category of legislative power involved. At the outset the Court should ask whether the category of legislative power extends to the particular act or regulation impugned. It is only when this question has been decided that the inconsistency problem should be dealt with. In the *Noarlunga* case, the approach of the judges was diverse. The majority examined the claim of inconsistency before they dealt with the actual scope of the trade and commerce power.[18]

Unfortunately, the result of the case has been to deny to the States authority over particular operations more amenable to State than to Commonwealth control. The future of Commonwealth-State relations depends on the extent to which the classification and inconsistency problems are treated in a more defined manner by the High Court.

R. D. LUMB

[18] It seems that the question of the actual scope of the powers in question must logically precede the question whether the purported exercises of these powers conflict with one another.

CRIMINAL PROCEDURE – BAIL IN MISDEMEANOURS – DISCRETIONARY POWER OF SUPREME COURT

In December 1953 William Light was alleged to have committed the misdemeanour of attempted armed robbery. On December 14th he was charged in a Court of Petty Sessions. On an adjournment Light was released on bail of £300. On December 23rd the charge was again adjourned and Light was once more released on £300 bail, although this time bail was opposed by the police. At the hearing on January 15th 1954 he was remanded in custody, bail being refused. On January 18th he was committed for trial and once more bail was refused. He then made an application for bail to a Supreme Court Judge sitting in Chambers, and his application was based on two contentions; first, that in the Supreme Court, bail should be granted as a matter of right to a person charged with a misdemeanour; and second, that if bail could be refused, such a refusal in this case would be prejudicial to the preparation of his defence. It was held by Sholl J. that bail in these circumstances was a matter of discretion and not of right; and that in the exercise of this discretion bail should not be granted to this particular applicant – *R. v. Light.*[1]

It is submitted that *Light's* case is of exceptional interest, not only because of the law applied but also because it raises nice points as to the theoretical validity of an *argumentum ab inconvenienti* decision, and as to the question of whether this is a leading case, and if so what parts of the decision constitute it a leading case. If we follow the train of thought which Sholl J. used to reach his

[1] [1954] V.L.R. 152.

decision – that at common law bail to a person charged with a misdemeanour is not a matter of right – we find a rather tenuous link in his chain of reasoning. Counsel for Light based his contention on three main authorities.

1. A highly ambiguous statement by Atkinson J. in *R. v. Phillips* (2).[2]

2. A consideration of the 1898 Habeas Corpus Act in *R. v. Spilsbury*.[3]

3. A statement in Paul on Justices.[4]

Sholl J. decided however that the power to grant bail was purely discretionary and he based his decision on a consideration of *R. v. Phillips* (1).[5] The decision in this case was that the English High Court had the power to deny bail to a person charged before it with a misdemeanour. This decision was based on (i) previous case law: *R. v. Foote*,[6] and dicta in *R. v. Spilsbury*[7] and these two cases were chosen in preference to two older cases which were considered with disapproval;[8] (ii) a consideration of the summary jurisdiction legislation in force in England in 1922. The English Act gave the magistrates the power to refuse bail, and it was thought that it would be a strange result if the High Court Judges did not have the same power on an application following a magistrate's refusal.

In the Victorian case it was obvious that the Court would not be bound by a case concerning the powers of the English High Court, but Sholl J. pointed out that s. 58 of the Victorian Justices Act gave similar powers to those contained in the English Act to magistrates in this State, and consequently held upon that persuasive authority that the Supreme Court of Victoria should also possess such a discretionary power.

Here we have the tenuous link to which I referred earlier. If we examine the decision without regard to any of the exigencies of practice, it is submitted that Sholl J. and the Court in *R. v. Phillips* (1) were not justified in assuming a change in the common law powers of the higher jurisdiction from a statutory power given to the officers of the lowest-ranking courts of justice. However this objection is obviously rather pedantic, and a consideration of the ludicrous position that would have existed if the decision of Sholl J. had been otherwise will show us that such a deviation from the strict rules of logic must be accepted, if not acclaimed, as an example of the flexibility of the common law.

I have dealt with this aspect of *R. v. Light* at some length for its importance might easily be overlooked because of both its brief consideration in the report and the attractive utility of the subsequent masterly condensation by Sholl J. of the considerations relevant

[2] (1947) 32 C.A.R. 147. [3] [1898] 2 Q.B. 615. [4] at 89.
[5] (1922) 128 L.T. 113. [6] (1883) 10 Q.B.D. 378. [7] [1898] 2 Q.B. 615, 620.
[8] *Re Frost* (1887) 4 T.L.R. 757; *R. v. Larkin* (1914) 48 I.L.T. 95.

to an exercise of the power to grant bail. There is no doubt that this latter aspect of the case is of value to the legal profession and to students, but the practical value of the case is scarcely an accurate correlative of its importance in the development of the law, for these were merely matters which the Judge considered in coming to his decision that bail should be refused to the applicant—a *ratio decidendi* of little, if any, interest. However, because of their value these points are tabulated briefly below. They are:

1. Whether a refusal to grant bail will prejudice the preparation of the applicant's defence. This involves (a) inability to examine exhibits while in custody; (b) inconvenience of legal conferences; (c) inability to locate witnesses.

2. Probability of the appearance of the accused at his trial. This involves (a) previous behaviour when on bail; (b) the nature of the alleged crime; (c) the probability of conviction; (d) the possible severity of punishment.

3. The safety of the public and the security of its property. This involves the prisoner's past history and his present character.

4. Hardship to various parties: (a) the inability to earn money; (b) the consequent hardship to his family; (c) the state of his health; (d) (in rare cases) the state of his business.

5. Whether the Crown opposes bail.

6. The possibility of Crown witnesses being tampered with if the accused is released on bail.

The conclusion to be drawn is that *R. v. Light* is a leading case because of the decision concerning the power of the Supreme Court to grant bail, and, though the decision rests on a logically unsound basis, it is to be welcomed. The refusal of bail to the applicant is a separate matter and in itself of no great importance, but the matters considered by Sholl J. in reaching his decision are of great practical value.

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