[HIGH COURT OF AUSTRALIA.]

THE MELBOURNE STEAMSHIP COMPANY LIMITED . . . . . DEFENDANTS, } APPELLANTS;

AND

MOOREHEAD . . . . . INFORMANT, RESPONDENT.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *October*, 1, 2, 21.

Griffith C.J., Barton and Isaacs JJ.

Questions asked by Comptroller-General of Customs—Duty to answer—Prosecution pending—Person interrogated not charged—Corporation—Australian Industries Preservation Act 1906-1909 (*No.* 9 *of* 1906—*No.* 26 *of* 1909), *sec.* 15B.

When the Attorney-General has formally instituted a prosecution in the High Court in respect of an alleged offence against the *Australian Industries Preservation Act* 1906-1909, the power conferred by sec. 15B is exhausted so far as regards the persons whom the Attorney-General alleges to have committed the offence for which he prosecutes, whether they are made parties to the suit or not, and that section therefore cannot be used for the purpose of a pending suit.

So *held* by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting).

By *Isaacs* J. The limit of the power conferred by sec. 15B is that, where the Crown has arraigned before a Court a particular person on a particular charge, the power cannot be exercised as to that person in relation to that particular charge.

By *Griffith* C.J. When a public officer entrusted with a power to be used for a particular purpose avowedly seeks to use it for another and unauthorized purpose, the persons against whom it is sought to be so used may object to its exercise. Consequently, if questions are avowedly put for an unauthorized purpose the person interrogated is justified in refusing to answer.

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Semble, by *Griffith* C.J., when a question demanding a categorical answer is put under sec. 15B and is so framed as to include matters concerning which the questioner is not entitled, as well as matters concerning which he is entitled, to ask, it is for the questioner, and not for the person questioned, to modify it so as to confine it within permitted limits.

Held also, by *Griffith* C.J and *Barton* J. (*Isaacs* J. dissenting), that sec. 15B does not authorize the Comptroller-General of Customs to require an incorporated company to answer questions.

Decision of Court of Petty Sessions of Victoria reversed.

APPEAL from a Court of Petty Sessions of Victoria.

On 26th April 1912 at the Court of Petty Sessions at Melbourne before a Police Magistrate an information was heard whereby Richard William Moorehead, an officer of Customs, charged the appellants with refusing to answer certain questions put to them under the authority of sec. 15B of the *Australian Industries Preservation Act* 1906-1909. The following were the circumstances under which the prosecution was instituted:—

By writ dated 4th June 1910 an action was brought in the High Court, New South Wales Registry, by the King and the Attorney-General of the Commonwealth against the Associated Northern Collieries, a number of companies who were colliery proprietors, the Associated Steamship Companies, a number of companies who were shipowners, and a number of individuals, but the appellants were not included among the defendants. By the action the plaintiffs sought to recover penalties for offences against the *Australian Industries Preservation Act* 1906-1909 (See *R. and the Attorney-General of the Commonwealth* v. *Associated Northern Collieries* (1).

By paragraphs 41 to 45 of the statement of claim it was alleged that the defendants entered into a certain contract, and were members of a combination, with respect to trade and commerce between several of the States with intent to restrain trade and commerce to the detriment of the public; and by paragraph 46 it was alleged that the defendants were members of a certain combination between themselves and the appellants and others in relation to trade and commerce between certain of the States with intent to restrain trade and commerce to the detriment of the public. The statement of claim in the action was dated 25th

(1) 14 C.L.R., 387.

August 1910 and was amended prior to 16th March 1911. The action was set down for trial on 17th February 1911, and the hearing thereof had, prior to 16th March 1911, been fixed for 10th April 1911.

The questions which were asked on 16th March 1911 and answers to which were required to be made on or before 24th March 1911, were as follow:—

"(1) (*a*) Is the Melbourne Steamship Company Limited now or has it been at any time since the month of October 1906 a party directly or indirectly or does it now or did it share directly or indirectly in the benefits and obligations of any agreement arrangement or understanding between all or any of the following colliery proprietors:—" (The names of the colliery proprietors were set out); "and all or any of the following shipping companies:—The Adelaide Steamship Company Limited, Howard Smith Company Limited, Huddart Parker and Company Proprietary Limited, McIlwraith McEacharn and Company Proprietary Limited, in relation to the sale and/or supply of coal in, and/or the carriage of coal to, all or any of the States of the Commonwealth other than New South Wales?

(*b*) If so (1) What were the terms of the said agreement, arrangement or understanding?

(2) Who were the parties thereto?

(3) When and where was it entered into?

(4) Was the said understanding, agreement or arrangement or all or any of the terms thereof in writing?

(5) If in writing has the Melbourne Steamship Company Limited or any officer thereof now or has the said Company or any such officer at any time had, in its or his possession or control a copy thereof or any document or writing containing all or any of the terms thereof?

(6) Did the said Company become a party to or share in the benefits and obligations of such agreement by reason of or after any communication either verbal or written from any person or company to the said Company or to any officer or agent thereof in relation to its trade or business of carrying coal from New South Wales to the other States?

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(7) If so, what was the said communication, by whom and when was it made, was it verbal or written, and if written has the said Company or any officer thereof such communication or a copy thereof in its or his possession or control ?

"(2) (a) Did any person or company in or about the month of October 1906 or at any other time communicate with the Melbourne Steamship Company Limited or any officer or agent thereof directly or indirectly for the purpose of asking or suggesting that the said Company should refuse to carry or should refrain from carrying coal other than that obtained from one or other of the colliery proprietors mentioned in Question 1 above, from Newcastle to the other States of the Commonwealth or any of them and/or should refuse to sell or deal in such other coal in such other State ?

(b) If so (1) By whom and when was such communication made ?

(2) What were its terms ?

(3) Was it verbal or written ?

(4) If written has the said Company or any officer thereof such communication or any copy thereof in its or his possession or control ?

"(3) (a) Is the Melbourne Steamship Company Limited now or has it been at any time since October 1906 directly or indirectly a party to any agreement arrangement or understanding by which its freedom to carry purchase sell and/or deal in coal obtained from any mine or mines in the State of New South Wales to and/or in any State or States of the Commonwealth other than New South Wales was in any way restricted or affected ?

(*b*) If so (1) What were the terms thereof ?

(2) Who were the parties thereto ?

(3) When and where was it entered into ?

(4) Was it entered into at the direct or indirect instigation or suggestion or request of any other person or company, and if so, who was such person or company, what were the terms of such instigation suggestion or request, was it verbal or written, and if written, has

the said company or any officer thereof such writing or a copy thereof in its or his possession or control ?

"(4) (*a*) Has the Melbourne Steamship Company Limited been engaged among other things since October 1906 in the business of carrying coal from the State of New South Wales to all or any, and which, of the other States of the Commonwealth and/or selling such coal in such other State or States ?

(*b*) Has the said Company on any occasion since October 1906 carried any coal from New South Wales to or sold or dealt with any coal in such other State or States except coal obtained from one or other of the colliery proprietors mentioned in Question 1 hereof ?

(*c*) If so, when and from whom was such coal obtained ?

(*d*) Has the said Company at any time since October 1906 been directly or indirectly asked to carry any coal other than that obtained from one or other of the above-mentioned colliery proprietors from any port or ports in the State of New South Wales to one or more of such other States ? If so, when was such request made, and what answer was given ?

"(5) Was the Melbourne Steamship Company Limited represented at all or any of the meetings or conferences set out hereunder between representatives of all or any of the colliery proprietors and all or any of the shipping companies named in Question 1 ?

(*a*) Meeting held at 2.30 p.m. on 23rd July 1907 at office of the Australasian Steamship Owners' Federation, Melbourne.

(*b*) Meeting held on Friday, 23rd April 1909, at offices of Australasian Steamship Owners' Federation, Steamship Buildings, 509 Collins Street, Melbourne.

(*c*) Meeting held at offices of Steamship Buildings, 509 Collins Street, Melbourne, on 30th November 1909.

(6) (*a*) Is the Melbourne Steamship Company Limited now or has it been at any time a party to any arrangement understanding or agreement between all or any of the shipping companies mentioned in Question (1) hereof with reference to the terms on which and/or price at which coal obtained by them from all or any of the colliery proprietors mentioned in the said first question should be sold to retail dealers and/or with

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reference to the terms on which or the price at which such coal should be sold to consumers in Melbourne, Adelaide, Perth and/or Tasmania?

(*b*) If so (1) What were the terms of such arrangement, agreement or understanding?

(2) When was it entered into?

(3) Who were the parties thereto?

(4) Was it verbal or written, and if such agreement, understanding or arrangement was written, has the Melbourne Steamship Company Limited or any officer thereof in his or its possession or control a copy thereof or of any writing containing all or any of the terms thereof?"

On 22nd March 1911 the solicitors for the appellants wrote to the Commonwealth Crown Solicitor, asking for an extension of time for answering, and the letter contained the following paragraph:—

"On 17th our Mr. Fookes interviewed your Mr. Sharwood to ask for an extension of time for answering: Mr. Sharwood stated that the questions were put to the persons named in connection with certain proceedings in Sydney and for the purpose of enabling the Crown to supply certain particulars to the defendants in these proceedings, which particulars the Crown had undertaken, in accordance with an order of the Court, to deliver by 1st April next, and for that reason Mr. Sharwood stated the time could not, he thought, be extended much beyond 24th inst."

On 28th March the solicitors for the defendant company wrote declining, on behalf of the company to answer any of the questions, and stating as follows:—

"We informed your Mr. Sharwood on Saturday last that we were taking counsel's opinion as to whether sec. 15B of the *Australian Industries Preservation Act* authorizes the Comptroller-General to require our clients to answer questions which are admittedly put for the purpose of obtaining information for the use of the Crown in an action now pending between the Crown and certain other persons."

At the hearing of the information Mr. Sharwood, who was Chief Clerk in the Commonwealth Crown Solicitor's office, being called as a witness by the Crown, admitted on cross-examination

that the above-mentioned passages were practically correct statements of the conversations which had occurred between him and Mr. Fookes.

The Police Magistrate held that sec. 15B of the Act was wide enough to cover a case in which the Comptroller-General seeks to ask questions from a person against whom at the time no proceedings are taken or contemplated, and that it was wide enough to cover the facts of the present case. He therefore convicted the defendant company, and imposed on them a fine of £5 with £10 10s. costs.

From this decision the defendant company now by way of order to review appealed to the High Court, on the grounds stated in the judgment of *Griffith* C.J.

Mitchell K.C. and *McArthur*, for the appellants. The power given by sec. 15B of the *Australian Industries Preservation Act* 1906-1909 of requiring questions to be answered cannot be used in aid of pending criminal proceedings. If the contrary view is correct, during the hearing of a prosecution questions could be asked in order to enable the prosecution to find out what evidence witnesses for the defence would give. The Act does not intend that the power should be ancillary to an existing action. Although the fact that proceedings are pending against some persons is not a reason why the power should not be used for the purpose of determining whether proceedings should not be taken against some other person, yet here it is clear that the questions were asked for the purpose of proving the offence already charged against other persons. [They referred to *Appleton* v. *Moorehead* (1).] Sec. 15B does not give power to require an incorporated company to answer questions. Although by sec. 22 of the *Acts Interpretation Act* 1901 "person" includes "corporation" except where a contrary intention appears, such an intention appears in this Act. By sec. 3 answers are to be made to the best of one's knowledge, information and belief," and a company cannot have a belief. In sec. 15C, where a corporation is required to produce documents, it is specially mentioned. [They referred to *Ranger* v. *Great Western Railway Co.* (2).

(1) 8 C.L.R., 330.

(2) 4 De G. & J., 74.

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[ISAACS J. referred to *Wilson* v. *Church* (1)].

Starke, for the respondent. Under sec. 15B the Comptroller-General has power to ask questions for the purpose of a pending suit, but not from a party to that pending suit. If the power does not extend to a pending suit, it still enables the Comptroller-General to ask questions for the purpose of determining whether a person not a party to that suit shall be made a party to it. Although a charge was made against the appellants in respect of one of the offences alleged, none was made against them in respect of another. The questions were relevant to both offences, and the appellants cannot excuse themselves from answering by referring the questions to the offence in respect of which they were charged. There is no reason why sec. 15B should not apply to corporations. The offence in respect of which the questions may be asked may be committed by a corporation, and the ancillary provision for collecting evidence in respect of that offence should equally apply to corporations.

McArthur, in reply.

Cur. adv. vult.

October 21.

GRIFFITH C.J. read the following judgment :—

This is an appeal from a conviction by a Police Magistrate upon a charge of failing to answer certain questions put to the appellants by the Comptroller-General of Customs, and purporting to be asked under the provisions of sec. 15B of the *Australian Industries Preservation Act*. Two objections are taken :—

(1) That sec. 15B does not apply to questions asked for the purpose of obtaining information for use in proceedings already commenced against other persons, and does not empower the Comptroller-General to require answers to questions asked for such purpose ;

(2) That the section does not apply to questions asked of an incorporated company, and does not empower the Comptroller-General to require an incorporated company to answer questions.

The nature and object of the powers conferred by sec. 15B were the subject of full discussion in the case of *Appleton* v. *Moorehead* (2). The cases in which they may be exercised are two—

(1) 9 Ch. D., 552, at p. 555. (2) 8 C.L.R., 330.

(1) if the Comptroller-General believes that an offence has been committed, and (2) if a complaint in writing has been made to him that an offence has been committed. The questions are to be put to persons whom the Comptroller-General believes to be capable of giving information as to the "alleged" offence, *i.e.* the offence which he believes to have been committed or of which complaint has been made to him. The object of the inquiry is to ascertain whether the belief or complaint is well founded. The only result that can follow from it is a prosecution, which must be instituted by the Attorney-General or some person authorized by him (sec. 14).

In my opinion, when the Attorney-General has formally instituted a prosecution in this Court in respect of an alleged offence, the power as well as the purpose of sec. 15B is exhausted so far as regards the persons whom the Attorney-General alleges to have committed the offence for which he prosecutes, whether they are made parties to the suit or not. From that time the matter becomes subject to the judicial power, or, to adapt a familiar phrase, *transit in litem pendentem*. The section cannot, therefore, as contended by Mr. *Starke*, be used for the purpose of collecting evidence in a pending suit. It is true that the words "if the Comptroller believes" may be literally capable of including cases where he bases his belief on the fact that the Attorney-General has brought a suit, but they are so inapt to express that meaning that such a construction should be rejected.

The relevant facts of the present case are that on 4th June 1910 an action was commenced at the suit of the Crown against several defendants, not including the appellants, for penalties under the Act. The subject matter of *Appleton's Case* (1) was certain questions which had been put to him for the purposes of that action before its commencement. By the statement of claim in the action it was alleged (paragraph 46) that the defendants were on 1st January 1907 members of a combination between themselves and the appellants and others in relation to trade and commerce in coal among the States with intent to restrain trade to the detriment of the public. That action was set down for

(1) 8 C.L.R., 330.

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trial on 17th February 1911, and the hearing had before 16th March been fixed for 10th April.

The questions in respect of which the appellants have been convicted were put by the Comptroller-General on 16th March. The first of them inquired whether the appellants had since October 1906 been a party to or shared in the benefits of any agreement arrangement or understanding between all or any of the persons and firms who were defendants to the action (other than those charged as accessories only) in relation to the sale supply and carriage of coal to the States other than New South Wales.

This question was clearly relevant to the allegation contained in paragraph 46 of the statement of claim; and the Comptroller-General was, therefore, for the reasons which I have given, not entitled to ask it at that stage so far as it referred to that matter.

In answer to this, it is said by the respondent that the statement of claim also contained an allegation that the defendants (not mentioning the appellants and the others) had between 24th September 1906 and 30th January 1907 made a contract relating to the same subject matter and with a like intent, and that the question might have been put with the object of discovering whether the appellants were parties to that contract, which, it is suggested, may have been quite different from and unconnected with the combination alleged in paragraph 46, so that the Attorney-General might be able to take proceedings against the appellants in respect of it, either by a fresh suit or by adding them as defendants to the existing suit. The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and *a fortiori* not in criminal proceedings.

I am sometimes inclined to think that in some parts—not all—of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

I am not sure that even as a technical point of pleading the point taken is a good one, but I am relieved from the necessity of deciding it. When the questions were put to the appellants, they, through their solicitors, intimated to the Crown Solicitor that they objected to answer them, giving as a reason for the objection that the representative of the Crown Solicitor had told them that the questions were put in connection with the action then pending, and for the purpose of obtaining information for the use of the Crown in the action. They said that they were advised by Counsel that the Comptroller-General in putting the questions for that purpose was exceeding his power, and that in accordance with that advice the appellants would refuse to answer. In replying to this communication no suggestion was made that the questions were put for any other purpose, or were relevant to any other matter. The conversation with the Crown Solicitor's representative was admitted.

An analogy—incomplete, of course, as all analogies must be—is afforded by the rules observed by Courts in granting a new trial for the erroneous rejection of evidence. If evidence tendered is objected to, and the only ground urged in support of it is invalid, and the evidence is consequently rejected, the party who tendered it cannot afterwards obtain a new trial on the ground that it was admissible on some other ground not stated.

The principle of the rule is that the action of the Court was right when taken. In the same way, I think that the action of a person interrogated under sec. 15B in refusing to answer a question avowedly put for a purpose which is unauthorized is right when taken. The same result is arrived at by applying the rule that a person who does or omits to do an act under an honest and reasonable though mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. In the present case it is apparent that the appellants honestly believed on reasonable grounds that the respondent demanded the answers for the purposes of the pending action, which he was not entitled to do.

Further, when a public officer is entrusted with a power to be used for a particular purpose and avowedly seeks to use it for

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another and unauthorized purpose, the persons against whom it is sought to be so used may object to its exercise. It is ordinarily difficult to establish such an excuse, but in this case the difficulty does not arise. Such an attempted use of a power is sometimes called an abuse of the power—in civil cases it is called a fraud on the power—I use both terms in the technical, and not in any invidious, sense, because in this case the unqualified nature of the power was honestly believed to exist. But that makes no difference in the result.

Moreover, I am disposed to think that when a question demanding a categorical answer is put under sec. 15B, being so framed as to include matters concerning which the questioner is not entitled, as well as matters concerning which he is entitled, to ask, the person to whom the question is put may refuse to answer it in that form, and that it is for the questioner, and not for the person questioned, to modify it so as to confine it within permitted limits.

I am therefore of opinion that under the circumstances the appellants were justified in their refusal to answer.

As to the second point raised on the appeal I have felt a good deal of difficulty.

The words of sec. 15B are "may by writing under his hand require any person whom he believes to be capable of giving any information . . . to answer questions." The term "answer questions" is defined to mean that the person on whom the obligation of answering is cast shall answer to the best of his knowledge, information and belief.

By the *Acts Interpretation Act*, sec. 22, unless the contrary intention appears, the word "person" when used in a Statute includes a body corporate. Sec. 3 of the Act under consideration contains a similar provision. One cannot help thinking, *a priori*, that the object of sec. 15B was, as pointed out in *Appleton* v. *Moorehead* (1), to discover facts from the examination of individuals, just as examining justices discover facts from the examination of witnesses. The *Justices Act* of Victoria (No. 1105) provides, by sec. 20, that a summons to a person to attend before justices as a witness shall be directed to any person who

(1) 8 C.L.R., 330.

appears "likely to be able to give material evidence." Similar provisions are contained in the Justices Acts of the other States. They do not, of course, apply to corporations. Sec. 15C deals specifically with the production of documents belonging to corporations, although the "person" mentioned in sec. 15B may also be required to produce documents. A fair inference is that sec. 15B was not intended to apply to corporations *quoad hoc*. And, if not *quoad hoc*, why at all? Again, knowledge, information and belief cannot, except in a technical sense, be imputed to a body corporate. It is true that under the old Chancery practice a corporation made defendant to a bill was required to make answer to the plaintiff's interrogatories under its corporate seal to the best of its knowledge, information and belief. But that requirement was for the purposes of pleading, and not of evidence. A corporation cannot, of course, be a witness.

If it had been intended that sec. 15B should apply to corporations, one might have expected that it would have contained a provision that the answer should be made under the corporate seal, or by some member or officer appointed by the corporation for the purpose of making answer, according to the practice of this Court as well as the High Court of Justice in England and the Australian Supreme Courts with regard to discovery, and that the answer so given should be admissible against the corporation.

I do not think that either the old practice of the Court of Chancery and of the Australian Courts which have not adopted the Judicature Acts, or the practice of those Courts which have adopted them, can be regarded as incorporated by implication in sec. 15B.

Reference was made to the provision in sec. 15B (4) that the answer of a "person" to questions shall not be admissible in evidence against him except in proceedings for an offence under the Act, from which it may be inferred that it was intended that it should be used in such proceedings. I agree, but I do not think that this provision carries the argument any further. The provision is by way of protection only, and is equally valuable and applicable whether "person" includes corporations or not.

For these reasons, I have come to the conclusion that a contrary

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intention appears, and that in sec. 15B the word "person" does not include corporations.

On both grounds I think that the appeal must be allowed.

BARTON J. I am of opinion that the view expressed by *O'Connor* J. in *Appleton* v. *Moorehead* (1) is the correct one. Broadly on the ground he states there, 15B was held to be within the constitutional powers of the Commonwealth. If sec. 15B were read as an interference with judicial proceedings, it would be an exercise by the legislature of a power vested by the Constitution in the judiciary. It cannot, therefore, be so read if it is, as without doubt it is, open to an interpretation consistent with the Constitution. Such interpretation removes it altogether from the area of judicial proceedings. It cannot therefore be used as an aid to such proceedings, and it follows that such a use of it as was admitted by Mr. *Sharwood* on behalf of the Crown Solicitor, was unauthorized by law, and that the defendant was not bound to answer questions administered under cover of the section in an inquiry in aid of pending judicial proceedings. When the point has been reached at which the Crown institutes such proceedings in respect of the subject matter of the questions, there is no right in the Comptroller-General to institute such an inquiry. That subject matter has passed into the hands of the Courts alone. But it is said that the questions might have been put in an effort to discover whether the appellants were parties to some contract or combination charged in the information in the prosecution proceeding against others, as a foundation for proceedings against the appellants themselves. That might possibly have been so but for the evidence, which is that the questions were put in aid of the then pending proceedings. In face of that evidence, it is useless to speculate on what might have been. When the appellants refused to answer they were justified by law, and that is sufficient for the purposes of this case.

On the second point I am of opinion that the very marked difference in expression between secs. 15B and 15C evinces an intention that in the first of these two sections the word

(1) 8 C.L.R., 330, at pp. 379-380.

"person" is not to include corporations. The reason for that difference exists in the fact that sec. 15B is intended for the eliciting of evidence similar to that of a witness in a forensic investigation although the proceeding is not a judicial one. A corporation cannot give evidence as a witness any more than it can make an affidavit. I think the distinction between a corporation and a person in this regard was intended to be expressed in the terms of these two sections.

I am therefore of opinion that the appeal succeeds on both grounds.

ISAACS J. read the following judgment:—In my opinion this order to review should be discharged with costs on the ground that the company was bound by law to answer every question fully; and that it had no legal justification for refusing. In *Appleton* v. *Moorehead* (1), I said of the procedure under sec. 15B "It is mere investigation with a view to inform the mind of the Executive whether the law has or has not been observed, and, if not, whether the nature of the contravention is such as to merit further action."

This quotation involving the disclosure of full particulars states the two material directions in which the discovery authorized by the section may assist the Executive: (1) Whether any and what contravention of the anti-trust provisions of the Act has taken place; and (2) whether, assuming a contravention, a given person should be proceeded against for his share in it.

These two matters are separate, and it is important to observe that whenever the Executive is in doubt as to *either*, the section gives the means of informing its mind. If, however, the Executive is already so far satisfied as to both, that legal proceedings have been instituted, or as the case may be, consented to by the Attorney-General against the given person in respect of a given contravention then, as regards that person in relation to that offence, the object of the section is exhausted, and has no operation, because the limits of the power have been reached.

I apply the law so interpreted to the facts of this case. And in the first place, I leave out of consideration, the question of Mr.

(1) 8 C.L.R., 330, at p. 385.

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Sharwood's conversation with Mr. Fookes, in order to see how the matter stands independently. Paragraphs 41 to 45 inclusive of the statement of claim charged against certain persons other than the present appellants the alleged offences of an illegal contract, and an illegal combination based on the contract; and I can see no reason whatever to doubt the right of the Comptroller-General to inquire as to the company also. Otherwise every time a new offender is believed to be discovered, all existing proceedings against persons said to be connected with his alleged offence must be discontinued and then commenced *de novo*. Form and not substance would be worshipped and the sacrifice would be heavy.

Paragraph 46 alleged an offence in which it was said the present appellants participated, but only other persons were charged, and not the appellants. It is obvious the Attorney-General is not bound to arraign every person who in some minor degree becomes implicated in the offence.

Sec. 14 was passed so that the law officer of the Crown should exercise some discretion. The facts, so far as known to him, may in a particular instance lead him to think the interests of justice do not demand the prosecution of a given participant in the contravention. It depends on the nature, extent, and duration, of that person's participation. But if after the Attorney-General has instituted proceedings against those whom he considers real offenders, the Comptroller-General has subsequently good reason to believe the case may be more serious as against a party omitted, there is no reason, so far as I can see, to exclude the operation of the section, for the purpose of obtaining definite and reliable information as to that person. In that view paragraph 46 presents no obstacle whatever to the Comptroller-General's questions.

If it does, the Crown is placed in this situation: it must in every case where a party is implicated, include him from the first in the proceedings lest he should prove to be more deeply involved than at first appears, or it must afterwards discontinue all the existing proceedings, then inquire under sec. 15B, and then re-institute the action, or else allow a possible offender against the law to escape through the secrecy of his own actions.

That Parliament ever contemplated this seems to me incredible. The Crown has, however, pressed the position further than I have indicated. Its full contention has been that the words of the section are unlimited and unqualified, and that so long as the Comptroller-General believes the offence has been committed, he may act whether the offence in relation to the given person is under prosecution or not. I disagree with that contention, not on the ground that it is an interference with judicial power, but on a wholly different ground.

Indeed, I see no foundation for the suggestion that this particular statutory procedure is ever an exercise of judicial power, or that Parliament is incompetent to authorize its use whether legal proceedings have been instituted or not. The institution of process cannot change the nature of the procedure under the section; that which it is to-day, it remains to-morrow. Discovery of facts may be attached also to judicial procedure, and so made part of it, but it is not an exclusive or even an inherent attribute of that procedure. *The Customs Act* 1901 (secs. 4, 38, 214 and 215) affords instances of executive power of this nature. The common law Courts did not possess the power to grant discovery in England until 1854. Some Courts do not possess it now. The jurisdiction was assumed in Chancery because of the inability of the common law and some other Courts to grant it. And it is important to observe that if the proceeding to obtain information be treated as necessarily judicial after the institution of the action in which the information might be utilized, and notwithstanding the person interrogated is no party to the action, it cannot consistently be regarded as otherwise than judicial where it is pursued with a view to ascertain any necessary circumstances in contemplation of an action, and equally with a view to use it in that action when instituted, and particularly if the action is contemplated against the person interrogated. This is apparent from the fact that in Chancery, a bill of discovery might be filed before the party commenced his action at law, and either to ascertain what form of action to bring, or the proper person to sue, and for other purposes: See *Bray on Discovery*, pp. 612-613. So that the previous institution of an action is no test. If it were, then, as judicial power

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applies equally to any class of litigation, an expectant defendant acting on the principle affirmed in the *Sugar Commission Case*, might forestall the Government, by suing for a declaration, and, by thus converting the section into a judicial instrument, deprive the Crown of its real and probably its only means of ascertaining the truth, and vindicating the law. So I put aside the suggestion of judicial action.

The true ground is that, reading sec. 15B with the rest of the Act, I gather the limit of the power to be where the matter has reached the stage when the Crown has definitely arraigned before a Court a particular person on a particular charge. As to him, in relation to that charge, the language of the power is, on the face of it, then inapplicable. This is greatly aided by the fact that complaint in writing mentioned in the section would include a complaint by a person injured civilly by some alleged contravention and desirous of suing for treble damages under sec. 11, but debarred from instituting proceedings by sec. 14 (2) until he receives the written consent of the Attorney-General. In that case the power would be clearly exhausted when the consent is given, but not till then; and by parity of reasoning, a similar result flows from the institution of a prosecution which must be by the Crown itself: See sec. 14 (1). In that case the prosecution against the party mentioned for the contravention mentioned is the limit of the power.

But if the limit of the power be as stated, it is obvious the Crown's right cannot validly be rejected at an earlier period, and before that limit is reached. Neither by express words nor by necessary implication is the authority so explicitly given further restrained. I do not see how it is open to this Court to insert limitations which Parliament has excluded; limitations which affect discretion only, and really open up an inquiry as to the motive of the Crown in putting in force an acknowledged power with which it has been entrusted for the public welfare. I do not think that what was so candidly said by the Crown Solicitor's representative is in any way material to the Comptroller-General's power. I see nothing in the Act indicating the intention of Parliament—for that, to my mind, is the real question, as personally, I see no shred of reason to doubt its competency—to

render the exercise of the statutory authority unlawful merely because the information when obtained was to be utilized so as to comply with the defendants' demands for particulars. Quite consistently with that the appellants might after discovery be added with any necessary or desired amendments. True, the Crown might have discontinued all its proceedings up to date, and paid the costs, then put its questions to this company, examined its documents, and then could have re-started the cumbersome litigation, re-incurred the huge expense on both sides, and it would then have been free from this objection. I cannot read into the Act any such necessity, but if the appellants' present contention be correct, the Crown would be forced to pursue this devious, burdensome, harassing and wasteful course, or risk the loss of information necessary for the purposes of justice, and the protection of the public in respect of perhaps the prime necessaries of life.

Authorities are numerous that motive in such a case is immaterial no matter what person is exercising a right. More particularly must this be so in the case of the Crown, entrusted with the means which Parliament has thought necessary to maintain the due observance of its legislation. I do not think it is competent to a Court to inquire into the motives of the Executive in such a case unless the Statute so declares. That is for another Department of Government. It is not difficult to see, if such an issue can be raised, to what lengths it may be carried. Nor can the difficulty be overcome by using the word "purpose," because it is really not purpose but "motive" which is challenged. The distinction between the two is clear. The purpose of an act is the effect it is intended to have when done, which in this case is simply to elicit information. That is a perfectly lawful purpose. What is alleged on the strength of the conversation between Mr. *Sharwood* and Mr. *Fookes* is merely the motive actuating the Crown in attaining the desired and lawful purpose. The authorities are familiar and clear that where a legal right exists, motive is immaterial. In *Ex parte Wilbran*; *In re Wilbran* (1) it was said that "Courts of justice had no concern with the motives of parties who asserted a legal right."

(1) 5 Madd. 1, at p. 2.

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The Privy Council adopted this in *King v. Henderson* (1). In *Grenville* v. *College of Physicians* (2), *Holt* C.J., speaking of a man's justification for arresting another, said : "It is not what he declares, but the authority which he has is his justification." This was approved by *Lawrence* J. in *Crowther* v. *Ramsbottom* (3). Lord *Kenyon* C.J. in the same case said (4) :—"I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient." Now the Comptroller-General's belief at a time when such belief is contemplated by the Act is the only legal justification stated by the legislature as necessary ; and as that admittedly existed in the present case, it seems to me that is sufficient; and to require more is practically to legislate not to interpret. I therefore see no reason for absolving the appellant company from answering.

A subsidiary question is raised on behalf of the appellants as to whether sec. 15B applies to a corporation at all. The Act itself, sec. 3, says that unless the contrary intention appears "person" includes "corporation." The *Acts Interpretation Act* 1901, secs. 22 and 23, makes a general enactment to the same effect. It therefore lies on a person in the position of the appellants to show the contrary intention. See *per* Privy Council in *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (5). Learned counsel for the company endeavoured to show contrary intention by saying, first, that a company cannot naturally answer questions or produce documents, and that sec. 15C recognized this and made special provision for individuals to perform such acts.

But to begin with, sec. 15C makes no provision whatever as to answering questions; so that, if the argument is good, there is no power to make a corporation answer questions at all, either by itself or through the medium of an individual. Next, sec. 15C is not confined to individuals, but expressly recognizes and enforces the duty of the corporation to produce its books ; though

(1) (1898) A.C., 720, at p. 732.
(2) 12 Mod., 386, at p. 387.
(3) 7 T.R., 654, at p. 658.
(4) 7 T.R., 654, at p. 657.
(5) 9 App. Cas., 365, at p. 369.

there is added the power to compel specific individuals under a personal sanction to perform the required duty. The inclusion of individuals in sec. 15c was probably to meet possible difficulties that have on occasions arisen, as for instance, in *Crowther* v. *Appleby* (1), where directors refused to allow their secretary to produce the company's books to an arbitrator; the latest English example being *Eccles & Co.* v. *Louisville and Nashville Railroad Co.* (2) where the Court of Appeal were divided as to the duty of a clerk in the employ of a firm to produce before a Commissioner under letters rogatory certain documents belonging to and in the possession of his employers.

I see no indication of "contrary intention" so as to take a corporation out of sec. 15B if, according to ordinary legal notions, it primarily falls within the terms of that section. An illustration of contrary intention is found in *Hawke* v. *E. Hulton & Co. Ltd.* (3), where it was held that a corporation could not be convicted under the *Lotteries Act* as a rogue and vagabond. But a corporation can do many things which at first sight appear much more difficult to fasten on a corporate body than permitting the inspection of documents or their answering questions, which may be done in writing: *Chuter* v. *Freeth & Pocock Ltd.* (4) is a very strong illustration both for the actual point decided and the principles stated by Lord *Alverstone* C.J.

The cases cited during the argument—*Ranger* v. *Great Western Railway Co.*(5), *Dyke* v. *Stephens* (6), *Wilson* v. *Church* (7)—establish the ordinary liability and of course the recognized capacity of a corporation to answer and to produce documents. Naturally this has to be done by means of individuals competent to perform the necessary physical acts, call those individuals agents or representatives or what you please. But as shown by the case of *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.* (8), and particularly by the judgment of *Collins* L.J., the answer so given is the answer of the company and not of the individual who gives it. Indeed, as *Rigby* L.J., points out (pp. 11-12) under the former practice when an officer was joined

(1) L.R. 9 C.P., 23.
(2) (1912) 1 K.B., 135.
(3) (1909) 2 K.B., 93.
(4) (1911) 2 K.B., 832, at p. 836.
(5) 4 DeG. & J., 74.
(6) 30 Ch. D., 189, at p. 191.
(7) 9 Ch. D., 552, at p. 555.
(8) (1900) 2 Ch., 1.

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as a defendant with the company for the purpose of discovery, and when both he and the company had to answer separately his answer could not be read as evidence against his co-defendant, the corporation. Very recently the principle under discussion has been applied in America in *Wilson* v. *United States* (1); *Dreier* v. *United States* (2). In the first case the appellant who was president of a corporation refused to permit inspection by a grand jury of books of the corporation in his possession. A subpœna had been issued directed to the corporation only, requiring it to produce the books. Service was made upon Wilson and others, he attended and declined to produce and was orally presented by the grand jury to the Court for contempt and the Court committed him. One objection raised before the Supreme Court on Appeal from a refusal to discharge him on *habeas corpus*, was, that the subpœna, without mention of any individual or officer, simply directed a corporation which could not give oral testimony to produce books. On the point now under consideration the Court said (3):—"Where the documents of a corporation are sought the practice has been to subpœna the officer who has them in his custody. But there would seem to be no reason why the subpœna *duces tecum* should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity, and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice."

The personal responsibility of Wilson was affirmed, and the reasons found at p. 377 of the report are not material in the present case, but are closely connected with the subject.

For these reasons, I think the company contravened the law by refusing to comply with the Comptroller-General's requirements, and that the decision of the Police Magistrate should be upheld.

Appeal allowed. Conviction quashed with £10 10s. costs. Respondent to pay costs of the appeal.

(1) 221 U.S., 361.

(2) 221 U.S., 394.

(3) 221 U.S., 361, at p. 374.

Solicitors, for the appellants, *Hedderwick, Fookes & Alston.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

SMITH AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

OLDHAM (CHIEF ELECTORAL OFFICER FOR THE COMMONWEALTH) . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *Oct.* 8, 9.

Griffith C.J., Barton and Isaacs JJ.

Parliamentary Election (Commonwealth)—Political article in newspaper during election—Signature of author—Validity of Commonwealth legislation—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 10, 51 (*xxxvi.*)—*Commonwealth Electoral Act* 1902-1911 (*No.* 19 *of* 1902—*No.* 17 *of* 1911), *sec.* 181AA.

The Commonwealth Parliament has power under the Constitution to make laws regulating federal parliamentary elections, and, therefore, sec. 181AA of the *Commonwealth Electoral Act* 1902-1911 is within the powers of the Commonwealth Parliament to enact.

Decision of Court of Petty Sessions of Victoria affirmed.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne on 27th June 1912 an information was heard whereby Ryton Campbell Oldham, Chief Electoral Officer for the Commonwealth, charged that Robert Murray Smith, Roderick Murchison, Edward Fancourt Mitchell, Edward Fanning, Lauchlan Charles Mackinnon and William George Lucas Spowers, the editors of *The Argus* newspaper, on 31st May 1912, did, contrary to the *Commonwealth Electoral Act* 1902-1911, after the issue, and before the return, of