[HIGH COURT OF AUSTRALIA.]

THE KING *v.* NICHOLLS.

H. C. OF A. 1911.

MELBOURNE. *June* 7.

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

Contempt of Court—Nature of offence—Obstruction to or interference with justice—Publication of statements concerning a Judge of the High Court.

Statements made concerning a Judge of the High Court do not constitute a contempt of the High Court unless they are calculated to obstruct or interfere with the course of justice, or the due administration of the law, in the High Court.

MOTION.

On 7th April 1911 there was printed and published at Hobart, Tasmania, in a newspaper called *The Mercury*, an article headed "A Modest Judge," which was as follows:—"Mr. Justice Higgins is, we believe, what is called a political Judge, that is, he was appointed because he had well served a political party. He, moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship. In the course of the hearing of a case in the Arbitration Court, one of the counsel described the Broken Hill labour organizations as 'the most tyrannical that he had known,' and he added, 'moreover, they are encouraged by their Union and the Government of this country.' Whereupon Mr. Justice Higgins was shocked, and is reported to have said severely, 'You are not entitled to speak severely of those above us.' Whether he meant that the Union or the Government 'is above us' is said to be somewhat uncertain, because as the Unions are supposed to rule the Government, it is held that they must be regarded as the supreme power, and must not be lightly spoken of, no matter what kind of language they may use themselves. On the other hand, it is argued that he must have meant the Labour Ministry, because the charge of encouragement seems

to have been levelled at it openly in Court for the first time, and every one knows that the Unions do encourage all sorts of strange things. Assuming, as we may assume, we think, that he meant the Ministry, we find ourselves impelled to remark on the fact that a Judge, a superior Judge too, should admit that even a Ministry or a Government is superior to him in the exercise of his judicial functions. As we and most people understand the matter, a Judge on the Bench in the exercise of his judicial functions has no superior, and if a Government has done wrong in a public manner, there is no reason why the fact should not be stated, and it might even form a reason for a special decision in a case. In fact, it is conceivable that the action of a Minister might be a reason for a special decision, and, certainly, of special remarks, not only by counsel, but by the Judge, too. Mr. Justice Higgins thinks not, and has no resemblance to the Judge who did not hesitate to deal with a Prince of Wales in an exemplary mannner, and who has had universal applause ever since. The time may not be far distant, we suppose, when we shall not be allowed to speak ill of the Caucus, for that is above all. From another point of view, we may be disposed to exclaim with Maria, in 'Twelfth Night':— 'La you, an you speak ill of the devil, how he takes it to heart.'"

Notice was given pursuant to Order XLIX., r. 2, of the *Rules of the High Court*, on behalf of the Attorney-General of the Commonwealth to Henry Richard Nicholls editor of *The Mercury*, that the High Court would be moved that Nicholls should be ordered to stand committed to prison for his contempt of the High Court, or in the alternative for his contempt of the Commonwealth Court of Conciliation and Arbitration, in printing and publishing the above article concerning Mr. Justice *Higgins* in his capacity as a Judge of the High Court or in the alternative in his capacity as President of the Commonwealth Court of Conciliation and Arbitration, and that Nicholls should be ordered to pay the costs of the motion and of the order to be made thereon.

The motion now came on for hearing.

An affidavit was filed on behalf of the Crown setting out a

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shorthand writer's note of the incident which took place in the Commonwealth Court of Conciliation and Arbitration to which reference was made in the article. The note so far as material was as follows :—

"Mr. *Starke*.—Of all the labour organizations I have ever heard of Broken Hill and that field seem to be the strongest and about the most tyrannous I have ever heard of. They not only do not do their work but they break their agreements with impunity and they are encouraged by their Unions and by the Government of this country.

"*Higgins* J.—I will not allow you to speak in that way of the Government of this country. You have no right to speak in that way, and you will understand I will not listen to it.

"Mr. *Starke*.—I am entitled to put forward any view I like for my clients.

"*Higgins* J.—You are not entitled to speak disrespectfully of those above us.

"Mr. *Starke*.—I am not speaking disrespectfully.

"*Higgins* J.—If that is not disrespectful I do not know what is.

"Mr. *Starke*.—I spoke of the tyranny of these Unions at Broken Hill.

"*Higgins* J.—I will not allow you to speak in that form of a Government of the country and those above us. If you do not comply with my rules you will leave the Court."

Counsel did not argue as to the alleged contempt of the Commonwealth Court of Conciliation and Arbitration.

Weigall K.C. (with him *Gregory*), for the Crown. The first two sentences of the article taken into consideration constitute a contempt of the High Court. To speak of a Judge of a Court in such a manner as is calculated to destroy the respect of the community for his decisions and to create among the public a belief that his judgments are affected by political subserviency is a contempt of Court.

[GRIFFITH C.J.—A Judge is as much open to be libelled as anybody else. The libel may or may not be justified. But although a publication concerning a Judge may be libellous, it is

not a contempt of Court unless it is calculated to obstruct or interfere with the course of justice or the due administration of the law: *In the matter of a Special Reference from the Bahama Islands* (1).]

Contempt may be of two kinds, scandalizing the Court or doing something calculated to interfere with the due course of justice: *R* v. *Gray* (2). This case is within the former class. It is an allegation of political subserviency and bias. Its probable effect is to excite a general dissatisfaction with the learned Judge's decisions.

[O'CONNOR J.—In *McLeod* v. *St. Aubyn* (3) it was stated that prosecutions for contempt known as scandalizing a Judge had become practically obsolete.]

This publication, if it were believed, would be likely to lessen the confidence of anyone who read it in the High Court.

[They also referred to *R.* v. *Almon* (4); *In re "The Evening News"* (5).]

McArthur, for Nicholls, stated that Nicholls admitted that, in so far as the first two sentences of the article might convey the meaning that Mr. Justice *Higgins* owed his appointment to a labour Government, they were inaccurate, and he withdrew them and expressed his regret for their publication. The article does not amount to a contempt of Court.

GRIFFITH C.J. delivered the judgment of the Court. This motion asks for the committal of the respondent for his contempt of this Court or, in the alternative, for his contempt of the Commonwealth Court of Conciliation and Arbitration, in respect of the publication of an article in the Hobart *Mercury* of 7th April. The article is of some length. The text of it is an episode alleged to have taken place in the Arbitration Court of which my brother *Higgins* is the President. Whether it is a correct report or not we do not know. That was the subject matter. The article was prefaced by the heading "A Modest Judge," and began:—"Mr. Justice *Higgins* is, we believe, a

(1) (1893) A.C., 138.
(2) (1900) 2 Q.B., 36, at p. 40.
(3) (1899) A.C., 549, at p. 561.
(4) Wilmot's Opinions, 243, at p. 255.
(5) 1 N.S.W. L.R., 211.

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political Judge, that is, he was appointed because he had well served a political party. He, moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship." The article went on to refer to an episode in which it is suggested that he said that counsel was not entitled to speak disrespectfully of "those above us," and to discuss the question whether the learned Judge meant by the words "those above us" the Government, or the Broken Hill Unions, or the labour organization, or what is called the "caucus." So that the subject of the article was a reference which the learned Judge had made to "those above us" —if he said it—whatever that may mean, and which the writer took to mean the Government or the "caucus." If the application which we have to deal with was in reference to that comment, and the question were whether that comment was calculated to bring the Arbitration Court into contempt, it would be necessary to consider the whole of the article carefully. But that part of the motion is not pressed. Possibly the Attorney-General saw the difficulty of contending that this Court and the Arbitration Court are the same. The application is now limited to the two introductory sentences I have read.

The proposition upon which Mr. *Weigall* relied is that any publication calculated to bring a Judge into contempt or to lower his authority is a contempt of the Court. He says that *Higgins* J. is a Judge of the High Court, that this publication is calculated to bring him into contempt or lower his authority, and, therefore, that the respondent is guilty of a contempt of the High Court. In my opinion this proposition cannot be supported in the large sense which is contended for. Mr. *Weigall* relies upon the language by Lord *Russell of Killowen*, C.J., in *Reg.* v. *Gray* (1) where he said:—"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord *Hardwicke*

(1) (1900) 2 Q.B.. 36, at p. 40.

L.C. characterized as 'scandalizing a Court or a Judge.' (*In re Read and Huggonson*), (1). That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published."

With regard to what Lord *Hardwicke* L.C. characterized as "scandalizing a Court or a Judge" it was pointed out by my brother *O'Connor* that in *McLeod* v. *St. Aubyn* (2) Lord *Morris* stated that prosecutions for that class of contempt are practically obsolete in England. The article in question in *Reg.* v. *Gray* (3) was of a very gross character, and the case might very well have been put under the other heading. In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into contempt in that sense amounts to contempt of Court. That distinction was pointed out by a Committee of the Privy Council to which the question was referred by the Secretary of State in 1892. The case is reported as *In the matter of a Special Reference from the Bahama Islands* (4). In that case a man had, in a letter published in a newspaper, held up the Chief Justice of a Colony to public ridicule in the grossest manner, representing him as an utterly incompetent Judge, and a shirker of his work, and suggesting that it would be a providential thing if he were to die. The Board, consisting of eleven members of the Judicial Committee, did not give a formal judgment—it is not the practice in such cases to do so—but reported that the letter complained of, though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of Court. That is the question to be

(1) 2 Atk., 469, at p. 471.
(2) (1899) A.C., 549, at p. 561.
(3) (1900) 2 Q.B., 36.
(4) (1893) A.C., 138.

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determined in this case. Are these two paragraphs which I have read calculated to obstruct or interfere with the course of justice in the High Court or the due administration of the law by the High Court? I think it is impossible to answer that question in the affirmative. The words taken by themselves are capable of an innocent meaning and, when taken in conjunction with the rest of the article, they clearly refer to an episode which took place in the Arbitration Court.

It is said by Mr. *Weigall* that they suggest a want of impartiality, but we do not find that in them, and I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel.

The only question for us to determine here is whether these words are calculated to obstruct or interfere with the course of justice or the due administration of the law in this Court. It being impossible to answer that question in the affirmative, no order should be made upon the motion.

The respondent has very properly expressed his regret for having used language which is said to be capable of being construed as disrespectful comment which he did not intend. He has very properly withdrawn any such imputation. But that, of course, does not render him guilty of an offence which he has not committed. The motion will be dismissed.

Motion dismissed.

Solicitor, for the Attorney-General, *Charles Powers*, Commonwealth Crown Solicitor.

Solicitors, for the respondent, *Moule, Hamilton & Kiddle.*

B. L.