facts in this case, the only question to be determined is one of law, and no evidence that could be adduced can make any difference. It seems to me that the judgment of this Court must be to vary the judgment of the Full Court by giving judgment for the plaintiff.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion.

Pilkington. I move that judgment be entered for the plaintiff for possession of the land, with costs of the appeal, and of the proceedings in the Court below.

GRIFFITH C.J. Yes. The appellant will have the costs of the action and of the appeal, except the costs of the issue in which the defendant succeeded.

Judgment varied by directing judgment to be entered for the Crown with costs of the action and of the appeal, except the costs of the issue as to the agreement with Cowen.

Solicitor for appellant, *A. S. Canning.*
Solicitor for respondent, *F. W. Sayer.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

CLOUGH . . . . . APPELLANT;

AND

LEAHY . . . . . RESPONDENT.

SYDNEY, *Nov.* 29, 30; *Dec.* 1, 2, 5.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Constitutional law—Royal Commission—Limitations on power of Executive to appoint—Commission to inquire into matters within the jurisdiction of the Industrial Arbitration Court—Validity of Commission—Witness—Refusal to be sworn—Reasonable excuse—Royal Commissioners Evidence Act (N.S.W.), (No. 23 of 1901), secs. 3, 8.

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Royal Commissions of inquiry are lawful; and the Courts have no power to restrain persons acting under the authority of such Commissions, provided they do not invade private rights, or interfere with the course of justice.

A Royal Commission was issued by the Government with the advice of the Executive Council, authorizing and appointing certain persons to make "a diligent and full inquiry into the formation, constitution, and working of" a certain industrial union registered under the *Industrial Arbitration Act*, and also into the following questions: Whether that union was an evasion of the *Trade Union Act* or the *Industrial Arbitration Act*; whether the existence of that union was any obstacle to the presentation of any dispute which might arise in the industry to which it belonged to the Industrial Arbitration Court; whether its registration under the last-mentioned Act hampered that Court from doing justice in any such dispute; and whether any alteration of the law, and, if so, what, was necessary in respect of the matters to be inquired into. Questions relating to the status of the union had been raised in certain proceedings before the Court of Arbitration, which had given a decision in favour of the union.

Held, that there was nothing unlawful in the appointment of such a commission.

Held, also, that the alleged impropriety of the appointment of the Commission was not a "reasonable excuse" for the refusal of a witness to be sworn and give evidence, when duly summoned to appear before the Commission, under sec. 3 of the *Royal Commissioners Evidence Act* (No. 23 of 1901) (1).

Decision of the Supreme Court, (1904) 4 S.R. (N.S.W.), 401, reversed.

APPEAL from a decision of the Supreme Court: *Ex parte Leahy*, *Ex parte Rayment* (2).

The respondent was charged before a magistrate, on the information of the appellant, under sec. 8 of the *Royal Commissioners Evidence Act* 1901, with having refused, when duly summoned, to be sworn and to give evidence before a Royal Commission.

The Commission was by letters patent dated 2nd February, 1904, addressed to *Alfred Paxton Backhouse*, Esquire, one of the judges of the District Court of New South Wales, as President, and to the Minister for Lands and six other members of the Parliament of the State, authorizing and appointing them to

(1) 3. Whenever by letters patent under the Great Seal any person or persons have been appointed by the Governor a commission to make an inquiry, the president or chairman of such commission, or any person so appointed as sole commissioner, may summon by writing under his hand any person, whose evidence is in the judgment of such president, chairman, commissioner, or of any member of such commission, material to the subject-matter of such inquiry, to attend the said commission at such place and time as shall be specified in such summons.

(2) (1904) 4 S.R. (N.S.W.), 401.

make "a diligent and full inquiry into the formation, constitution, and working of the Machine Shearers and Shed Employés Union, Industrial Union of Employés:—Whether the Machine Shearers and Shed Employés Union, Industrial Union, &c., is an evasion of the *Trade Union Act*, or the *Industrial Arbitration Act*:

"Whether the existence of the Machine Shearers, &c., Union, Industrial Union, &c., is any obstacle to the fair and complete presentation of any dispute which may arise in the pastoral industry to the Industrial Arbitration Court:

"Whether its registration under the *Industrial Arbitration Act* does not hamper the Arbitration Court from doing complete justice in any dispute arising in the pastoral industry:

"Whether any alteration of the law, and, if so, what, is necessary in respect of the premises."

The Commission then proceeded to give the members power to meet and call before them by summons all persons whom they might think necessary, to require the production of all books, papers, &c., which they might require, and to visit and inspect offices and places where they were deposited, and to inquire by all lawful ways and means, and within three months to certify and report, and appointed Judge *Backhouse* to be President, and declared the Commission to be a Royal Commission for all purposes of the Act, No. 23 of 1901. The Commission was sealed with the public seal, and under the hand of the Governor of the State. The Commissioners met, and the respondent, who was secretary of the Machine Shearers Union, was summoned to appear before it. He attended and refused to be sworn or to give evidence.

At the prosecution before the magistrate, counsel for the respondent took the following objections to the information:—

(1) That the document purporting to be a Royal Commission is not within the powers conferred upon his Excellency the Governor by the letters patent providing for the appointment of a Governor for the State, of the Governor's Commission, or the Governor's Letter of Instruction, or other powers conferred upon the Governor pursuant to the said letters patent, and is therefore wholly void and inoperative:

(2) That, assuming the issue of Royal Commissions of inquiry

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to be within the powers conferred upon his Excellency the Governor, the same is an unconstitutional and illegal exercise of the prerogative of the Crown when affecting individual rights, or relating to the conduct, character, or status of the individual, not binding on the subject, and not validated by the *Royal Commissioners Evidence Act*, 1901:

(3) That, assuming the issue of a Royal Commission of inquiry to be within the powers conferred upon his Excellency the Governor, the issue of the document purporting to be a Royal Commission of inquiry in the present case is unconstitutional and illegal, on the following grounds:—

(i.) Inasmuch as it contemplates an inquiry as to matters which have been the subject of litigation and adjudication by the Registrar of the Court of Arbitration, in the exercise of judicial functions conferred upon the said Registrar by Statute. And the proceedings before the Commission are in the nature of a revision of the said adjudications, and are designed in order to re-open the said decisions:

(ii.) Inasmuch as the said Commission assumes to exercise an inquiry in disregard of rights and interests protected by the laws of the State:

(iii.) Inasmuch as the said Commission assumes to make inquiries as to matters which have been the subject of litigation, and which may be the subject of further litigation between the Machine Shearers Union and the Australian Workers Union:

(iv.) Inasmuch as the Commission originally included Mr. Donald MacDonell, who was vitally interested in a report by the Commission adverse to the Machine Shearers Union, and also the honourable W. P. Crick, a Minister of the Crown, whose duty it might afterwards become to decide upon some executive action growing out of the proceedings of the Commission:

(v.) Inasmuch as the appointment of the said Commission was made after the last prorogation of Parliament, and was an abuse of power upon the part of the Executive, in support of political supporters having had litigation, and contemplating continued litigation against the Machine Shearers Union:

(4) Assuming the legality of the Royal Commission, the following grounds of reasonable excuse for refusing to be sworn:—

(i.) That, for the reasons mentioned in sub-paragraph (v.) of paragraph (3), the matter should be the subject of consideration by the Parliament of the State:

(ii.) That for a period of two years or thereabouts there has been litigation between the Machine Shearers Union and the Australian Workers Union, during which time insulting and defamatory articles disparaging Mr. John Leahy have been inserted in the "Worker" newspaper belonging to the Australian Workers Union and controlled by its officials, and since the issue of the said Commission a defamatory article appeared in the "Worker" newspaper of the 23rd day of January last insulting the said John Leahy, and disparaging him as a witness before the said Royal Commission, and that the said Commission was appointed at the instance of Donald MacDonell, the general secretary of the Australian Workers Union, and counsel instructed by the said Donald MacDonell appearing on behalf of the Australian Workers Union to prosecute the said inquiry:

(iii.) Upon public grounds as regards the liberty of the subject:

(5) Generally upon other grounds disclosed by the evidence of the case.

The magistrate convicted and fined the respondent, who thereupon applied to the Supreme Court and obtained a rule *nisi* for a prohibition against the magistrate and the appellant, upon the grounds that the Commission was illegal, and that the respondent had reasonable excuse within the meaning of the *Royal Commissioners Evidence Act*, 1901, for refusing to be sworn. The Supreme Court made the rule absolute with costs: *Ex parte Leahy, Ex parte Rayment* (1).

Wise, K.C. and *Delohery* (*Pollock* with them), for the appellant. The Commission was to inquire into the matters therein stated by "all lawful ways and means." Therefore, unless it is illegal to inquire into those matters at all, no objection can be taken to the validity of the Commission, and it cannot be assumed that it will do anything that is unlawful. The Crown has a right to issue a Commission to inquire into any matters whatsoever, if it

(1) (1904) 4 S.R. (N.S.W.), 401.

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deems them worthy of inquiry, and provided that in doing so it does not invade private rights, or appoint a new court in the guise of a Commission. It is wholly in the discretion of the Crown to decide as to the expediency or advisability of issuing a Commission in each case, and the Supreme Court has no authority to review that discretion. But, assuming that only matters of public interest and importance may be inquired into by the Crown, the Supreme Court was wrong in treating the subject of inquiry in the present case as matter of private interest only. The question whether an amendment of the *Arbitration Act* was necessary was a matter of public importance. The Registrar of the Arbitration Court had refused to cancel the registration of the Machine Shearers Union, on the ground that he was not satisfied that its members could conveniently belong to the other union in the industry, viz., the Australian Workers Union. The Registrar had no power to summon witnesses, and had to decide the question on the evidence brought before him by the applicant and respondent unions, and it had been held by the Arbitration Court that there was no appeal from his decision. That was a state of the law which might well call for inquiry, with a view to an alteration of the law. It was a matter of great public interest to settle authoritatively the question whether the machinery of the *Arbitration Act* was sufficient for its purposes. There was a great deal of unrest and friction in the industry, as a consequence of the continued existence of the Machine Shearers Union, as appears from the evidence as to a shearers' strike in *Keogh* v. *Australian Workers Union* (1). It was the policy of the Act that only one union should exist in an industry, if possible: *Australian Workers Union* v. *Machine Shearers and Shed Employés Union* (2); *Protective Society of New South Wales United Labourers* v. *Builders Labourers Union* (3).

[GRIFFITH C.J.—Your argument is based on the assumption that it is material that the matter to be inquired into should be one of public interest. Is that material?]

(1) (1902) 2 S.R. (N.S.W.) (E.), 265.
(2) (1902) 1 Arbitration Rep. (N.S.W.), 16.
(3) (1903) 2 Arbitration Rep. (N.S.W.), 32, 226.

Even if it is, this was plainly a matter of public interest. There were several applications made by the Australian Workers Union to the Registrar for cancellation of the registration of the Machine Shearers Union. The last was in June, 1903: *Australian Workers Union* v. *Machine Shearers and Shed Employés Union* (1). The Registrar again refused, holding that want of *bonâ fides* could not be made a ground of cancellation, so long as the forms required by the Act were complied with, relying on *Salomon* v. *Salomon* (2). Until there is legislation the Registrar's decision stands, and the policy of the Act is hindered.

The constitution of industrial unions is itself a matter of public interest, because at their instance the Court of Arbitration may determine the conditions of labour affecting the whole of an industry. [He referred to the argument on this point in *Ex parte Leahy* (3).] Any body constituted under Act of Parliament with great powers is of public importance. [He referred to *Clark's Australian Constitutional Law*, p. 250.]

[GRIFFITH C.J.—There is no need for the body to be one created by Statute. Surely it is sufficient that the Government thinks it to be of great public importance, and that some amendment of the law concerning it may be necessary.]

It has long been the practice to inquire by Select Committees of the House in England and here: *Anson's Law and Custom of the Constitution*, 3rd ed., vol. I., p. 365. Select Committees and Commissions are on the same footing as regards the power to inquire: *Cox's British Commonwealth*, pp. 250-256; *Todd's Parliamentary Government in England*, vol. II., p. 347. This Royal Commission was appointed in place of a Select Committee, in order to prevent any difficulty that might arise as to summoning and compelling witnesses to be sworn. A Royal Commission to inquire into charges made by a prisoner against a warder of a gaol was held to be legal in New Zealand: *Jellicoe* v. *Haselden* (4). The power to administer an oath does not constitute the Commission a Court, nor does the fact that the inquiry is into private matters affect its legality: *Clark's Australian Constitutional Law*, p. 226. The

(1) (1903) 2 Arbitration Rep. (N.S.W.), 366.
(2) (1897) A.C., 22.
(3) (1904) 4 S.R. (N.S.W.), 401, at p. 406.
(4) 22 N.Z.L.R., 343.

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only authority which could give rise to a doubt as to the power of the Crown to appoint such a Commission is a statement in 12 Coke, pp. 31-32, as to Commissions of inquiry, that a certain Commission was against the law because it was to inquire only, so that a person might have been charged by perjury and have no remedy. That statement has been much criticised, as not being borne out by an examination of the real purpose and scope of the Commission in question. Lord *Campbell*, in his Life of Coke, in *Lives of the Chief Justices*, vol. I., p. 281 (note) speaks of *Coke's Reports* as having been originally printed in Norman-French in 1634, and translated in 1656. The translation may have misrepresented the original. In *Attorney-General* v. *Bates* (1), Coke's 12th Report is referred to as an undigested collection of notes and not of great weight. In *Lewis* v. *Walter* (2), *Holroyd* J., says that *Campbell* C.J., speaks disparagingly of the value of Coke's Reports owing to the intrusion of his own opinions. The validity of Commissions of inquiry was considered in connection with the Oxford University Commission; *Reports of Commissioners* (Oxford University) for 1852, vol. 22, p. 30. That was a Commission to inquire into certain matters in connection with the administration of the University, and gave power to call for such persons, books, &c., as the Commission might think fit. An opinion was given by the officers of the Crown, that Commissions of inquiry were legal. They refer to the passage in Coke's Reports as being only in reference to inquiries into offences. But inquiries may be made even into offences, so long as the Commission does not usurp the functions of the criminal Courts, and inflict punishment. In 1849 the *Dolly's Brae Commission*, "Hansard," vol. 108, pp. 886-968, was issued by the Lord-lieutenant of Ireland, by warrant directing a magistrate to hold an inquiry in County Down and investigate all matters that took place on the occasion of a certain Orange procession, and to cause steps to be taken to bring to justice the persons legally responsible for the outrages committed on that occasion; *Accounts and Papers, Ireland* (1850), vol. 51, p. 1. In 1867, a Commission was issued to *Erle* C.J., and others, to inquire into and report upon the origination of trade unions and

(1) 11 Har. S. Tr., 29, at p. 31.

(2) 4 B. & Ald., 605, at p. 614.

other associations, their effect on trade and industry, &c., any recent cases of outrage or wrong intimidation by such unions, and to suggest any amendments in the laws that may be necessary; *Reports Commissioners Trade Unions* (1867), vol. 32. In April of that year an Act was passed, the effect of which was to provide for compelling the attendance of witnesses, &c.: 30 & 31 Vict., c. 8. In the same year 30 & 31 Vict., c. 74, was passed, giving the Commission power to sit in any place, elsewhere than in Sheffield, the place originally fixed as the seat of inquiry: [He referred to *Clark's Australian Constitutional Law*, pp. 246-248.] That was almost exactly parallel to the present case. It is clear therefore that it has been a regular constitutional practice in England for the Crown to issue Commissions of inquiry in matters of importance, particularly in cases where it appears that an amendment of the law may be necessary to meet difficulties that are new, or have assumed an aggravated form. [He also referred to a number of cases in which Royal Commissions had been issued in New South Wales to inquire into matters both public and private, and even in connection with criminal charges against officers.] There is therefore nothing illegal in the Commission, although a Commission lawfully appointed may possibly do unlawful things. If the Commission is valid, it may exercise all the powers conferred by the *Royal Commissioners Evidence Act*, 1901, and every witness summoned is bound to appear, and submit to be sworn, if required. [He referred to an anonymous article in the *Law Review and Quarterly Journal of British and Foreign Jurisprudence*, 1851, 1852, vol. 15, pp. 269, 299, dealing with the history of Royal Commissions, and giving many instances.] All the cases referred to go to show that the appointment of such Commissions is a recognized means of obtaining information for the purposes of government.

Delohery followed. This was a matter of public interest, because, by 45 Vict. No. 12, trades unions are recognized as public bodies. Their public nature is still further accentuated by the *Industrial Arbitration Act*, 1901, which gives them increased powers and privileges.

[O'CONNOR J.—What authority is there for the contention

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that a Royal Commission can only be issued to inquire into matters of public interest?]

There is none but the decision of the Supreme Court in this case, and the treatise of *Clark on Australian Constitutional Law.* [He referred also to *South Hetton Coal Co.* v. *North Eastern News Association* (1)].

The legality or validity of Royal Commissions has been recognised by early Statutes, *e.g.*, by 42 Edw. III., c. 4. The only cases in which prohibitions have been granted against Commissions are those in which the Commission has taken upon itself the functions of some existing Court; *e.g.*, *Case of Isobel Peel* (2), in which a prohibition was granted to a Commission of inquiry which had imposed a heavy fine upon her for an offence cognizable by the established Courts of the realm.

In *Scott* v. *Avery* (3), Lord *Campbell* C.J., in dealing with a contract to refer matters to an arbitrator, said that such a contract does not oust the jurisdiction of a Court, and is, therefore, perfectly legal, and in accordance with public policy. The arbitrator merely inquires into the matter, but the result of his inquiry cannot affect the rights of the parties until it is enforced through the Courts of law. If, therefore, a private person can appoint persons to hold an inquiry, the Crown has no less right to do so, if it thinks a matter of sufficient importance to justify the issuing of a Commission.

Dr. Cullen (with him, *Broomfield*), for respondent. The right of the Executive to inform itself as to matters affecting the introduction of fresh legislation is not disputed, but the appointment of this Commission was an attempt to subject matters of private litigation to public and compulsory inquiry before a tribunal other than that which, by the law of the country, was entrusted with exclusive jurisdiction over those matters. Questions of right between individuals are withdrawn from the power of the Executive. Where a method is appointed by law for the decision of questions between one subject and another, the Executive may not hold an inquiry into those matters. There must be some limit

(1) (1894) 1 Q.B., 133
(2) Cro. Car., 113.
(3) 5 H.L.C., 811; 25 L.J., Ex. 308.

to the legal power of the King or of the Government to direct a public inquiry. A private person may make any inquiry he pleases, and, so long as he does not defame any person, or commit contempt of Court, he cannot be punished. For any wrong that he may commit in doing so, there is a remedy at law. There is a great difference between the private act of an individual, and the public act of a State official. The public ascertainment of disputed rights is reserved for the Courts of Justice and the King's Judges, and when they have been ascertained, it is illegal to re-open them by public inquiry, as this Commission proposed to do.

[GRIFFITH C.J.—It may be objectionable to re-open such questions critically, but, if no more is done, where is the illegality?]

It is a breach of the law, to hold a public inquiry into them, even though there is no power to follow up the inquiry by reversal of the Court's decision. Otherwise the Crown might anticipate every civil or criminal proceeding by compelling the parties to disclose their case to a Commission of inquiry.

[GRIFFITH C.J.—Apart from the Statute, nobody is compelled to attend or give evidence. The question is, first, how far, apart from Statute, Royal Commissions are legal or illegal, and next, what is the effect of the Statute upon them.]

Investigation into the matters referred to must not be made officially except by the constituted Courts. What might be harmless in a private person may become unconstitutional in the King or a high official. In almost all the cases cited for the appellant it was conceded that there was some limit to the right to appoint Commissions of inquiry. That appears in the opinion given by the Crown Law officers in favour of the validity of the Oxford University Commission. Offences may not be inquired into by Commission. No man should be publicly exposed to a charge without warrant of law. It is idle to say that he should wait until some harm is done to him, and then prosecute the persons responsible. He is entitled to check the evil at its source, by having the validity of the Commission inquired into by a writ of *scire facias*, or by applying to the Courts for a prohibition. The fact that such Commissions have been appointed in the past is no argument in favour of their legality. The power of inquiry is dangerous to the subject,

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and should have some firmer warrant than mere precedent. An illegal Commission may pass unchallenged because no person directly suffered at its hands. No question can arise until it attempts to exercise its powers, but when it does so, the question is whether in its inception it was illegal. In considering that question the consequences of the exercise of such powers are material. If they are injurious, it will be presumed that the Commission is illegal, unless the contrary is shown. If the Commission is illegally issued, because its purpose is unlawful, no person need obey its authority. This Commission was to inquire into the question whether the Union to which the respondent belonged was an evasion of the *Industrial Arbitration Act*. That involved the question whether the respondent was guilty of a conspiracy, which was a matter within the jurisdiction of the Courts of Justice.

[O'CONNOR J.—But the matter had been before the Court. Was not the object of the Commission's inquiry to ascertain whether there was a necessity for further legislation on the subject?]

It cannot be the law that a Commission may inquire into the merits of a case already decided in a Court. That would be a harrassing of the individual, an invasion of his rights. The Crown has no right to put people to answer except through the machinery of the criminal law. In the case of the *Sheffield Commission* (1867), which was to inquire into specific charges of outrage, Parliament thought it necessary to pass special enactments, in order to give the Commission power and protection in its exercise. The Commission was not acted upon until the passing of the Act.

[BARTON J.—Was not the Act passed in order to give effective powers to a Commission already lawfully appointed? Without protection to witnesses no useful inquiry could be held. I am disposed to think with Mr. Justice *Clark*, the learned author of *Australian Constitutional Law*, that that case removes all doubt as to the power of the Crown to appoint such Commissions.]

The author admits that the power is not absolute. The principle upon which the legality of an official act should be tested is stated in *Entick* v. *Carrington* (1). That was a case of seizure

(1) 19 How. St. Tri., 1030; 2 Wils., 275; *Broom's Constitutional Law*, 591.

of papers under warrant, and it was held that such an interference with private rights was *primâ facie* unlawful, unless clear authority for its exercise was to be found in the law, and that the fact that similar warrants had been issued before was of no weight. The same principle should be applied to Commissions to inquire into matters of private litigation. To take them away from the Courts is contrary to the principles of *Magna Charta* and "subversive of the freedom" of the subject.

[GRIFFITH C.J.—This Commission did not take them away from the Courts. It did not try them, as a Court would. It merely inquired.]

A body may be a Court although it has not power to determine the rights of parties: 3 *Blackstone's Commentaries* (1852 ed.), p. 24. It cannot really affect the rights of individuals; but it can act as if it had the power, until restrained. The Commission condemned by *Coke* in Rep. 12 was very similar to the present, and his statement is entitled to great weight. The limitation upon the Crown's right to inquire may be stated thus, that a public inquiry, by executive authority only, into questions of the guilt or innocence of individuals or their civil rights, or into the merits of a dispute between two individuals, otherwise than with their consent, is contrary to law, not in the sense that it is punishable as an offence, but that a direction to do it cannot be acted upon. By "public" is meant by public authority and in a public manner, as distinct from obtaining information by private inquiry. The doing of a thing by the Sovereign may be unlawful as terrifying and oppressive, although the same thing done by a private individual is harmless and lawful, *e.g.*, the soliciting of "benevolences."

[GRIFFITH C.J.—Can the mere discovery of a crime by the Commission be a legal wrong to anybody, particularly to the criminal? The mere fact that the inquiry may lead to defamation is not sufficient to make it an injurious Commission. It is only unlawful or unjustified defamation that is contrary to the law.]

The inquiry into guilt or innocence is a judicial function: *Hearne's Government of England*, 1st ed. (1867), p. 74; *Dawkins v. Lord Rokeby* (1). The case of an arbitration is very different. That is founded on the consent of parties, and the legislature in the

(1) L.R. 8 Q.B., 255.

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Arbitration Act merely made regulations to control the proceedings, and make them effective. The case of the *Princess Carolina* referred to in the *Law Review*, was an inquiry by a committee of the Privy Council, into questions involving treason and the succession, and throws no light on the present question. *Stephen's Commentaries on the Laws of England*, 7th ed., vol. II., p. 400.

The Royal Commissioners Evidence Act, does not affect the question whether there are any limits to the power of the Crown to issue Commissions of inquiry. It leaves the law as it found it in that respect, but it affords a new way of testing the validity of a Commission; any person concerned may object to the exercise by any particular Commission of the powers conferred by the Act. The word "lawfully" must be understood before "appointed" in sec. 3. The Act does not validate the appointment of a Commission which would have been invalid otherwise. A summons issued by a Commission unlawfully constituted would have no binding force upon the person summoned. Moreover, a "reasonable excuse" will exempt an individual from penalty: sec. 8. If the examination of a witness would be likely to cause him serious inconvenience or prejudice, he would have a reasonable excuse for refusing to obey even a valid and binding summons. The reasons set out in the objections as amounting to a reasonable excuse are ample for that purpose. The Arbitration Court had power under the *Arbitration Act* to deal with the matter in dispute between the unions, but the Commission was endeavouring to compel the respondent to produce documents which the Arbitration Court had no power to order him to produce. The respondent was, therefore, justified in refusing to place himself under the control of the Commission by being sworn.

[GRIFFITH C.J. referred to *London County Council* v. *Attorney-General* (1).

Delohery in reply, referred to *Dolly's Brae Commission*, Accounts and Papers, 1850, vol. 51, p. 3; and *Chitty's Prerogatives of the Crown*, p. 4.

Cur. adv. vult.

(1) (1902) A.C., 165.

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December 5th.

GRIFFITH C.J. This is an appeal from a judgment of the Full Court of New South Wales making absolute a rule *nisi* for a prohibition against a conviction by which the respondent was convicted of refusing, without reasonable excuse, to be sworn by a Royal Commission. It has been the practice in New South Wales, and, I believe, in most, if not in all, parts of the British Dominions, for many years, for the Crown, from time to time, to appoint Commissioners to make inquiry concerning matters as to which the Executive Government thinks it desirable that information should be collected, to be made use of in the administration of the affairs of the country, or for the guidance of Parliament. Many years ago the legislature of New South Wales, recognizing the practice, and recognizing also that the Commissioners so appointed had no coercive power either to require the attendance of witnesses, or to require them to be sworn or to answer questions, passed a Statute which has from time to time been amended, and is now found in the Act No. 23 of 1901, called *The Royal Commissioners Evidence Act*. In substance that Act provides that, wherever by letters patent under the Great Seal the Governor-in-Council appoints a person or persons as a Commission to make any inquiry, the chairman or sole Commissioner may summon any person whose evidence is, in his judgment, material to the subject-matter of the inquiry. And it is provided by the eighth section that any person served with a summons who, without reasonable excuse, fails to attend before the Commission, or refuses to be sworn, or to answer any questions put to him by any Commissioner bearing on the subject-matter of the inquiry, shall be liable to a fine not exceeding £20.

On 2nd February last the Governor of New South Wales, with the advice of the Executive Council, issued letters patent appointing Commissioners, of whom the chairman was a District Court Judge, one of the Commissioners being the Minister for Lands, and the other six being members of the Legislative Assembly, and authorizing them to make a diligent and full inquiry into the following matters: [His Honor then read from the Commission as set out above and proceeded]:

The Commission met, and the respondent was summoned to attend before it. He attended, but refused to be sworn. He was

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thereupon prosecuted before the magistrate, and at the hearing he made various objections to being sworn. The first objection, that the Governor had no power under the letters patent constituting the office of Governor of New South Wales, or under his Commission or Instruction, to issue the letters patent in question, has not been the subject of argument before us. The Full Court thought it was not arguable. It is clearly untenable.

The other objections were as follows:—[His Honor read the grounds of objection as set out above.]

The magistrate over-ruled the objections and convicted the respondent, and fined him. The respondent then applied for a prohibition and, after argument, an order was made absolute for a prohibition. The case is reported at considerable length. Substantially the reason for the Court's decision is given in the concluding part of the judgment of the learned Chief Justice. He is reported to have said (1):—"Taking the view I do that the Royal Commission in this case was to inquire into a dispute between two rival unions already three times adjudicated upon and in which the Arbitration Court had full power to do complete justice between the parties, I am of opinion that no public interests were involved, and that the Royal Commission was both illegal and unconstitutional as an unjustifiable attempt to invade private interests, and a usurpation of the jurisdiction of a Court lawfully constituted to deal with the same matter."

Mr. Justice *Owen*, after referring to some ancient Commissions, to which I will also refer directly, concluded his judgment thus (2): "It is clear, therefore, that a Royal Commission taking an inquiry of this nature away from the duly constituted Court deprives the party summoned of a very important safeguard to which he would be entitled in the Court. And, further, it would compel one of the parties to a dispute to disclose his case to the other side before action brought, and so provide the other side with a weapon of attack. I am, therefore, of opinion that the inquiry directed by this Royal Commission does in effect supersede the Industrial Arbitration Court, and relates to a matter which has already been inquired into in that Court and determined, and which may again come before it, and is, therefore, illegal."

(1) (1904) 4 S.R. (N.S.W.), 401, at p. 417.
(2) (1904) 4 S.R. (N.S.W.), 401, at pp. 421-2.

Mr. Justice *Pring* put the matter also on the ground of interference with the course of justice. After referring to the authority in Coke, he said (1):—"From that time to the present, as far as I am aware, no lawyer has ever ventured to contend that the prerogative of the King can be stretched so as to give him the right to interfere with the proceedings of Courts of Justice. Such an interference, whether it be by asserting a right to give judgments in disputes which are pending or to constitute an irregular Court of Appeal to revise the decision of a regular and constitutional Court, is, in my opinion, illegal."

He then inquired whether the appointment of this Commission was such an interference with the Courts of Justice as to be illegal, and dealt with the facts connected with the appointment of the Commission, *i.e.*, the historical circumstances which induced the Executive Government to issue the letters patent.

Before us the same arguments were used, and some others. The main contention was that the Commission is "unlawful and illegal." A good deal of difficulty was found by the learned counsel who argued very ably for the respondent in saying exactly what he meant by "unlawful" and "illegal." It is obvious that there is a great deal of difference between a thing which is prohibited by law and a thing as to which there is not in existence any positive law authorizing it. Now, I apprehend that in a matter of this sort, when we are called upon to inquire into the powers of the Crown to issue Commissions, it is just as well to begin with first principles, and I propose to deal first of all with, not the "legality," whatever that means, but the lawfulness of such a Commission of inquiry, apart altogether from any statute; that is to say, to inquire whether there is any statute law or rule of common law that makes it unlawful for the Crown to issue Commissions of inquiry. It is no part of the function of a Court of Justice to inquire into the propriety of the acts of the Executive Government. It is clear that the Executive Government cannot by its Commission make lawful the doing of an unlawful act. If an act is unlawful —forbidden by law—a person who does it can claim no protection

(1) (1904) 4 S.R. (N.S.W.), 401, at p. 425.

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by saying that he acted under the authority of the Crown. Nor can the Crown enforce the answering of a question by an individual, unless some law confers the authority to do so. Nor can the Crown justify the publication of defamatory matter merely by its authority. If, in the course of an inquiry made by the Crown, defamatory matter is published, it is actionable, and may be perhaps punishable criminally, unless it is protected by the general law. If the circumstances of the publication are such as to render it lawful, under what is commonly called here the rule of privilege, then the Crown has not authorized the doing of an unlawful act, but the doing of a lawful act. If defamatory words are spoken under circumstances which do not come within the protection of justification or privilege, the person speaking them has no protection whatever, and is liable to the ordinary consequences of an unlawful act. This doctrine applies to all matters alike, whether the matter is one of public or private interest. The rules for determining whether particular defamatory matter so published would be privileged may vary according to the circumstances, but, if the publication is lawful, it is not from the mere fact of the issue of the Commission, but because the circumstances under which the publication was made are such that the law holds the publication lawful. Nor can the Crown interfere with the administration of the course of justice. It is not to be supposed that the Crown would do such a thing; but, if persons acting under a Commission from the Crown were to do acts which, if done by private persons, would amount to an unlawful interference with the course of justice, the act would be unlawful, and would be punishable. So that in this respect the powers of the Crown are practically no greater than the powers of a private individual. It is quite unnecessary, indeed, to call in aid what are called the "prerogative" powers of the Crown. That term is generally used as an epithet to describe some special powers, greater than those possessed by individuals, which the Crown can exercise by virtue of the Royal authority. There are some such powers exercised under the law, but the power of inquiry is not a prerogative right. The power of inquiry, of asking questions, is a power which every individual citizen possesses, and, provided that in asking these questions he does not

violate any law, what Court can prohibit him from asking them? He cannot compel an answer; and, if he asks a question and gets an answer which is defamatory of anybody else, and the circumstances are such that the occasion is not privileged, the person who utters the words is liable to the consequences of an unlawful publication of defamatory matter.

We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle. The liberty of another can only be interfered with according to law, but, subject to that limitation, every person is free to make any inquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it desirable in the public interest to get information on any topic. And it seems impossible, from this point of view, to draw a line beyond which an inquiry will be necessarily unlawful.

It is not unlawful for me to make the most impertinent inquiry into my neighbour's affairs. It is very undesirable, but it is not unlawful. It cannot be suggested that the Crown would do such a thing, but, if it did, it would be no more unlawful for the Crown to make such an inquiry than for an individual. If I make impertinent inquiries as to my neighbour's private affairs, I may bring down upon myself the censure of right-thinking people. If the Crown makes an inquiry into the affairs of private persons, the advisers of the Crown may incur the censure of public opinion. They may also incur the censure of Parliament. Any and every person is equally free to form an opinion as to the propriety of the inquiry, but it would be a strange thing if Courts of Justice were to assert the right to inquire into the propriety of executive action—whether it was a thing which, according to rules of action commonly received in the civilization in which we live, ought to be done. That is a question which a Court of Justice has no right to inquire into. It is for a Court of Justice to inquire whether the law has been transgressed.

Now, applying these principles, what is there unlawful in the issuing of this Commission of inquiry? So far as Dr. Cullen is able to suggest, there is nothing unlawful in the mere inquiry

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itself. He, however, says that a difference arises if the inquiry is made publicly. I will refer directly to his argument on that point, and in the meantime it will be convenient to say something on the supposed authorities on the subject. The only thing that can be called an authority is the passage quoted from 12 Coke, 31, in which the Judges are stated to have resolved—under what circumstances we do not know, when we do not know, and for what purposes we do not know, that certain Commissions issued in the time of James I. were unlawful. These Commissions were in form Commissions to inquire into various acts which were, or were supposed to be, misdemeanours. The form was substantially the same as Commissions of *oyer* and *terminer*. Juries of twelve were to be sworn and to make presentments, and the Sheriff was directed to summon them under the ordinary process of law. They were in fact an attempt to institute new Courts with coercive jurisdiction, which were to hold proceedings in the nature of an inquisition, and the findings of the jurors were to be recorded in the Court of Chancery. What was to be done with them afterwards does not appear. The learned Judges held that such an attempt as that was unlawful, and it is only strange that anyone should have thought it competent for the Crown in that day, in the exercise of its prerogative power, to establish a new Court of that kind and confer upon it coercive jurisdiction. This authority has clearly no bearing on the general question whether a Commission to inquire and collect such information as witnesses voluntarily give it is lawful.

Then we were referred to the case of the Commission to inquire into the affairs of the Oxford University, as to which there was quoted to us the opinion of four extremely learned lawyers to the effect that that Commission was unconstitutional and illegal. But, on inquiring what were the questions submitted to these learned lawyers, we find they were whether the Commission was "constitutional and legal, and such as the University, or the members of it are bound or ought to obey." Whether it was constitutional and legal seems to be an abstract question, the meaning of which might be interpreted differently by different persons. What the persons who took advice wanted to know was whether they were bound to obey the Commission or not, that

is to say, whether the Commissioners had jurisdiction to compel them to give the information they desired, or, assuming that was not so, whether as a matter of propriety, they ought as loyal subjects to attend and give the information. The four learned lawyers answered the question in the negative; the three Crown Law Officers of the day were of a contrary opinion. That instance affords no authority for the contention that the Commission itself was unlawful, in the sense of being contrary to law.

We were also referred to the *Dolly's Brae Commission* in Ireland, which was a Commission to inquire into crimes suspected to have been committed there on the occasion of an Orange procession, and to the *Sheffield Commission* on what were called the rattening cases, in connection with which a special Act of Parliament was passed compelling the attendance of witnesses, and protecting those who made full disclosures from civil and criminal consequences.

None of these authorities tend to suggest or throw any doubt on the doctrine which I just now laid down, that an inquiry of itself is lawful and not forbidden by law. But, having got so far, Dr. Cullen says:—Yes, but what may be proper as to a private inquiry may be improper and become unlawful if the inquiry is made publicly. We pressed him to formulate a line of demarcation at which such an inquiry becomes unlawful, not in the sense of being improper, but contrary to law, and the highest ground on which he put it, and I think the highest ground on which he could put it, was this: "A public inquiry into a question of guilt or innocence, or as to the civil rights of individuals, or as to the merits of a dispute between individuals, except with their consent, is contrary to law." During the argument, we asked him in vain for any authority to this effect. Why is an inquiry into the question of the guilt or innocence of an individual, a mere voluntary inquiry, contrary to law? The mere fact of inquiry is not unlawful. In every criminal prosecution a preliminary official inquiry takes place, although it is not public, and in the case of actions between individuals the plaintiff must inquire privately before he brings his action. Why does an inquiry into the question of guilt or innocence become unlawful by being made publicly? It must be borne in mind that the Com-

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mission, apart from Statute law, does not give the Commissioners any coercive power. The inquiry simply amounts to the asking of questions of persons willing to give information. The only reason that was suggested why it should then become unlawful was that, if it is issued under the authority of the Crown, it might operate *in terrorem*. If this is a Commission that might operate *in terrorem*, and if it is therefore unlawful, it must be because the holding of a public inquiry, which might so operate, is contrary to law; that is to say, that if the Crown does some act which is likely to terrify timid people, the officers through whom it acts are violating the law, in which view they would, I suppose, be liable to a prosecution for a misdemeanour; just as going armed in public to the terror of peaceful subjects is a misdemeanour under the Statute of 2 Edw. III., which is, I believe, still in force in New South Wales. So, it is said, persons who go abroad publicly collecting information on matters thought by the Executive Government to be of public interest, for which special duty they have been appointed, are also guilty of acts done to the terror of peaceful subjects.

We look in vain, however, for any authority for such a proposition. The only case quoted in support of it—*Entick* v. *Carrington* (1)—is a case to a very different effect, that acts in invasion of the liberty of the subject, or in interference with his property, are unlawful, unless they are justified by some statute or known principle of law. All that was decided, or rather, declared by that case is that an act which is an interference with liberty or property is unlawful unless a positive law can be found to authorize it.

As to the objection to a public inquiry that it might lead to public defamation, it has been already pointed out that, if any defamation occurs in the course of an inquiry, the defamation is either lawful or unlawful. If the publication is unlawful, it cannot be authorized by the Commission. If it is lawful, it is not so by virtue of the Commission, but by virtue of the general law, except so far as the Commission may, under that law, or under Statute, constitute a case of privilege. What objection can be

(1) 19 How. St. Tri., 1030; 2. Wils., 275.

offered then, to the present Commission? There is one objection which probably would be a good one if it could be sustained. Any interference with the course of the administration of justice is a contempt of Court, and is unlawful. If, therefore, any person, purporting to act under the authority of a Royal Commission, were to do an act amounting to an interference with the course of justice, he could not claim any protection on the plea that he was acting for the Crown.

That being, as we conceive, the law, what is the objection to the present Commission. The letters patent on their face show that the Executive Government desired information on certain specified matters, but the main object of all the inquiries is to ascertain whether any alteration of the law, and, if so, what, is necessary in respect of the premises. It is suggested that this is an interference with the administration of justice. In what way? The Arbitration Court is a Court lately established in New South Wales, and is to a certain extent an experiment in legislation. It is not likely that all the details have at the first attempt been worked out to complete satisfaction, and it is very probable that the machinery of the *Arbitration Act* may not work exactly in the way intended. These are difficulties which arise in respect of every new institution. How the Act does work, and what are its legal effects, can only be authoritatively determined by judicial decision in a suit between two parties; but surely, if, in the course of a suit between two parties, the law is declared to be such as in the opinion of the legislature is unsatisfactory, the Government are not debarred from inquiring into any suggested defects merely because they were first ascertained in the course of legal proceedings. As already said, defects in the law can only be authoritatively ascertained by a decision in a matter between parties. It would be, indeed, a strange limitation to say that it is unlawful to hold a public inquiry into supposed defects of the law because they have first been discovered in the course of private litigation. They cannot be discovered authoritatively in any other way. I do not think it is any part of our duty to suggest a case in which the Government might issue a Commission having for its obvious purpose interference with the course of justice. It is inconceivable;

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but, if it did occur, it would be sufficient to say that the Crown had been wrongly advised, and had no power to do it.

In the present case it is true that there has been litigation between the Unions mentioned, and it is said that, in the course of it, certain defects were suggested to have been found in the Act. It is for the legislature to amend the Act if it thinks fit. If, in view of the investigations of the Commission, they come to a different conclusion from that of the Court of Arbitration, what harm is done? The Commission does not affect any rights declared by the Court to exist as between the parties, and the judgment of the Court given in favour of one party still stands in his favour. It may be that the legislature, if it thinks fit, will say, that in future the law shall be different. The Court may have been right or wrong in its decision. Every Court is liable to err. If the Commission reports, after inquiry, that the law is so and so, the legislature may leave it as so declared, or may alter it; but how is it any interference with the rights of any person to make an inquiry to ascertain whether the Court came to a right conclusion on the facts or the law? It in no way impeaches the proceedings of the Court, and in no sense can it be called an interference with the course of justice.

There being, then, nothing unlawful in the inquiry, we find that the Statute provides that the Chairman may issue a summons directing the attendance of any person as a witness, and, if he fails to attend, or refuses to be sworn, without reasonable excuse, he is liable to a penalty. It is not necessary to consider whether the Statute enlarges the power of the Governor to issue such Commissions. If the view I have expressed is a correct one, there is no need to enlarge it. The contention must rather be that the Statute restricts the power. There is nothing in the Act to suggest any such restriction, but it is not necessary to consider that question now, for it is not suggested by the appellant that the Statute authorizes the issue of a Commission for what would otherwise be an unlawful purpose. The purpose in the present case has been shown to be not unlawful. The only question then is, the Commission having been issued for purposes not unlawful, did the respondent give any reasonable excuse for refusing to be sworn? This was the charge against him; and of it he

was clearly guilty. If the charge against him had been that, having been sworn, he refused without reasonable excuse to answer questions put to him, an entirely different set of considerations would arise, upon which it would be unwise to speculate. What is a reasonable excuse for refusing to give information is a matter which may well be dealt with when it arises. In the present case some of the objections taken by the respondent to being sworn seem to be fantastical, but it is not necessary to refer to them in detail except so far as they suggest that it is for a Court of Justice to review the propriety of the action of the Executive Government. It would be an unfortunate thing if a Court of Justice should undertake to review the propriety of the action of either the Executive or the legislature. In the case of the legislature our duty is to ascertain what it has done, and give effect to it; and with respect to the Executive, the only duty of the Court is to see that its acts are not unlawful, and, if they are, to restrain or punish its agents. With this limitation, the general rule of liberty must govern the Executive, as the private individual. For these reasons it seems to me there is nothing in any of the objections. The Commission is not unlawful, and no answer is made to the charge that the respondent without reasonable excuse refused to be sworn. The appeal should, therefore, be allowed.

BARTON J., and O'CONNOR J., concurred.

Appeal allowed with costs. Order making rule absolute for prohibition discharged, and Rule Nisi discharged with costs.

Solicitor for appellant, *The Crown Solicitor of New South Wales.*

Solicitor for respondent, *A. De Lissa.*

C. A. W.