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JAMES F. McKENZIE & Co. v. LESLIE.

Higgins J.

ISAACS J. I entirely concur, with this additional observation: I think sec. 114 of the *Trade Marks Act* 1905 applies both to the use and the registration of trade marks.

HIGGINS J. read the following judgment. I concur in the orders which have been stated. I think that the conditions which are imposed on the registration under application 1192, taken with secs. 6, 50 and 51 of the *Trades Marks Act* 1905, sufficiently protect any rights which the respondents have under the New South Wales registration. Under sec. 50, registration under that Act is mere *primâ facie* evidence of right to ex-exclusive use; and under sec. 51 it becomes after five years conclusive evidence "subject to this Act"—that is to say, subject (*inter alia*) to sec. 6.

Appeals allowed.

Solicitors, for the appellants, *Waters & Crespin.*
Solicitor, for the respondents, *S. E. Pile,* Sydney.

B. L.

[HIGH COURT OF AUSTRALIA.]

HOPE . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *March* 15.

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

Appeal to High Court in Criminal Case — Special leave — Evidence — Dying declaration.

On the trial of a woman for the murder of a girl, statements made by the deceased girl within 24 hours of her death, which had been reduced to writing and signed by her, and also conversations between her and the

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persons to whom she made the statements which were reduced to writing, were admitted in evidence. The accused was convicted. A question as to the admissibility of this evidence having been referred to the Full Court, the conviction was affirmed. Special leave to appeal to the High Court was sought on the grounds that the principle upon which dying declarations are admissible had been wrongly stated, and that where such declarations are reduced to writing, oral evidence of what the deceased said is inadmissibe.

Held (*Isaacs* J. dissenting), applying the principle in *In re Dillet*, 12 App. Cas., 459, at p. 467, that the case was not one in which special leave should be granted.

Special leave to appeal from the decision of the Supreme Court: *Rex* v. *Hope*, (1909) V.L.R., 149; 30 A.L.T., 167, refused.

MOTION for special leave to appeal from the Supreme Court of Victoria.

Florence Hope was tried before *Cussen* J. and a jury of twelve on a charge of murder. The case for the prosecution was based on allegations that the accused had unlawfully used an instrument to procure the miscarriage of a girl named Bertha Elizabeth Whitford, that in consequence the miscarriage had taken place, and that as the result the girl had died.

Certain statements were made by the deceased within twenty-four hours of her death to two police officers on separate occasions, some of which were reduced to writing in the form of two statements, and were signed by the deceased. These written statements were put in evidence, and the two police officers also gave evidence as to the conversations between them and the deceased at the time the written statements were made. Counsel for the prisoner contended that the written statements were inadmissible as it was not shown that the deceased had a settled, hopeless expectation of immediate death, and also that in both cases they were made in answer to questions, and in one case that the questions and answers were not reduced to writing.

The jury having found the accused guilty, *Cussen* J. reserved for the Full Court the question whether the evidence of either of the two police officers, including the written statements put in evidence, was inadmissible in any particular.

The Full Court having affirmed the conviction (*Rex* v. *Hope*) (1),

(1) (1909) V.L.R., 149; 30 A.L.T., 167.

the accused now applied to the High Court for special leave to appeal.

Schutt, for the appellant. The Full Court in stating the circumstances under which dying declarations are admissible has omitted that the expectation of death must be hopeless. Where the statement of a person immediately prior to his death has been reduced to writing, that is the best evidence of the statement, and other prior statements made by him not reduced to writing are inadmissible.

[ISAACS J. referred to *Taylor on Evidence*, 10th ed., p. 513; *R.* v. *Gay* (1); *R.* v. *Scallan* (2); *R.* v. *Reason* (3); *R.* v. *Mitchell* (4).

HIGGINS J. referred to *Phipson on Evidence*, 4th ed., p. 279.]

GRIFFITH C.J. The majority of the Court are of opinion that this case falls within that of *In re Dillet* (5), a decision which has been followed in this Court, and that special leave to appeal should be refused.

ISAACS J. I regret that I take a different view, and I think that, where it is a case of life or death, nothing in the shape of a technicality should stand in the way of giving a person sentenced to death an opportunity of preserving his life. In *R.* v. *Bertrand* (6), *Sir John T. Coleridge* in delivering the opinion of the Privy Council said:—"The result is, that any application to be allowed to appeal in a criminal case comes to this Committee labouring under a great preliminary difficulty—a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law inter-

(1) 7 C. & P., 230.
(2) 1 Cr. & D. Ab. C., 340.
(3) 1 Stra., 499.
(4) 17 Cox C.C., 503.
(5) 12 App. Cas., 459.
(6) L.R. 1 P.C., 520, at p. 530.

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rupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision." *In re Dillet* (1), was a case in which the rule was laid down, but there leave to appeal was granted because the prisoner was prejudiced and so the actual decision supports the present application. In the last case before the Privy Council: *Tshingumuzi* v. *Attorney-General of Natal* (2), leave was refused on the authority of *In re Dillet* (1). That was a case of disputed evidence and of the proper inference to be drawn from the evidence, and the Court said:—"It is impracticable to suppose that in such a case . . . this Board can judge better than those who have heard the witnesses themselves."

Now what is the present case? It is a case where a woman was charged with the murder of another woman by an illegal operation. The Doctor who made a *post mortem* examination of the body of the deceased said that death was caused by a perforation extending through the wall of the womb into the surrounding tissue in an upward and outward direction. He then went on to describe the state of the organ, and he said that in his opinion the condition was produced by the introduction into the uterus of some instrument, and that an instrument like a catheter, which was produced, would cause the perforation. A good deal, therefore, turns upon the nature of the instrument which probably caused the perforation. Now in the written statements made by the deceased there is no description of the instrument whatever, except that it was a tube. The nature, shape, and substance are left all undetermined. That is so also with regard to the other written statement. The only place in which I can see any reference to the nature of the instrument is in the oral statement, alleged by the witness Jenkins to have been made to him by the deceased, that the instrument was like a syringe with the end turned up. That is a very important statement and, in my opinion, extremely pertinent to the question whether the perforation in an upward and outward direction was caused by the prisoner or by some other person, for the

(1) 12 App. Cas., 459.

(2) (1908) A.C., 248, at p. 250.

deceased left the prisoner's house some time afterwards. If that oral evidence was not admissible there was imminent peril of the jury's minds being affected by that testimony, and I think that in that case substantial injustice would have been done. This is not a technicality. The technicality, I think, is in not giving effect to it. The position of a prisoner on trial for her life is not one in which she should be tied down by the most rigid rules of procedure.

Now, there is a considerable body of authority to be found in *Taylor on Evidence*, 10th ed., p. 513, and the cases there referred to, which, as far as it goes, is in support of the position that, where a declaration is made by a dying person and is reduced to writing and signed, that written declaration is the one intended by him to be used. It is the final revised statement to which he wishes to pin his faith and to pledge his dying breath. Therefore in this anomolous state of affairs, where an unsworn statement, taken without the accused having the smallest opportunity of testing it by cross-examination, is admitted in evidence, the law regards its admission, as was said by *Byles* J. in *R.* v. *Jenkins* (1), "with scrupulous, and I had almost said with superstitious, care." I feel that in this case, which is one of life and death, it would be right to allow the accused to have a chance of having the matter argued, and I therefore am unable to concur in the judgment of the Court.

HIGGINS J. I concur in the decision of the Court. I would like to say with reference to one of the points raised by Mr. *Schutt*, as to the evidence of what was verbally said not being admissible if what was said has been committed to writing, that the case of *R.* v. *Sheridan* (2) appears to me to be conclusive. That was a prosecution for breach of a law about holding meetings in which the accused was charged with having read out a certain resolution at a meeting. The prosecution proposed to give evidence of what was said in reading out the resolution, and objection was taken. The Judges held that what was said was admissible. Lord Chief Justice *Downes* said:—"I do not feel that this objection to the evidence has any weight. The paper alluded to is

(1) L.R. 1 C.C.R., 187, at p. 193. (2) 31 How. St. Tr., 543, at p. 673.

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not that kind of instrument which should, in the first instance, be produced, or accounted for, before evidence of an inferior nature can be given. The objection is founded upon a presumption that there is a document of an authentic nature, showing what the proceedings were, and that it is not competent to give evidence of those proceedings, without producing that document. The evidence offered is to show the transactions of the meeting; what was said by the one and the other; in short, the general conduct of the assembly. This cannot be rejected because there was some person there who took notes of what passed. Possibly, that person may have a more accurate account; but it goes no further than that." The other Judges concurred.

Leave to appeal refused.

Solicitors, for the appellant, *P. J. Ridgeway.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JONES . . . . . APPELLANT;
INFORMANT,

AND

GEDYE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *October* 11.

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

Trade Mark—Falsely applying trade mark—Defence—No intention to defraud—Trade Marks Act 1905 (*No.* 20 *of* 1905), *sec.* 87.

The words "intent to defraud" in sec. 87 of the *Trade Marks Act* 1905 mean intent to induce purchasers to believe that goods to which a trade mark is falsely applied, and which are manufactured by the seller, are manufactured by some person other than the seller.

An information for an offence under the section, to which it was a defence to show that the defendant had no intent to defraud, having been dismissed,