grown from its parent legislature. The true code is intended by the legislature to place in statutory form at the one time all the pre-existing law on a given subject, common law or statutory law. It is of the true code that Lord Herschell's well-known canon of interpretation in *Bank of England v. Vagliano Bros.*⁶⁹ was laid down and to the true code it must surely be confined. The origins of the many sections of the Crimes Act 1958, show that it was not conceived by the legislature *uno ictu* as such a code intended to embody the whole criminal law. Unless this differentiation of a true code and a consolidation is misconceived, and the High Court far astray in *Nolan v. Clifford*, the approach of Lowe and Pape JJ. to the Crimes Act cannot be sustained.

It has thus been argued that, in order to decide whether the common law rules as to reprieves for insanity have been impliedly abrogated by provisions contained in a consolidating Act, it is necessary to follow the approach of *Nolan v. Clifford*, to consider the common law, to consider the effect of the various statutory provisions now contained in the Crimes Act at the time each was first enacted, and finally to consider the effect of these provisions as gathered together in successive consolidations. It is only if there can be found at one of those stages a plain intention by the legislature to abrogate the common law rules that such a conclusion should be reached.

With these considerations in mind it is necessary to consider suggestion (b) of the Crown that particular sections in the Crimes Act and other legislation⁷⁰ or their legislative ancestors when read in conjunction abrogated the common law rules.

This answer seems also inherent in the judgment of Lowe and Pape JJ. and was certainly accepted by Dean J. in his remarks on section 485 of the Crimes Act. It was argued for Tait and accepted

⁶⁹ [1891] A.C. 107 144-145. Lord Herschell said: ' . . . I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, . . . '

⁷⁰ Ss. 3, 472, 485 and 505 of the Crimes Act 1958, and s. 58 of the Juries Act 1958.

by Smith J. that no one of those sections when first enacted, and no combination of them in subsequent consolidations, revealed any intention of the legislature to abrogate the common law rules.

Section 3 of the Crimes Act 1958⁷¹ may be traced back through earlier consolidations to its first appearance in Victorian legislation as section 3 of the Criminal Law and Practice Statute 1864, and its language originated in section 3 of the Offences Against the Person Act 1828 (U.K.).⁷² The section simply spells out what was previously the penalty for murder by virtue of the common law. While the execution of the sentence was regulated by 25 Geo. II c. 37,⁷³ murder was previously punishable by death by virtue of the fact that it was a common law felony rendered unclergyable by statute.⁷⁴ In 1827 benefit of the clergy was abolished by 7 & 8 Geo. IV c. 28.⁷⁵ The draftsman of the Offences Against the Person Act 1828 merely spelled out in section 3 the common law punishment, also perhaps bringing murder under the second branch of section 7 of 7 & 8 Geo. IV c. 28 where previously it remained punishable by death by virtue of the first branch. Does section 3 at any stage of its history say anything as to a power to reprieve once sentence is pronounced?

Section 472⁷⁶ of the Crimes Act 1958 is traceable back through Victorian consolidations to section 287 of the Criminal Law and Practice Statute 1864. Its form may be further traced through English legislation⁷⁷ to section 2 of 6 & 7 Will. IV c. 30⁷⁸ (1836). The

⁷¹ The Crimes Act 1958 provides:

S. 3 'Whosoever is convicted of murder shall suffer death as a felon.'

⁷² 9 Geo. IV c. 31, which provides:

S. 3 'And be it enacted, That every Person convicted of Murder, or of being an Accessory before the Fact to Murder, shall suffer Death as a Felon; and every Accessory after the Fact to Murder shall be liable, at the Discretion of the Court, to be transported beyond the Seas for Life, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Four Years.'

⁷³ An Act for better preventing the horrid Crime of Murder, 1752.

⁷⁴ 23 Henry VIII c. 1; 25 Henry VIII c. 3; 32 Henry VIII c. 3; 1 Ed. VI c. 12, s. 10.

⁷⁵ 7 & 8 Geo. IV c. 28 provides:

S. 6 'And be it enacted, That Benefit of Clergy, with respect to Persons convicted of Felony, shall be abolished; but that nothing herein contained shall prevent the Joinder in any Indictment of any Counts which might have been joined before the passing of this Act.'

S. 7 'And be it enacted, That no Person convicted of Felony shall suffer Death, unless it be for some Felony which was excluded from the Benefit of Clergy before or on the First Day of the present Session of Parliament, or which hath been or shall be made punishable with Death by some Statute passed after that Day.'

⁷⁶ The Crimes Act 1958 provides:

S. 472 'Except as provided in the next succeeding section, upon every conviction for murder the court shall pronounce sentence of death in the same manner in all respects as sentence of death might have been pronounced before the passing of this Act upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.'

⁷⁷ Cf. 24 and 25 Vict. c. 100, s. 2.

⁷⁸ 6 & 7 Will. IV c. 30 provides:

S. 2 'And be it further enacted, That from and after the passing of this Act

origin of the provision lies in the fact that under earlier legislation⁷⁹ sentence of death for murder was required to be pronounced in a special form including a direction for Marks of Infamy (dissection or hanging in chains) after execution 'in order to impress a just Horror in the Mind of the Offender, and on the Minds of such as shall be present, of the heinous Crime of Murder'. In the middle of the nineteenth century these provisions for Marks of Infamy were gradually repealed.⁸⁰ Thus the intention of section 2 of 6 & 7 Will. IV c. 30 is clearly to provide that the form of sentence of death in cases of murder is henceforward to be the same as that in use for other capital offences, *i.e.* with no order as to Marks of Infamy or appointment of the time for execution. Section 472 of the Crimes Act 1958 is merely a provision as to the manner in which sentence is to be pronounced and says nothing by implication as to a power to reprieve.

Section 485 of the Crimes Act⁸¹ is on one construction⁸² capable of raising an implication that once the Governor has directed a time and place for execution, the sentence must be carried out, and that any power of a court to reprieve for insanity at this stage is abrogated. But Smith J. did not consider this a necessary implication. He pointed out that at common law the time and place of execution were normally left to the Sheriff as the chief officer of the Crown in the county.⁸³ In a colony this function naturally fell upon the Governor. The section could thus be construed merely to recognize an existing practice and to assume the existence of a valid sentence of death not suspended by reprieve or otherwise. In the view of Smith J. if a reprieve followed the Governor's fixing of time and place, the Governor's supplement to the sentence was suspended along with the sentence itself. He considered the section to say nothing about the power to reprieve.

In this conflict of interpretation the legislative history of the section may be considered for assistance. Section 485 appears in its

Sentence of Death may be pronounced after Convictions for Murder in the same Manner and the Judge shall have the same Power in all respects as after Convictions for other Capital Offences.'

⁷⁹ 25 Geo. II c. 37 (1752); 9 Geo. IV c. 31, ss. 4 and 5 (1828).

⁸⁰ 2 and 3 Will. IV c. 75, 516 (1832)—abolishing provision for dissection; 4 and 5 Will. IV c. 26 (1834)—abolishing the power to direct hanging in chains; 6 and 7 Will. IV c. 30 (1836) repealing provisions as to time of execution and the prison discipline of sentenced murderers.

⁸¹ The Crimes Act 1958 provides:

S. 485 'Sentence of death shall be carried into execution at such time and within the walls or enclosed yard of such gaols as the Governor may by writing under his hand direct and not elsewhere by the sheriff or his deputy and shall in all cases whatsoever whether for treason or murder be executed by hanging the offender by his neck until he is dead.'

⁸² Adopted by Dean J.

⁸³ See Blackstone, *Commentaries*, iv, ch. 32.

present form for the first time as section 549 of the Crimes Act 1928. This section is a consolidation of section 549 of the Crimes Act 1915, providing: 'Sentence of death shall be carried into execution within the walls or enclosed yard of such gaol as the Governor may by writing under his hand direct and not elsewhere by the sheriff or his deputy,' and section 44 of the Imperial Acts Application Act 1922, providing: 'The punishment of death in all cases whatsoever whether for treason or otherwise is to be executed by hanging the offender by the neck until he is dead. The time and place of execution are to be appointed by the Governor in Council.' The former section is directly traceable⁸⁴ to section 1 of the Victorian Act, 18 Vict. No. 44 (1854), passed to abolish public executions. It refers to the place of execution and does not speak as to reprieves.

The latter section in the Imperial Acts Application Act 1922 is part of an Act drafted by Sir Leo Cussen and enacted by the Victorian Parliament to clarify which pre-1828 U.K. statutes might be then in force in Victoria by virtue of section 24 of 9 Geo. IV c. 83.⁸⁵ Part III of the Act enacts in consolidated form as part of the statute law of Victoria those provisions of pre-1828 U.K. Acts which were considered to be undoubtedly in operation in Victoria and suitable for consolidation. Thus the earlier sentence of section 44 dealing with the method of execution of sentences of death consolidates the provisions of 30 Geo. III c. 48 (1790), 54 Geo. III c. 146 (1814) and 57 Geo. III c. 6 (1817). Before those acts different methods of execution were required by law for certain crimes, for example, burning to death in the case of women convicted of treason and hanging, drawing and quartering in the case of men convicted of high treason. Those acts abolish such special forms of execution and reduce the method of execution of sentence of death to one common

⁸⁴ *Per* Crimes Act 1890, s. 530; Criminal Law and Practice Statute 1864, s. 308.

⁸⁵ 9 Geo. IV c. 83 provides:

S. 24 'Provided also, and be it further enacted and declared, that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof), shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf: Provided always that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the said supreme courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge or decide as to the application of any such laws or statutes in the said colonies respectively.'

method for treason and felonies punishable by death, *i.e.* hanging the offender by his neck until he is dead.

The final sentence of section 44, conferring upon the Governor in Council the power to appoint the time of execution, went beyond consolidation. It was drawn from section 664 of the Queensland Criminal Code and put into statutory form what was already the Victorian practice. But does the enactment of that provision as to the fixing of time show an intention by implication to abolish the common law power of the courts to reprieve for insanity? It is submitted that Smith J. is correct in holding that this was merely a machinery provision and should not be construed to sweep away by a side wind a common law jurisdiction protective of the life of the subject.⁸⁶ It may be recalled that at common law the executive had no power to order the execution of sentence of death and that the authority for the execution of sentence was the order of the court.⁸⁷ It is submitted that section 485 does not by implication alter that position⁸⁸ and the court's order which authorizes execution remains subject to its control and capable of being stayed by judicial reprieve in the manner recognized by the common law.

Section 505⁸⁹ of the Crimes Act 1958 may be traced back through various consolidations to section 320 of the Criminal Law and Practice Statute 1864. As Smith J. points out,

there has for over a century been a custom of including such a saving provision in any statute whereby power has been given to commute or remit sentences or whereby any other provision has been made from which a doubt could be suggested as to the continued existence of an unfettered power in the Governor or in the Sovereign.⁹⁰

The section was thus inserted *ex abundante cautela* to preserve the prerogative of mercy and says nothing as to the power of a court to reprieve.

Section 58 of the Juries Act 1958⁹¹ provides a statutory procedure

⁸⁶ He compares *Leach v. The King* [1912] A.C. 305.

⁸⁷ *Sir Walter Rawley's Case*, Hut. 22; *The King v. Harris*, 1 Ld. Raym. 482; *Clifford v. Heller* (1899) 42 Atl. 155; Blackstone, *Commentaries*, iv. ch. 32.

⁸⁸ *Cf. Williamson v. Inspector General of Penal Establishments* [1958] V.R. 330, 334 (F.C.).

⁸⁹ The Crimes Act 1958 provides:

S. 505 'Nothing in this Act shall in any manner affect Her Majesty's royal prerogative of mercy.'

⁹⁰ [1963] V.R. 556; he compares 2 and 3 Will. IV ch. 62; II Vict. Nos. 34 and 55; 24 Vict. No. 121; Indeterminate Sentences Act 1907, s. 33; Penal Reform Act 1956, s. 34.

⁹¹ The Juries Act 1958 provides.

S. 58 (1) 'No jury *de ventre inspiciendo* shall be impanelled or sworn.

(2) In case a female upon a capital conviction alleges or there is otherwise reason to suppose that she is pregnant, the court shall direct that one or more medical practitioners be sworn to inquire whether she is with child of a quick child, and if after due inquiry it is reported that she is with child of a quick child, the court shall stay execution of the sentence until such female is delivered of a child

for the reprieve of pregnant women sentenced to death. The common law provision for a mandatory reprieve in such a case is thus abrogated but it is difficult to derive from this an implication that common law rules governing the other case of mandatory reprieve for insanity are also abolished.

The judgment of Lowe and Pape JJ. in considering what implications could be drawn from the various sections of the Crimes Act 1958 declined to look at the historical origins of the various consolidated sections set out above. Lowe and Pape JJ. apparently took the view that the historical origins of the various sections cannot be properly considered in construing a consolidating act. It has been submitted above that they were really treating the Crimes Act as a true code and that this approach is misconceived. But the joint judgment cited as authority for its approach to a consolidating statute the series of High Court judgments set out above which in turn relied upon the words of Lord Watson in *Administrator-General of Bengal v. Prem Lal Mullick*.⁹² It is thus necessary to consider what the High Court and Privy Council were saying when they stated of a consolidation:

It takes effect from the day it passed and its true construction depends on its language as applied to the subject matter considered as at that date.

In each of the cases cited the question at issue was the meaning of a section in a consolidating act when considered in relation to a section in another act also in operation and dealing with the same subject matter.⁹³ The truth that was being pointed out is that the time at which a consolidating Act speaks is that of its enactment and that its reciprocal effect upon other statutes and the matters and things of the natural world to which it applies must be decided as of that date. In none of the cases was the issue whether a consolidation by a fortuitous combining of sections had abolished established common law rules. What Lord Watson rejected was a proposition that a section in a consolidating Act should be construed according to *the state of circumstances*⁹⁴ existing when it first became law. This may be understood more clearly by considering the facts of *Bengal v. Prem Lal Mullick*.

or until in the course of nature such delivery is no longer possible.' This section may be traced back through various consolidations to its first appearance as ss. 87 and 88 of the Juries Statute 1876, Act No. 560. ⁹² L.R. 22 I.A. 107, 116.

⁹³ *Bennett v. Minister for Public Works* (N.S.W.) (1908) 7 C.L.R. 372—Darling Harbour Wharves Resumption Act 1900, s. 13 and Public Works Act 1900, s. 119; *Maybury v. Plowman* (1913) 16 C.L.R. 468—Crimes Act 1900 (N.S.W.) s. 352, and Inclosed Lands Protection Act 1901, s. 6; *A.-G. (N.S.W.) v. Hill & Halls Ltd* (1923) 32 C.L.R. 112—*Registration of Deeds Act* 1897 (N.S.W.), s. 12 and Liens on Crops and Wool and Stock Mortgages Act 1898, s. 4; *Administrator-General of Bengal v. Prem Lal Mullick* (1895) L.R. 22, I.A. 107—Hindu Wills Act 1870 and Administrator General's Act 1874, s. 31. ⁹⁴ Author's italics.

The executors of a Hindu testator transferred the testator's estate to the Administrator-General, purporting to act under section 31 of the Administrator-General's Act 1874. This provided: 'Any private executor or administrator may . . . transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General. . . .' This clause was a re-enactment of section 30 of the Administrator-General's Act 1867. At the time when this earlier Act was passed the executor of a Hindu estate by reason of his limited functions was not a 'private executor' within the meaning of section 30. The Hindu Wills Act 1870 increased the powers and functions of a Hindu executor, making them identical with those of any other private executor. It was argued that a Hindu executor was not a 'private executor' within the words of section 31 of the 1874 Act because this was a consolidating statute and a Hindu executor was not a private executor when the original section 30 was enacted. It was this remarkable argument, which ignores that in the meantime a Hindu executor had become identical with any other executor, that Lord Watson was concerned to reject. He does so by pointing out that the circumstances to which a consolidating Act applies are those in existence at the time when it is passed.

But when the question is whether the combined effect of sections in a consolidating Act is to abrogate by implication common law rules not inconsistent with them and the implication is by no means clear, there is ample authority that a court should consider the origins of the consolidated sections and the mischief they were enacted to meet in order to ascertain their meaning and implication.⁹⁵ Thus in the absence of any express abrogation of the common law rules as to reprieves it is submitted that the appro-

⁹⁵ Cf. *River Wear Commissioners v. Adamson* [1877] 2 App. Cas. 743, 779, per Lord Gordon; *Attorney-General (N.S.W.) v. Hill and Halls Limited* (1923) 32 C.L.R. 112, 125, per Isaacs and Rich JJ. 'To construe this Act, the rule acted on in *Maybury v. Plowman* must again be applied. If the statute, read as a whole and by the light of the subject matter and surrounding circumstances at the time it is passed, is clear and unambiguous, its own terms must govern. If those terms remain doubtful, its history may assist'; *Ingamells v. Petroff* (1934) 50 C.L.R. 451, 462-463, per Dixon J. 'The purpose of a consolidating Act, which is to reduce all the previous legislative enactments on a subject to a single consistent and coherent statement, which will operate as the exclusive expression of the statutory law upon that subject, should not be defeated by recourse to the prior legislation in order to control or determine the effect of the consolidating enactment (see, per Lord Watson, *Administrator-General of Bengal v. Prem Lal Mullick*. But, where the natural meaning of the language of the consolidating statute is said to be restrained by implications arising from its context or subject matter, or obscurities or ambiguities are found in the consolidating provisions it must often happen that the difficulties cannot be dispelled without examining the course of legislation in order "to call in aid the ground and cause of making the statute" in the phrase of Tindal C.J. (*Sussex Peerage Case* (1884) 11 Cl. & Fin. 85, at p. 143). (Compare *Macmillan & Co. v. Dent*, per Fletcher Moulton L.J. [1907] 1 ch. 107 at p. 120); *Hall v. Braybrook* (1955-1956), 95 C.L.R. 620 in the treatment of s. 72 of the Crimes Act 1928 (Vic.) by Dixon C.J. and Fullagar J. (dissenting).

Also see *The Construction of Deeds and Statutes*: Odgers (4th ed.), 237-239.

priate rules of construction for a consolidating Act are those followed in *Nolan v. Clifford*⁹⁶ and that the authorities cited by the majority judgment are not directed to the type of questions of construction which arose in *Tait's* case.

It may further be pointed out that other sections in the Crimes Acts appear to have recognized by implication the power of a court to reprieve. In the Crimes Act 1928 in which what is now section 485 first appeared in its present form⁹⁷ sections 504 and 505 provide for the recording of sentence of death in the case of felonies other than murder in lieu of the oral pronouncing of sentence. Section 505 provides that the record 'shall have the like effect and be followed by the same consequences as if such judgment had actually been pronounced in open court and the offender had been reprieved by the court'. These sections do not re-appear in the Crimes Act 1957 but this is explicable by the fact that in 1957 there remained no felony⁹⁸ save murder which was punishable by death. The important point is that it appears to have been recognized in 1928 that the power to reprieve was unaffected by what is now section 485.

Section 438 of the Crimes Act 1958⁹⁹ which deals with trials for felonies or misdemeanours upon an information at common law expressly confers upon the trial judge the power to respite the execution of judgment. The present form of the section first appears in the Statute Law Revision Act 1916, while its general provisions are traceable to section 23 of the Judicature Act 1874,¹ and thence to II

⁹⁶ (1904) 1 C.L.R. 429.

⁹⁷ As s. 549.

⁹⁸ Treason is not a felony.

⁹⁹ The Crimes Act 1958 provides:

S. 438 'Upon all trials for felonies or misdemeanours upon an information at common law judgment may be pronounced during the sittings by the judge before whom the verdict is taken as well upon persons who have suffered judgment by default or confession as upon those who are tried and convicted whether such persons are present or not in court, and the judgment so pronounced shall be of the same force and effect as a judgment upon a presentment, and it shall be lawful for the judge before whom the trial is had either to issue an immediate order or warrant for committing the defendant in execution or to respite the execution of the judgment for such time and upon such terms as he thinks fit.'

¹ The Judicature Act 1874 provides:

S. 23 'Upon all trials for felonies or misdemeanours upon any record of the Supreme Court judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken as well upon the person who shall have suffered judgment by default or confession upon the same record as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Supreme Court, or such cases of information filed by Her Majesty's Attorney-General wherein the Attorney-General shall pray that the judgment may be postponed; (and the judgment so pronounced shall be afterwards entered upon the record and shall be of the same force and effect as a judgment of the court, unless the court shall within four days after the commencement of the ensuing term grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution or to respite the execution of the judgment upon such terms as he shall think fit until the fourth day of the ensuing term; and in case imprisonment shall be part of the sentence to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.)'

[Author's brackets]

Geo. IV and I Wm. IV c. 70 section 9. When the section was re-enacted as section 469 of the Crimes Act 1915 the words of the earlier provision which appear in brackets below and which confer, *inter alia*, a power to respite, were omitted; but a similar provision was restored by the Statute Law Revision Act 1916. The point of the original U.K. section was to deal with that class of case where an information was laid in the Court of Queen's Bench and the case pleaded there. The case would then be sent down for trial upon the record by a judge of Assize. Since that judge was not the Court of Queen's Bench it was necessary to confer specifically upon him the power to pass sentence and to provide that the sentence should have the same effect as if it had been passed at a normal trial on indictment.² The importance of the section is that it appears to recognize a power in the court to respite execution of judgment as a normal and recognized power of an ordinary trial court.³

Thus it is submitted that no sufficient implication is raised that the particular sections in the Crimes Act discussed earlier or their legislative ancestors when read in conjunction have abrogated the common law rules as to reprieves. This argument is pointed by asking at what time the combination of heterogeneous sections raised the necessary implication—in 1864, in 1876, in 1890, in 1915, in 1922, in 1928, in 1957 or in 1958? This question is not answered by the majority judgment nor by Dean J. although on their approach it should be capable of answer. Perhaps the implied answer given is 1922, when section 44 of the Imperial Acts Application Act was passed.⁴ One wonders whether Sir Leo Cussen ever contemplated this result of his measure.

It is necessary now to consider answer (c), that the common law rules have been abrogated by implication by section 69⁵ of the

² See the evidence of Sir Leo Cussen to the Statute Law Revision Committee on amendments to the Crimes Act 1915, Votes and Proceedings of the Legislative Assembly, Session 1916, vol. I, p. 781, and also *The Queen v. Stanley* (1888) 14 V.L.R. 509.

³ The exercise in Victoria in 1871 of a power in the trial judge to respite execution of sentence passed was recognized by Gurner, Crown Solicitor of the Colony. See *The Practice of the Criminal Law in the Colony of Victoria* (1871) 173, 177, in relation to applications for a pardon and in relation to taking the opinion of the Court on a case reserved.

⁴ See footnote 85, *supra*.

⁵ The Mental Hygiene Act 1958 provides:

S. 69 '(1) If any person while imprisoned or detained in any gaol or other place of confinement under any sentence or under a charge of any offence, or for not finding bail for good behaviour or to keep the peace or to answer a criminal charge or in consequence of any summary conviction or order by any justice appears to be insane it shall be lawful for the Chief Secretary upon receipt of certificates in the form or to the effect of the Fifth Schedule from two medical practitioners to direct by duplicate order under his hand that such person shall be removed to some mental hospital or hospital for the criminal insane as the Chief Secretary thinks proper and appoints.

Mental Hygiene Act 1958 or its legislative ancestor. This answer was accepted by Gowans J., by Dean J. and perhaps also by Lowe and Pape JJ. It may be remarked that in terms the section merely grants a power to the Chief Secretary to direct the removal of a prisoner certified to be insane to a mental hospital. Without such statutory authority such a removal would be, as Lowe J. points out, a trespass to the person, and as Smith J. points out, a contravention of the Habeas Corpus Act of 31 Car. II c. 2, section 8. There is no duty imposed to hold an inquiry into the sanity of a prisoner condemned to death where there is evidence to suggest a *prima facie* case of insanity, nor is the Chief Secretary placed by the section under any duty to remove when supplied with the medical certificates referred to. The question is then whether this provision by implication abrogates the common law rules by which the court is placed under a duty to reprieve where a person sentenced to death was established to be insane and by which the prisoner on establishing a *prima facie* case may be granted a judicial inquiry into the existence of insanity.

The history of this provision appears to be relevant. In its present form it may be traced back to section 66 of the Lunacy Act 1903. The predecessor of this section in Victorian legislation is section 6 of the Lunacy Act 1890 which in turn re-enacts section 6 of the Lunacy Statute 1867.⁶ The form of the latter section differs from

(2) Every person so removed whether before or after the commencement of this Act as one of the criminal insane shall be detained in some mental hospital or hospital for the criminal insane until it is certified by the chief medical officer alone or by the superintendent of such hospital and some other medical practitioner that such person is not insane, whereupon the Chief Secretary shall if such person remains subject to be continued in custody issue his order in duplicate to the superintendent of such hospital directing that such person be removed to the goal or other place whence he has been taken or to some other gaol or place of confinement to be dealt with according to law or if under sentence of death to undergo such sentence or if such person does not remain subject to be continued in custody the Chief Secretary shall direct that he be discharged and he shall be discharged accordingly.

⁶ The Lunacy Statute 1867 provides:

S. 6 'If any person while imprisoned or detained in any gaol or reformatory or industrial school or other place of confinement under any sentence, or under a charge of any offence, or for not finding bail for good behaviour or to keep the peace or to answer a criminal charge, or in consequence of any summary conviction or order by any justice, shall appear to be insane, it shall be lawful for any two justices having jurisdiction in the place where such person shall be imprisoned, and they are hereby required, to call to their assistance two medical practitioners to be selected by them for that purpose, and to inquire with their aid as to the insanity of such person; and if it shall be duly certified by such justices and such medical practitioners, in the form in the Fourth Schedule to this Act (No. 1), that such person is insane, it shall be lawful for the Chief Secretary upon receipt of such certificate to direct by warrant under his hand that such person shall be removed to such asylum or other proper receptacle for insane persons as the Chief Secretary may judge proper and appoint: Provided that in the case of any prisoner in confinement under sentence of death, if it shall be made to appear by any means whatsoever to the Chief Secretary that there is reasonable ground to believe that such prisoner is then insane, such Chief Secre-

that of the 1903 Act. In its general opening words it places justices of the peace under a duty to hold an inquiry into the sanity of prisoners appearing to be insane. It then makes a special provision for prisoners under sentence of death by which the Chief Secretary may appoint medical practitioners to inquire into the insanity of such prisoners who appear to be insane. It is thus not clear whether anyone is under a duty to hold an inquiry in the case of prisoners under sentence of death and appearing to be insane. It is however clear that if insanity is established by such an inquiry in the latter case, the statute, like the later legislation, merely gives the Chief Secretary a power to direct the removal of the prisoner to an asylum 'if he shall so think fit'.

This provision in the Lunacy Statute 1867⁷ is a copy of English legislation, section 2 of the Insane Prisoners Act Amendment Act 1864.⁸ The English Act however contains two material differences in the case of prisoners under sentence of death. First, a duty is imposed on a Secretary of State to hold an inquiry if such a prisoner appears to be insane. Secondly, a duty is imposed to direct the removal of such a prisoner to an asylum if he is found by the inquiry to be insane. Earlier English legislation merely conferred power to hold an inquiry and power to direct removal to an asylum,⁹ *i.e.* 'it shall be lawful . . . to direct. . . .' The provision at present in

tary may himself appoint two or more medical practitioners to inquire into the insanity of such prisoner; and if on such inquiry such prisoner shall be found to be then insane the fact shall be certified in writing by such practitioners to the Chief Secretary, according to the form in the said Fourth Schedule (No. 2), and the said Chief Secretary if he shall so think fit may on receipt of the said certificate direct by warrant under his hand that such prisoner shall be removed to such asylum or other proper receptacle for insane persons as aforesaid; and every person so removed under this Act, or already removed or in custody under any former Act relating to insane prisoners, shall remain under confinement in such asylum or other proper receptacle as aforesaid, or in any other lunatic asylum or other proper receptacle to which such person may be removed or may have been already removed or in which he may be in custody by virtue of any like warrant which the Chief Secretary is hereby empowered to issue if he shall think fit, until it shall be duly certified to the Chief Secretary by two or more medical practitioners that such person has become of sound mind, whereupon the said Chief Secretary is hereby authorized, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper or other person having the care of any such asylum or receptacle as aforesaid, directing that such person shall be removed back from thence to the prison or other place of confinement from whence he shall have been taken to undergo his sentence of death or other sentence or otherwise to be dealt with according to law, as if no such warrant for his removal to an asylum had been issued, or if the period of imprisonment or custody of such person shall have expired that he shall be discharged.'

⁷ Before 1867 the provision in force in Victoria would appear to have been s. 2 of 7 Vict. No. 14 (N.S.W., 1843) which is a copy of 1 and 2 Vict. C.27 (U.K) and merely grants a power to remove. See also 13 Vict. No. 3 (N.S.W., 1849).

⁸ 27 and 28 Vict. c. 29.

⁹ 56 Geo. III c. 117 (1816); 9 Geo. IV c. 40 s. 55 (1828); 1 and 2 Vict. c. 27 (1837)—relating to Ireland; 3 and 4 Vict. c. 54 (1840).

force in England, section 2 of the Criminal Lunatics Act 1884,¹⁰ like the Act of 1864, imposes a duty to hold an inquiry where a prisoner under sentence of death appears to be insane. However, like the Victorian and pre-1864 English legislation, it merely confers on the Secretary of State a power to direct the removal of such a prisoner to an asylum if the prisoner is certified to be insane as a result of such an inquiry. However, since 1840 the Home Secretary has invariably exercised the latter power if a prisoner is certified insane as a result of the statutory inquiry.¹¹ This he would be bound to do if the common law rule against the execution of insane criminals survives.¹¹

Of all these various provisions that which might raise the strongest case for an abrogation by implication of the common law rules is the English Act of 1864, which imposed both a duty on the executive to hold an inquiry and a duty to remove in case of insanity. It is significant to note that an English text writer, considering the 1864 Act, did not consider it to abrogate the common law.¹² Smith J. points out that the general view of text writers is that the present English provisions which impose a duty to hold an inquiry do not abrogate the common law.¹³ All the more difficult is it to gather the necessary implication from Victorian legislation which has never clearly imposed a duty on the Chief Secretary either to hold an inquiry if a *prima facie* case of insanity is made out or to remove a prisoner under sentence of death to an asylum if such an inquiry finds him to be insane. The Victorian legislation is readily explicable as merely conferring upon the executive a power to remove in addition to, rather than in derogation of, the common law powers possessed by the courts. If the principles of *Nolan v. Clifford* are applied it is hard to find a clear implication that the common law is to go.

It may be noted that, although in 1845 there was in force in England 3 and 4 Vict. c. 54 conferring on the executive a power to hold an inquiry and a power to remove, the Criminal Law Commissioners in their Eighth report did not consider the common law to be affected.¹⁴ Lowe and Pape JJ. considered it significant that the Atkin Committee of 1922 treated judicial functions as ceasing on verdict and sentence. But their report does advert to the common law rules in these terms: 'There is authority of some weight from the time of Lord Coke for considering that apart from statutory

¹⁰ 47 and 48 Vict. c. 64, see footnote 8, p. 436.

¹¹ See Report of Royal Commission on Capital Punishment, 1949-1953 (Cmd 8932), paras. 368-369.

¹² Stephen's *Commentaries* (6th ed. 1868), iv, 560; although it is doubtful whether Stephen appreciated the full force of the Act; *Cf.* 116-117.

¹³ See footnote 39, *supra*.

¹⁴ See above p. 450.

provisions it was contrary to common law to execute an insane criminal';¹⁵ it then proceeds to quote several of the authorities set out above.

The writer's conclusion is thus that none of the statutes discussed have by implication abrogated the common law rules and that Smith J. was correct in holding them still in force in Victoria. It was contended by the Crown that if they were not removed by statute they were no longer the law of Victoria through desuetude. But can common law rules strongly protective of the life of the subject thus disappear? If common law crimes may be revived after many years of desuetude,¹⁶ all the more so may be rules protective of the subject. The Crown also relied upon *Balmukand v. The King-Emperor*¹⁷ where Indian prisoners sentenced to death pursuant to the Indian Penal Code and due for execution applied to the Privy Council for a stay of execution pending arrival in England of transcripts of their trial and an application for special leave to appeal. The Judicial Committee refused to grant the stay sought, pointing out that the Board was not a Court of Criminal Appeal and that the matter was one for the Executive. But it may be noted that this case did not concern reprieves on the ground of insanity, that the Indian Penal Code is a true code which may well have abrogated the common law and that, as the Board pointed out, it was neither the trial court nor a court of Criminal Appeal but a Board tendering advice to the Sovereign, the powers of which may well differ from a court of common law. Indeed in Tait's own case the High Court found no difficulty in making an order very like that sought in the case of Balmukand.

If then the common law rules survive in Victoria, was the case of Tait one appropriate for their exercise? The trial judge, Dean J., stated that, even had he the power, he would not in the exercise of his discretion order an inquiry. Yet Smith J. considered a case had been made out for the holding of a judicial inquiry into sanity.

The Crown argued that the common law rules covered only the case where insanity arose after sentence had been pronounced and not a case such as this where the evidence suggested the insanity had been present even before trial. Some of the classic formulations of the common law rule appear to support this argument.¹⁸ The

¹⁵ Note also the attitude of the Royal Commission on Capital Punishment, 1949-1953 and 8932, para. 368: 'If a medical inquiry is held and the doctors certify that the prisoner is insane, it is not only right and proper that the Home Secretary should respite the sentence of death and direct the prisoner's removal to Broadmoor or to a mental hospital, but it is his imperative duty to do so, both under the statute and because it is contrary to the common law to execute an insane criminal'.

¹⁶ Cf. Misprision of felony, *The Queen v. Crimmins* [1959] V.R. 270.

¹⁷ [1915] A.C. 629.

general trend of American authority also appears to limit the application of the common law rules in this way.¹⁹ But as Smith J. pointed out the rule is not invariably formulated in this fashion.²⁰ The usual formulation may be explained in that the rule is older than the differentiation of separate tests for insanity for the purposes of a defence to guilt, for establishing unfitness to plead and for providing grounds for staying execution. When the different criteria of insanity for such different purposes had not yet been established, a person who was insane before trial would be caught by the rule governing unfitness to plead and would not need the assistance of the rule as to execution. But with the differentiation of a separate criterion for unfitness to plead²¹ a person not insane for the purposes of that rule might still be insane for the purpose of the rule governing stays of execution. There can be no ground for a different result in the case of a person who becomes insane within the common law rule after sentence and one who is just as insane but has been so from a time preceding his trial and even preceding his crime.

But this leads to the very difficult question, what is the test of insanity for the purpose of applying the common law rules as to stays of execution? The Crown argued that it required the kind of obvious frenzy or imbecility which was the only insanity recognized when the rule was originally developed by the common law, before the formulation of different tests of insanity for different purposes. This argument thus ties in with the Crown's earlier argument that the common law rules governing stays of execution covered only the case where insanity arose subsequent to judgment. But long since the common law has developed different tests of insanity for the many different purposes for which insanity may be relevant, for example, the defence to criminal guilt, unfitness to plead, capacity to make a will, capacity to enter a contract or liability in tort. All of these tests recognize to greater or less degrees the advances in medical science which have been made since the day of Coke. If it is accepted that the common law rule applies equally whether the requisite insanity arises before or after trial, one thing seems certain. Since fitness to plead and verdict of guilty are prerequisites in a case calling for the operation of the common law rule, it is possible to dismiss the tests for fitness to plead and the M'Naghten

¹⁸ Hale, *P.C.*, i, 35; ' . . . And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.'

¹⁹ 24 *Corpus Juris Secundum*, § 1569, 439-445; § 1619, 921-932.

²⁰ Stephen's *Commentaries* (3rd ed.), iv, 508-510; Kenny (17th ed.), 588; Russell (11th ed.) 110, Blackstone *Commentaries* iv, 388-389.

²¹ *The Queen v. Presser* [1958] V.R. 45.

rules. The tests for the common law as to execution must require a lesser, or at least a different degree of insanity to that required by the former tests.

It was argued for Tait that the test should be that adopted for the purposes of certification under the Mental Hygiene Act 1958.²² But apart from section 69 the provisions for certification by medical practitioners and commissions *de lunatico inquirendo* are directed to the civil law purposes of the protection of the lunatic's person and property and that of other persons.²³ The legislature has recognized certification to be relevant to the exercise of the Chief Secretary's power under section 69 in respect of insane persons but it has been argued that this is a power in addition to rather than in replacement of the common law rules. It may be doubted whether the law has a sufficiently precise test of the degree of insanity requisite for certification.

The degree of insanity requisite may best be judged by considering the purposes for which the common law rule is said to exist. It has been said that an insane person may be prevented from revealing new matters within his private knowledge which would prove his innocence;²⁴ that an insane person lacks the capacity to make his peace with his Maker;²⁵ that the execution of an insane man is no deterrent to others;²⁶ that such an execution is inhumane and cruel.²⁷ But perhaps the most convincing purpose for which the rule has been said to exist in modern circumstances is that punishment should not be inflicted upon a person incapable of comprehending the reason why he is punished.²⁸ Thus in the United States where the common law rules are still operative in many States²⁹ the tests of insanity adopted consider the mental condition of the prisoner in regards closely connected with the purposes of execution. Thus an appropriate American formulation of the test is whether the prisoner has not

from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.³⁰

²² Mental Hygiene Act 1958, ss. 27, 30, 47, 69. A similar test is adopted in the English statutory inquiry under s. 2 of the Criminal Lunatics Act 1884. See Report of Royal Commission on Capital Punishment, 1949-1953 (Cmd 8932), paras. 288, 359-372.

²³ Cf. the Full Court judgments in the Scott appeal.

²⁴ Sir John Hawles, S.G.—Remarks on the Trial of Charles Bateman; 11 State Trials, (1811 ed.), 474-479.

²⁵ *Ibid.*

²⁶ Coke, *Institutes*, 6.

²⁷ *Ibid.*

²⁸ *Lee v. State* (1903), 118 Ga. 764, 45 S.E. 628, cited 3 A.L.R. 98.

²⁹ Cf. *Solesbee v. Balkcom* (1950) 339 U.S. 9; 94 L.Ed. 604; 24 Corpus Juris Secundum, § 1569, 439-445; § 1619, 921-932. ³⁰ *State v. Smith* (1918) 3 A.L.R. 83.

It is submitted that the insanity required by the common law rules should be tested on the type of criteria thus suggested.

But the question before the judges in Tait's case had not reached the stage of a final decision whether he satisfied such a test. The question was simply whether he had made out a sufficient *prima facie* case for the order of an inquiry. It may be recalled that the Crown put no evidence at all before the Court. Supporting Tait's application were the affidavits of two psychiatrists based on their examination of Tait before his trial almost a year before. One swore that Tait was insane and of unsound mind on the ground that he suffered from the mental disorders, sadism, transvestitism and compulsive alcoholism. The other in his first affidavit swore that Tait was insane and of unsound mind

because he suffered from abnormal thoughts and feelings which result in behaviour making him incapable of managing himself or his affairs. His history and my observations suggest a degenerative condition. The symptoms of this degeneration are transvestitism, fetishism, sadism, homosexuality and anal sexuality.

He considered that further deterioration in mental condition was probable. A further affidavit of the same psychiatrist testified that Tait was suffering either from an organic brain disease or the developmental disease of psychopathic personality in an extreme degree. He continued that in either case

Tait is unlikely to be able fully to understand the purpose of his punishment or the matters which would make his punishment a just one. This is because his mental abnormalities, in particular his specific lack of insight into and understanding of his situation and his inability to experience the emotions of regret or shame, prevent him from evaluating sensibly the meaning either of his present position or of his relationship with society.

Despite this evidence Dean J. found no *prima facie* case of insanity had ever been made out, relying in particular on his own observations at Tait's trial. It may be conceded that the mere fact that a person suffers from mental disorders and abnormalities is not always sufficient to establish him insane within the common law rule. But Dean J.'s remarks suggest that he applied a test as severe as the M'Naghten rules. Although Dean J. at no stage formulated the test he was applying, his references to *The King v. Porter*³¹ suggest that he may have even applied the M'Naghten rules. It is submitted that in view of the uncontroverted evidence as to Tait's probable lack of understanding of the purpose of his punishment a *prima facie* case that Tait was insane in the sense appropriate to the common law rule was established and that Dean J. was wrong in

³¹ (1936) 55 C.L.R. 182.

law in his decision not to exercise his discretion to order an inquiry.

If a judicial inquiry ought to have been ordered, what form should it have taken? Presumably the evidence properly submitted to such an inquiry would be that of psychiatrists as to whether his present mental condition constituted insanity within a test such as that formulated above. This would involve making Tait available for examination by psychiatrists nominated by his own advisers or by the court, the access which was consistently refused by the Executive. It is submitted that the onus of proof on the balance of probabilities would be on Tait. It was he who was making an assertion; but there appears no reason why he should be saddled with the criminal onus. Whether the decision of fact should be made by judge alone or by a jury summoned for that purpose would appear to be at the discretion of the court. The traditional common law method of establishing facts is by the verdict of a jury and the Report of the Criminal Law Commissioners³² establishes that it was usual to summon a jury for an inquiry such as this. But no doubt in a case as much in the fierce light of press publicity as Tait's, the court might in its discretion refuse a jury. There is no doubt that under the common law the trial judge had jurisdiction not only to hear the application for an inquiry but also to conduct it himself. But remarks of Dixon C.J. when the matter was before the High Court suggest that the Full Court may have been wrong in holding that it had no jurisdiction to hear an application for an inquiry under the common law rules. Under the Supreme Court Act 1958 the 'Full Court' means all the judges of the Supreme Court or not less than any three of them . . . sitting as a Court and 'Court' means the Supreme Court.³³ Section 15³⁴ provides that the court shall have cognizance of all pleas civil, criminal or mixed and jurisdiction in Victoria as fully as the Court of Queen's Bench at Westminster had by common law in England at or previously to 4 January 1875. The power of a single judge to exercise the jurisdiction vested in the Court is specifically conferred by sections 42 and 43.³⁵

³² See above.

³³ Supreme Court Act 1958, s. 3.

³⁴ See footnote 25, p. 441.

³⁵ The Supreme Court Act 1958 provides:

S. 42 'Any single Judge sitting in Court may, subject to appeal in civil or mixed matters to the Full Court, hear and determine all motions causes actions matters and proceedings not required under any Act or Rules of Court to be heard and determined by the Full Court.'

S. 43 'Any Judge of the Court may, subject to any Rules of Court and to the provisions herein contained, exercise in Court or in Chambers all the jurisdiction vested in the Court in all such matters as before the passing of the *Judicature Act* 1883 might have been heard in Court or in Chambers respectively by a single Judge of the Court or by a Judge of Assize or by a Judge of the Central Criminal Court, or as may be directed or authorized to be so heard by any Rules of Court to be hereafter made or for the time being in force; in all such cases any Judge sitting in Court shall be deemed to constitute the Court.'

The Court of Queen's Bench was a court of general criminal jurisdiction. It might try indictments at first instance or transfer them by writ of *certiorari* from the courts of justices of oyer and terminer and gaol delivery.³⁶ Thus the Court of Queen's Bench would at common law be entitled to exercise the power to reprieve persons sentenced by it and also persons sentenced at assizes whose cases were transferred into Queen's Bench. As Dixon C.J. pointed out this jurisdiction of Queen's Bench was conferred on the Supreme Court of Victoria and the Full Court is the Court. Thus, unless the implications of other sections restrict the powers of the Full Court in criminal matters, that Court did have jurisdiction to hear Tait's application.

Thus whether by the trial judge or by the Full Court it is submitted that a judicial inquiry into Tait's sanity ought to have been ordered.

The High Court Order

The High Court did not consider the questions of law involved in Tait and Scott's applications for special leave to appeal since by the time fixed for the hearing of these applications the questions at issue had been rendered purely hypothetical by the Executive's commutation of Tait's sentence. But the High Court did on 31 October hear the applications in these matters for an adjournment and stay of the execution of Tait. The grounds were the absence of a proper opportunity for counsel to submit a fully prepared argument and the impossibility in the circumstances of the Court hearing a calm and dispassionate argument and reserving its judgment if it desired to do so. The existence of these grounds was caused by the decision of the Executive to hang Tait the next day. As has been related, the High Court granted the orders sought.

The High Court was set up pursuant to Chapter III of the Commonwealth Constitution and is the supreme Federal Court of the Commonwealth.³⁷ Under section 73 of the Constitution it is provided that

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences—

- (i) . . .
- (ii) . . . of the Supreme Court of any State. . . .

³⁶ See Holdsworth, *History of English Law* (7th ed.) i, 212-213.

³⁷ The Constitution provides:

S. 71 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.'

By section 35 of the Judiciary Act 1903-1960 (Cth) it is provided that:

The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State . . . shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:

(a) . . .

(b) Any judgment, whether final or interlocutory and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal:

In making the orders sought for an adjournment and stay of execution and a consequential injunction Dixon C.J. stated that the Court was so doing

entirely so that the authority of this Court may be maintained and we may have another opportunity of considering it.

It would appear from a remark of Dixon C.J. in argument that the power of the Court exercised was an incidental power to preserve the subject matter of litigation, human or otherwise, pending a decision.³⁸ A court of appeal has an inherent jurisdiction to make orders for the protection of property or person pending the determination of an appeal to it.³⁹ The existence of such an inherent power is also specifically recognized by Order 70 Rule 12 (4) of the Rules of the High Court,⁴⁰ although the Court in this case acted under its inherent power rather than the rule. The power thus exercised is a power inherent in and necessary for the exercise of the power to hear appeals conferred by the Commonwealth Constitution and the Judiciary Act. It was not of course an exercise of any power to stay executions pursuant to State Criminal Law governing executions and reprieves.

This ruling is relevant to the refusal of the Full Court at the outset of Scott's appeal to grant an adjournment and a respite of the sentence in order to facilitate the hearing of the appeal. While it is true that the Court had no power in the exercise of the lunacy jurisdiction to grant a stay, it did have the inherent power of a court of appeal exercised by the High Court. Likewise it would appear that the trial judge, Dean J., had a similar power to make

³⁸ *Scott v. The Chief Secretary; Tait v. The Queen* (1962-1963) 36 A.L.J.R. 330, 331; (1962) 108 C.L.R. 620, 623.

³⁹ See Annual Practice (1963) 1647. *Franov and anor v. Deposit & Investment Co. Ltd and anors* (1962-1963) 36 A.L.J.R. 163 (H.C.); and a trial court has a similar inherent jurisdiction to make orders preserving the *status quo* pending an appeal: *Orion Property Trust Ltd v. Du Cane Court Ltd* [1962] 1 W.L.R. 1085.

⁴⁰ Order 70 Rule 12 (4) provides:

'After notice of appeal has been duly given from a judgment, order or sentence in a criminal proceeding, the Court or a Justice, upon application made upon notice, may grant a stay of execution or admit the appellant to bail upon such terms or conditions as appear just.'

orders to preserve the *status quo* pending the hearing of an appeal.⁴¹ However, the State courts showed a reluctance to make any order restraining the Executive which was not shared by the High Court.

As has been pointed out the circumstances which caused the orders in question to be sought in the High Court were the direct result of the Victorian Executive's disregard of the conventions governing the relations of judiciary and executive in fixing a time for execution which left insufficient time for the travelling of the normal avenues of appeal. Some have seen in the High Court's order the supreme federal judicial body acting under a federal constitution to restrain a State Executive set upon a course of conduct which might render nugatory the processes of law. It is certainly the case that the High Court's order showed, as has often previously been shown, that the executives of states in a federation are subject to the law as administered by the supreme repository of the judicial power of the federation.

It has been remarked by the Premier of Victoria that in the light of the *Tait* case the law of Victoria will be re-examined to ensure that the law governing the execution of prisoners alleged to be insane remains in the form in which the majority of the Full Court believed it to be. It has been the burden of this article that the majority was wrong and that it remains part of the common law of Victoria that a judicial inquiry may be ordered into the sanity of a prisoner under sentence of death, in respect of whom a *prima facie* case of insanity is made out, and that, if such an inquiry finds the prisoner insane, a reprieve is mandatory. This much may be said in favour of the retention of the common law rules. If a genuine discontent exists in a substantial body of the community as to the manner in which the principles governing the execution of prisoners alleged to be insane are administered, it is better that those principles should be administered by the judiciary whose impartiality is universally acknowledged, than by the executive.

It may be considered more important that the judiciary on whom is placed the unpleasant duty of passing sentence of death should then be relieved from a further task of deciding whether there exists the insanity which justifies a reprieve. If this is accepted, it is submitted that the only satisfactory substitute for the common law rules is the substitution of a mandatory duty on the executive to hold a medical inquiry into the sanity of prisoners under sentence of death who appear to be insane. This has been the law in England since 1864. The medical inquiry should, as in England, include at least one independent psychiatrist who is not in the employ of the Crown.

⁴¹ See footnote 39 p. 472 and in particular *Orion Property Trust Ltd v. Du Cane Court Ltd* [1962] 1 W.L.R. 1085.

What should the criterion of insanity be? In England it is whether the prisoner is certifiable as insane. But there consideration is also given to the existence of other mental abnormality such as psychoneurosis, psychopathic personality, mental defectiveness or borderline states. Such lesser abnormalities are reported to the Home Secretary.⁴² In practice it appears that the criterion of whether the prisoner is certifiable as insane has proved satisfactory in the administration of the statutory provision in England. In Victoria under the provisions of the Mental Health Act 1959 the procedure commonly described as certification depends upon the recommendation of a medical practitioner or practitioners who must be of the opinion that the person in question is 'mentally ill'.⁴³ 'Mentally ill' is defined to mean '. . . suffering from a psychiatric or other illness which substantially impairs mental health.' Likewise under section 52 of the Mental Health Act 1959, the provision conferring upon the Chief Secretary power to order the removal of prisoners to a state institution, the present condition for the exercise of the power is that the prisoner appear to be mentally ill or intellectually defective.⁴⁴ 'Mental illness' so defined may be thought to be too vague and broad a criterion upon which to determine whether a convicted criminal should be executed. In general the procedure of 'certification' exists for the protection of the certified person's body and property and those of other persons rather than for the purposes of the criminal law. But on the other hand it may be argued that if a person's mental state is such that the community may require his incarceration for the protection of the community, his person and his property, it is not just that the community should take his life.⁴⁵

Perhaps the most satisfactory test of insanity for the purposes of a determination whether a convicted criminal should be executed is that formulated by American authority: Does he lack,

from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court?⁴⁶

⁴² Report of Royal Commission on Capital Punishment, 1949-1953 (Cmd 8932), paras. 288, 362.

⁴³ Mental Health Act 1959, ss. 42 and 43.

⁴⁴ See footnote 48, p. 448.

⁴⁵ An interesting discussion of this and related problems will be found in Ehrenzweig, 'A Psychoanalysis of the Insanity Plea—Clues to the problems of Criminal Responsibility and Insanity in the Death Cell' (1964) 73 *Yale Law Journal*, 425.

⁴⁶ *State v. Smith* (1918) 3 A.L.R. 83. I am indebted to Mr S. W. Johnston for his comments upon the appropriate criterion for insanity for these purposes. In his view the criterion for 'certification' is too vague and one which would command little agreement among medical practitioners.

Finally, it is submitted that, if such a medical inquiry finds a prisoner insane, there should be a mandatory duty upon the executive to reprieve. This, although not required by law, has been the invariable practice in England since 1840 and is no more than common decency and humanity requires.