[HIGH COURT OF AUSTRALIA.]

EATHER . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Nov.* 20, 23; *Dec.* 15.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Practice—High Court—Appeal from Supreme Court of State—Criminal matter—Special leave—Evidence of child not on oath—Corroboration—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 418*—*Judiciary Act* 1903-1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35 (1) (*b*).

In granting special leave to appeal in criminal cases the High Court will follow the practice of the Judicial Committee of the Privy Council, as expounded in *Ibrahim* v. *The King*, (1914) A.C., 599, and *Arnold* v. *The King-Emperor*, (1914) A.C., 644.

So *held* by *Griffith* C.J., and *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Isaacs* J. dissenting).

E. was charged with having indecently assaulted a girl five years of age. At the trial the child gave evidence against him but not on oath, and said that when she was on a bed in E.'s bedroom he touched her private parts with his hand and wiped them with a wet cloth. Medical evidence was to the effect that E. was at the time of the alleged assault suffering from gonorrhœa,

* Sec. 418 of the *Crimes Act* 1900 provides that "(1) On the hearing of any charge under secs. 67 to 81 inclusive, of this Act, where any child of tender years who is tendered as a witness does not in the opinion of the Court or Justices understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if in the opinion of the Court, or Justices, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. (2) No person shall be convicted of the offence charged, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused."

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that the child when examined shortly afterwards was suffering from that disease, and that the disease might have been communicated by the child's private parts being wiped with a cloth on which was some of the discharge from the disease. E., having been convicted, appealed to the Court of Criminal Appeal of New South Wales on the ground that the child's evidence was not "corroborated by some other material evidence in support thereof implicating the accused," as is required by sec. 418 (2) of the *Crimes Act* 1900. The Court of Criminal Appeal dismissed the appeal.

Held, by *Griffith* C.J., and *Barton*, *Gavan Duffy*, *Rich* and *Powers* JJ. (*Isaacs* J. dissenting), that the case was not one for granting special leave to appeal to the High Court.

Special leave to appeal from the decision of the Supreme Court of New South Wales: *R.* v. *Eather*, 14 S.R. (N.S.W.), 280, rescinded.

APPEAL from the Supreme Court of New South Wales.

At the Court of Quarter Sessions at Sydney on 19th May 1914 Charles Edward Barwon Eather was tried on a charge that on 20th March 1914 he indecently did assault Gwendolen Violet Black, a girl then under the age of sixteen years, to wit, of the age of five years and one month. It appeared from the evidence that the accused lived at a building used as a picture show where he had a bedroom, and that the child lived with her parents two doors from that building. The child, who was not sworn, stated in answer to the presiding Judge that she was in the bedroom with the accused, and that while she was on the bed the accused, who was standing beside her, touched her on her private parts with his hand and wiped those parts with a wet cloth. She also said that only the accused had touched her there before, and that he had touched her in the same place on several occasions. The child was examined on 28th March by a medical practitioner, who stated in evidence that she was suffering from gonorrhœa, and that that disease, which is infectious, usually takes from five to eight days to develop, and that it might be communicated by the child's private parts being wiped with a cloth upon which was the discharge from the disease. The same witness also stated that he examined the accused on 30th March, and found him to be suffering from a gonorrhœa of long standing. Objection was taken by counsel on behalf of the accused that the evidence of the child was not corroborated by any other material evidence implicating the accused, as was required by sec. 418 (2) of the

Crimes Act 1900. The learned Judge overruled the objection, and the jury convicted the accused, who was sentenced to fifteen months' imprisonment.

The accused then appealed to the Court of Criminal Appeal on the ground, *inter alia*, that there was no corroboration of the child's story such as was required by sec. 418. The Court (*Cullen* C.J. and *Gordon* J., *Pring* J. dissenting) dismissed the appeal: *R.* v. *Eather* (1).

From that decision the accused, by special leave, appealed to the High Court.

On the hearing of the appeal counsel for the respondent moved that the order granting special leave to appeal should be rescinded.

The appeal was first argued on 31st August before *Griffith* C.J., and *Isaacs* and *Gavan Duffy* JJ., and was now re-argued before a Full Bench.

Martin (with him *Addison*), for the appellant. Under sec. 418 (2) of the *Crimes Act* 1900 the corroboration required is something which supports the statement of the child and which also implicates the accused. It must be evidence that the offence has been committed, and that the accused is the person who committed it. It is not sufficient that there is evidence which shows that the accused is one of several persons who may have committed the offence. The only evidence which was put to the jury as being corroboration was the fact that both the accused and the child were suffering from gonorrhœa. That only shows that the accused was one of a class of persons who might have committed the offence. If the rarity of that disease was relied on as part of the corroboration, it should have been proved by the Crown. The corroboration required by sec. 418 (2) is much stronger than that which is required in the case of the evidence of an accomplice. [He referred to *Bessela* v. *Stern* (2); *R.* v. *Wilkes* (3); *R.* v. *Pratt* (4); *R.* v. *Farler* (5); *R.* v. *Wilson* (6); *R.* v. *Abbott* (7).]

(1) 14 S.R. (N.S.W.), 280.
(2) 2 C.P.D., 265.
(3) 7 C. & P., 272.
(4) 4 F. & F., 315.
(5) 8 C. & P., 106.
(6) 6 Cr. App. R., 125.
(7) 9 Q.L.J., 92.

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[ISAACS J. referred to *R.* v. *George* (1); *R.* v. *Stubbs* (2). RICH J. referred to *R.* v. *Threlfall* (3).]

Blacket K.C. (with him *Browning* and *Collins*), for the respondent. The evidence and the inferences that might properly be drawn from it are such that the jury might find that there was the corroboration required by sec. 418 (2). See *R.* v. *Pitts* (4); *Minister of Stamps* v. *Townend* (5). The only question in the appeal is one of fact, namely, whether certain inferences were properly drawn by the jury, and in such a case this Court will not interfere. No substantial or grave injustice has been done, and therefore special leave to appeal should not have been granted: *Bataillard* v. *The King* (6); *Arnold* v. *The King-Emperor* (7); *Ibrahim* v. *The King* (8); *Lanier* v. *The King* (9); *Clifford* v. *The King-Emperor* (10).

[GAVAN DUFFY J. referred to *Ex parte Macrae* (11); *Brown* v. *The King* (12).]

Martin, in reply. Special leave to appeal was properly granted. This Court has admittedly jurisdiction to entertain the appeal, and it raises a question of great and general importance in the administration of criminal law: *R.* v. *Bertrand* (13). [He also referred to *R.* v. *Brown* (14).]

Cur. adv. vult.

Dec. 15.

The judgment of GRIFFITH C.J. and BARTON, GAVAN DUFFY, POWERS and RICH JJ. was read by

GRIFFITH C.J. We are of opinion that in granting special leave to appeal in criminal cases this Court should follow the practice of the Judicial Committee. That practice has lately been very fully expounded in the cases of *Ibrahim* v. *The King* (8) and *Arnold* v. *The King-Emperor* (7). We are also of

(1) 2 Cr. App. R., 282.
(2) Dears. C.C., 555.
(3) 10 Cr. App. R., 112.
(4) 8 Cr. App. R., 126.
(5) (1909) A.C., 633.
(6) 4 C.L.R., 1282.
(7) (1914) A.C., 644.
(8) (1914) A.C., 599.
(9) (1914) A.C., 221.
(10) L R. 40 Ind. App., 241.
(11) (1893) A.C., 346, at p. 350.
(12) 17 C.L.R., 570.
(13) L.R. 1 P.C., 520.
(14) 6 Cr. App. R., 24.

opinion, upon examination of the facts of the present case, that it is one in which, according to that practice, leave should not have been given.

The leave will therefore be rescinded.

ISAACS J. read the following judgment:—This case primarily raises a very important question of New South Wales public law, incidentally important to every other State where similar legislation exists. It involves also important consequences to the appellant. The merits have been twice argued. The second argument was before a Full Bench, specially constituted to determine whether this Court should bind itself to follow the Privy Council rule in regard to criminal appeals, which involves, of course, the statement of what that rule is. We have, therefore, the responsibility now of examining this question for ourselves, and saying what our duty is according to law. If we have mistaken that duty in the past, and omitted to consider cases that we ought to have considered, that, in my judgment, can be no sufficient reason for failing in our duty in the future, and refusing to Australian citizens the judicial consideration we are specially constituted to bestow. Any practice we have followed is not like a rule of property law, which affects current transactions and influences the making of contracts or dispositions of a man's possessions. What we have done in the past in this regard cannot possibly affect any future case. We are therefore absolutely free, and, as I respectfully maintain, bound to ascertain our strict legal duty.

Now, as to the adoption of the artificial Privy Council rule, I have the misfortune to hold an opinion not in accordance with the rest of my learned brethren; and I also think that, even if their view is right as to that, this case is such that the Privy Council itself would, in the circumstances, entertain it, and decide whether the conviction should stand. Both these considerations are of such obvious interest to the administration of public justice that, in this final settlement of the part this Court is henceforth to play in that administration so long as the present law remains, I feel bound to state my reasons with great care.

The legislature of New South Wales, for the better protection

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of children, has altered the common law in a vital respect. Even where the child is so young as not to understand the nature of an oath, the Statute law permits the child to give evidence without an oath, if it appears to be sufficiently intelligent and to understand the duty of speaking the truth. In the present instance the child was only about five years old. And the English case of *R.* v. *George* (1) shows that the Court does not usually accept the evidence of a child of that age at all. But, while allowing this serious though necessary departure from the strictness of the common law, the legislature did so, only subject to a condition it considered absolutely necessary to guard the accused from the dangers of unformed intelligence, or the possible tutoring that so young a child might receive. The section provides that "No person shall be convicted of the offence charged, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused." In other words, unless the Court finds there is such evidence, the fundamental rule that no man shall be condemned on the unsworn statement of another shall stand. The case turns on the meaning of the words "implicating the accused," and whether the Court could properly say the condition was satisfied. If the Court could not, then a fundamental breach, not only of the Statute but also of the common law rules of criminal justice, has occurred, because there was no evidence upon which the accused could be lawfully convicted. Was, then, the evidence, to which the jury were directed to confine their attention as to corroboration, because it was in itself a compliance with the Act, such as in law was by itself sufficient to implicate the accused? If it was, the conviction was plainly right. If it was not, the conviction was as plainly wrong. No other circumstances can affect the matter, because trial by jury means trial by jury; and for the Supreme Court or this Court to say, "Well, even if it was wrong for the jury to find him guilty on what they were told to consider, we think he was guilty upon other evidence, excluded from what the jury were told to consider," is to violate a further fundamental principle of our law by substituting trial

(1) 2 Cr. App. R., 282.

by Judge for trial by jury, and without the advantage of hearing and seeing the witnesses.

Now, on the question of whether the evidence actually considered by the jury as corroborative was so or not, it is plain that while the child's evidence must be looked at to see whether the other evidence is material, and also to see what the independent evidence corroborates, if it corroborates anything, yet the independent evidence must alone be looked at to see whether it implicates the accused. To say that you have to consider the child's evidence in conjunction with the independent evidence in order to see whether the corroborative testimony, when combined with the child's evidence, implicates the man, is to destroy the very safeguard created. The learned Chief Justice of New South Wales only arrived at his view by regarding them in combination for this purpose.

On the other hand, the learned Judge at the trial and *Gordon* J. in the Full Court, while looking to the independent evidence for separate force, held in law that the mere fact that the accused was suffering from a disease which, if he had committed the offence charged against him, he could have communicated to her, was sufficient to implicate him in the actual commission of the offence. Now, in my opinion, that is equally inaccurate, and the view taken by *Pring* J. on this point was the right one.

The little girl stated that the only thing the accused did was to touch her with his hand, and wipe her with a cloth. It may be she was mistaken; but that is her evidence, and according to English law, the accused, if condemned, must be condemned upon the evidence actually given, not upon what a Court might conjecture a witness—if she had more sense and knowledge—would probably have given. Otherwise the less reliable the child's intelligence, the stronger can be made the case against the accused. That only shows the extreme danger of acting upon the statement of such a tiny child—almost a baby—unless there is really independent evidence corroborating her. If the evidence she actually gave be not believed, there is an end of the case. If it be believed, then the person who assaulted her, though infecting her by means of an already infected cloth, need not himself have been infected.

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If even the assumption be made—for it cannot, as I conceive, be called an inference, since it is contrary to the evidence—that the assault was otherwise than as described, there remains nothing but a coincidence. If the girl had named another man, and that other man had been similarly infected, it would have "implicated" him in the identical offence neither more nor less than the present accused.

There are, in truth, no other corroborative circumstances implicating Eather. He is shown to have been on friendly terms with the girl and her parents, to have been seen speaking to her in the presence of others on innocent occasions, and if those are circumstances implicating a man in a charge of this nature, then no one is safe from the most atrocious accusations that the testimony of a child of limited intelligence can be conjectured to support.

So little importance did the Crown and the Judge who tried the case attach to these other circumstances that they were not even presented to the jury as evidence of corroboration. For this Court now to retry the case on materials not presented to the jury is, in itself, to commit precisely what the Privy Council in *Makin* v. *Attorney-General for New South Wales* (1) said would be "a grave and substantial injustice" sufficient to call for the interposition of the King in Council. I therefore do not attempt it.

The Supreme Court, however, held that the one circumstance of disease either (1) was (*per Gordon* J.) alone sufficient to implicate the accused, or (2) (*per Cullen* C.J.) could be eked out in its corroborative effect by the testimony which itself required corroboration. In either view, a very serious misinterpretation of the law has taken place to the manifest and lifelong prejudice of the accused, and, in addition, that has occurred in a way that is of great general importance. The accused therefore succeeds, in my opinion, in showing the illegality of his conviction, not on a mere technicality, but coupled with circumstances so grave and important as to lift it out of a mere legal error, and to make it a proper case for review by this Court unless some rule or principle exists, superior to the justice of the case, requiring the Court to hold its hand.

(1) (1894) A.C., 57.

If my view is wrong, this Court, in my opinion, ought to say so. But that would be entertaining the appeal and actually deciding it, and any observations on the question of rescinding leave would either be so much waste effort, or would deprive the Court's expressions of opinion on the main point of the character of a judicial decision. But if my view is right, the conviction ought to be set aside, and either the man should be retried, or liberated as unlawfully condemned.

But the Crown, after failing, as I hold, on the main ground of the case, says that there is such a paramount rule or principle as I have referred to, and so falls back on an application to rescind the leave to appeal. That is to say: even though the man has been improperly condemned, even though the law of New South Wales has been broken by the conviction of the accused, under circumstances expressly forbidden by the State Parliament, yet the Crown representing the State of New South Wales urges that this Court should refrain from saying so, and the conviction should stand, and the man should be compelled to serve his illegal sentence.

What is the duty of this Court in face of such a request? Has it any right to lay down a rule—in effect a law—by which it declines jurisdiction in advance by refusing redress, whatever illegality or injustice has occurred, unless this artificial rule is satisfied? If it has the right at all, it can draw the line as tight as it pleases. But where is the right? Let us look at the matter first apart from the suggested adoption of some Privy Council rule.

By the Constitution, this Court is expressly created an Australian Court of Appeal from all judgments, decrees, orders and sentences of justices exercising the original jurisdiction of this Court, of any Court exercising federal jurisdiction, and of State Supreme Courts. That includes both civil and criminal matters, and does not discriminate between federal and State laws. There is also appellate jurisdiction from the Inter-State Commission, but, says the Constitution, "as to questions of law only," showing with great distinctness and emphasis that in all other cases appeals are intended to be heard as to matters of fact as well as of law.

Any distinction made between cases of proved injustice, because they rest on matters of fact as opposed to matters of law, or

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because the law infringed is State or federal, unless Parliament in the exercise of its discretion creates such a distinction, is consequently opposed to the intention of the Constitution itself.

If the matter rested where the Constitution leaves it, every unsuccessful litigant in one of the Courts named would have an absolute and unrestricted right of appeal to this Court, however trifling and frivolous his case might be—a right, however, which we would have no jurisdiction to decline. We should be bound by the organic law of the Commonwealth to hear and determine every such appeal.

The Constitution itself, however, provides that the Parliament —not this Court—may cut down that right of appeal by prescribing "exceptions" or "regulations." That is, it may take away appeal altogether where it thinks proper, and may regulate the right where it prefers to allow it at all, or it may choose to leave any matter to the full operation of the Constitution.

But unless Parliament has itself limited or excepted the right, it stands, and we have no power to cut it down; all we have to do is to discharge our judicial duty to suitors who lawfully claim it at our hands and according to the merits as they then appear.

Parliament, however, has limited the right of appeal and stated the limitations it directs. If in a civil case a litigant is dissatisfied and can show he has £300 at stake, that is enough; we must hear the appeal. If his civil status is affected under some law relating to aliens, marriage, divorce, bankruptcy or insolvency, he has the same absolute right. So far Parliament has not adhered to any Privy Council rule. But, says the legislature, though an absolute right of appeal is given wherever those circumstances appear, if in any other case—civil or criminal—the High Court thinks fit to give special leave, the party may appeal.

The words so extending the appellate jurisdiction are: "Any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal." The word "special" obviously means—with respect to that case specially, as distinguished from the general leave provided for by the Act in other cases.

As I read those words, the particular Court, sitting when the

application is made and hearing all the actual circumstances, is to have and to exercise unfettered discretion to grant or refuse the leave as justice may seem to require.

I am unable to read the enactment as if it provided that leave should be given whenever the High Court thinks that the Privy Council would think fit to grant it. And yet that is precisely what we are asked to declare. If Parliament had meant that, it could easily have said so.

Parliament has placed civil and criminal matters on precisely the same footing, so far as predetermined conditions are concerned. And this is so, whether it is a proposed appeal from a Justice of this Court, or from a Court exercising federal jurisdiction, or from a Court exercising purely State jurisdiction. It would be obviously improper to draw in this respect a distinction between State laws and Commonwealth laws, and to say we shall take more care to see Commonwealth laws obeyed than we shall as to State laws. Our duty to both is equally great. If the State Supreme Court, for instance, tried two men for a statutory offence of forgery, one of a Commonwealth document, and the other of a State document of precisely similar character, it could not be contended that, in the case of the Commonwealth, we should entertain an appeal to uphold the Commonwealth Statute, and at the same time decline to entertain an appeal from the Supreme Court to maintain the State Statute, merely because it was a State Statute. And if we were to entertain appeals where under a Commonwealth Statute a mere fine was inflicted, it would still require strong reason to convince me that we should refuse to consider a case where under a State Statute life itself was in peril. Therefore the interpretation of the federal enactment must be the same in all such cases, and whatever rule is laid down must be equally applicable to all such cases. Any adoption of the suggested rule involves this: that it leaves the final practical interpretation of all criminal enactments, federal and State, to other Courts. Either a Court of summary jurisdiction has the last word in interpreting federal Statutes of this character, with diverse interpretations all over Australia, or there must be an appeal to the State Supreme Court, with possibility there of diverse interpretation also, and yet whether it related to

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defrauding the Customs, robbing the post office, or trading with the enemy, we should be bound to refrain from setting the matter right. The suggested Privy Council rule contains no warrant for any distinction between federal and State laws. Any distinction introduced at once admits the inapplicability of the rule. As it appears to me, the matter rests on a simple and universal principle. Judges have no authority to lessen the jurisdiction entrusted to them, or to bind themselves or their successors in advance. Whatever powers, and therefore whatever duties, Parliament has directed them to satisfy, are for the public benefit, and must be satisfied by exercising and fulfilling them as appears right when the occasion arises for doing so. The Court must interpret the scope and meaning of the direction, but not alter it by enlarging or restricting it. And whatever artificial rule be formulated, however wide or narrow its bounds, it is an alteration of the law, and so offends against the principle that Judges must not be legislators.

In *Hyman* v. *Rose* (1) Lord *Loreburn* L.C. said:—"It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by Statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand." Other judicial expressions to the same effect may be found, as *per Lindley* L.J. in *In re Earl of Radnor's Will Trusts* (2) and *per* Sir *Samuel Evans* P. in *Palmer* v. *Palmer and Stockley* (3).

We are not without authoritative analogy on the meaning of a provision as to special leave to appeal. The English Rules of Court of 1883 (Order LVIII., r. 15) said that "no appeal to the Court of Appeal from any interlocutory order . . . . shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one

(1) (1912) A.C., 623, at p. 631. (2) 45 Ch. D., 402, at p. 424.
(3) (1914) P., 116, at p. 121.

year." In the House of Lords, in *Lane* v. *Esdaile* (1), Lord *Halsbury* L.C. said:—"Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given." He answers that definitely a little further on by saying that it is "obviously intended to prevent frivolous and unnecessary appeals."

Therefore, if there be no controlling authority compelling us to take a different view, the inevitable conclusion must be that each case, civil or criminal, must be looked at as it arises; the law and the facts must be considered, and upon the whole circumstances the Court which hears the application must exercise its own unfettered discretion and must determine whether the circumstances are for any reason sufficient to induce the Court to "think fit" to grant leave to appeal. That would be then following the direction of the legislature, which has stated its own general rules as far as general rules were to govern, and has left to the Court the specific consideration of each particular case not coming within the general rules enacted.

It is said that the superior rule or principle governing the matter is that we must and should follow the rule laid down by the Privy Council for its own guidance in criminal matters. It was said that the Court has already declared that it would adopt the Privy Council rule. The Court has at least—and this is the important point as to that—always regarded that rule as including the saving principle that where "substantial and grave injustice has been done" it may and, unless some extraordinary and overpowering circumstance intervenes, it should give leave to appeal. That saving principle, if understood, as I have always understood it hitherto, in its full sense, is broad enough to meet practically all cases. As long as that understanding remained, there was nothing substantial to differ about. But now a new complexion is given to the whole matter. The latest case on the subject is *Arnold* v. *The King-Emperor* (2), which says the Privy Council will not intervene, whatever the illegality or injustice may be, unless "justice in its very foundations has been subverted."

That case is really an expanded formulation, with reasons; of

(1) (1891) A.C., 210, at p. 212. (2) (1914) A.C., 644.

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the statement of the Lord Chancellor in *Armstrong* v. *The King* (1), decided just a year ago. Viscount *Haldane* L.C., for the Judicial Committee, there said :—" This Court is not a Court of Criminal Appeal. This is the King in Council receiving petitions for justice from his subjects. The King never interferes in criminal cases, unless there has been a violation of the principles of natural justice or some such gross violation of the ordinary rules of procedure as makes the trial virtually a farce."

I unhesitatingly say that no such similar notion ever existed in my mind as to the position or functions of this Court, and I am not aware of anything said by any other member of the Court claiming such attributes for this tribunal.

The Lord Chancellor went on to say :—" The administration of criminal justice is a local matter, and there is no Court of Appeal from the local jurisdictions in that respect." With the greatest deference to the opposite opinion, those last words show very clearly why we should not lay down a similar rule. However, the case of *Arnold* v. *The King-Emperor* (2), two months afterwards, re-stated the position, laying down the same test and in fuller terms.

If the criminal cases which this Court has decided in the past be looked at, I do not believe there is one which could stand that test. Illegality, injustice, and error sometimes in fact, sometimes in law, may be found to have been alleged or to have existed. But in none as I believe, and certainly not in the vast majority of them, could it have been said that "justice in its very foundations was subverted."

Take for instance the very recent case of *Spence* v. *Ravenscroft* (3). In that case this Court entertained and decided without question the point whether the use of an automatic slot machine for selling cigarettes on Sunday was or was not a breach of a Statute. No one, I venture to think, would gravely assert that by the decision of *Ferguson* J. appealed from, "justice in its very foundations was subverted," or that the Privy Council would have entertained that appeal for a moment. But that shows that such a limitation was never within the contemplation of the

(1) 30 T.L.R., 215.
(2) (1914) A.C., 644.
(3) 18 C.L.R., 349.

Court, and its suggested adoption now is entirely new. But I will add that if the cigarette slot machine case was a proper one for this Court to entertain, no hesitation need be felt at permitting a man to appeal in such a case as the present.

In any event, we are sitting, as I have already said, for the express purpose of formally considering this matter for ourselves. And the first requisite is to ask for some reason for adopting whatever rule the Privy Council may choose to follow. We are not the Privy Council. Our history is different, our constitution is different, our functions are different, and our *raison d'être* is different. Indeed, the very fact that the Privy Council refuse in most Australian cases to entertain appeals where life and liberty are in peril should, as I conceive, make us more studious to provide whatever redress justice requires.

To say that because the Privy Council will not grant redress for admitted illegality, therefore we will not, appears to me to be a self-condemnatory reason. It ought to be the other way. Facility for correction for injustice and legal error is one of the reasons of our existence as a Court. But, as that short view is obviously not accepted as sufficient by my learned brethren, I have to examine why the Privy Council do assume the position referred to. The reasons their Lordships give for their own position prove conclusively to my mind that we, in our situation, ought conversely not to adopt any such rule.

As to the extent of the rule itself, I say with all deference that, except by reference to *Arnold's Case* (1), I am not able to satisfy my mind as to its precise limits. Mere error in law is certainly not sufficient. For instance, "misdirection *as such* even irregularity *as such* will not suffice": *Ex parte Macrea* (2), as its effect is authoritatively summarized in *Ibrahim* v. *The King* (3). In other words, *Macrea's Case* decides that misconstruction of an Act without substantial and grave injustice is not enough.

If *Macrea's Case* could be taken to decide that misdirection even coupled with an absence of necessary evidence, was outside the Privy Council limits, it would follow that a misdirection as

(1) (1914) A.C., 644.
(2) (1893) A.C., 346.
(3) (1914) A.C., 599, at p. 614.

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to what constituted murder, and an absence of any proof of the *corpus delicti*, would not be enough to attract the jurisdiction of the Judicial Committee. I do not think their Lordships have said that.

In *Ibrahim's Case* (1), it is said:—"There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future"—citing *Bertrand's Case* (2). The case very often referred to is *Dillet's Case* (3), admitting an appeal "where substantial and grave injustice has been done"; and that is still adhered to in *Ibrahim's Case*. It is to be observed that in *Ibrahim's Case* it is recognized that the Supreme Court of New South Wales in *Makin's Case* (4), when exercising the long-established powers of correcting errors of law, and long before the recent creation of more widely extended powers of revision, was "A Court of Criminal Appeal" in the sense which the Privy Council attached to that expression; and that "grave and substantial injustice" arises where such a Court retries the case on the written material, instead of leaving it to the jury on oral evidence. That case, which involved the misinterpretation of a Statute, leading in the result to substantial and grave injustice, is the closest in analogy to the present.

Stopping at *Ibrahim's Case* (5), I should have thought that, even assuming the Privy Council rule were adopted as a binding addition to the statutory conditions created by Parliament, the present case would fall within it. And for this reason, namely, that "grave and substantial injustice" has been unquestionably done. The jury were told not merely that they might include the condition of the accused as part of the corroborative evidence of the girl's story as implicating the accused, but they might treat it as in itself sufficient and complete corroboration implicating him, and convict him accordingly. This to my mind falls within *Bertrand's Case* (2), as depriving the accused "of the

(1) (1914) A.C., 599, at p. 615.
(2) L.R. 1 P.C., 520.
(3) 12 App. Cas., 459.
(4) (1894) A.C., 57.
(5) (1914) A.C., 599.

protection of the law," which says that in such circumstances he shall not be convicted; and it also falls within *Dillet's Case* (1) as being "grave and substantial injustice." For grave and substantial injustice is certainly done, when a Judge so directs a jury as to lead them to take an erroneous view of any material part of a case, and this view may have affected their minds in determining it against the party appealing: *Per* Lord *Herschell*, in the House of Lords, in *Bray* v. *Ford* (2). If, however, the error complained of could have had no legitimate effect upon the verdict, no substantial wrong or miscarriage has been occasioned by it: *Per* Lord *Watson*, for the Privy Council, in *Manley* v. *Palache* (3). The last-mentioned decision is directly in point. Consequently, stopping at *Ibrahim's Case* (4), I should have had no doubt that the Privy Council practice would include such a case as this, even though fundamentally justice were not subverted.

But in *Arnold* v. *The King-Emperor* (5) Lord *Shaw* of Dunfermline, speaking for the Judicial Committee, a month after *Ibrahim's Case* was decided, said that the frequency of applications for appeal in criminal cases induced their Lordships to make a deliberate survey of the special positions and functions of the Board in criminal cases as the advisers of the King. This survey seems to me to entirely dispose of the contention that this Court should follow or is entitled to follow the same rule. I mean that the reasons for which the Privy Council adopts the rule are so inapplicable to us that we ought not to follow it.

His Lordship said in effect:—

(1) That the jurisdiction of the King under his Royal authority —*i.e.*, under his *prerogative*—was unquestionable, unless parted with by Statute.

(2) That reasons *constitutional and administrative* existed to control the exercise of that power.

(3) That those reasons operating in the administration of justice throughout the Empire made it necessary this power should not be so used as to be considered an *impediment* to the local

(1) 12 App. Cas., 459.
(2) (1896) A.C., 44, at p. 53.
(3) 73 L.T., 98.
(4) (1914) A.C., 599.
(5) (1914) A.C., 644.

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administration of the law. In other words, as I read it, high Imperial considerations of a constitutional nature, relating to leaving local authorities to administer their own public law, tempered the Royal prerogative of impeding its course by reconsidering individual complaints of error in the administration of that law.

(4) That this doctrine (first stated in 1862 by Dr. *Lushington* and Lord *Kingsdown* in two cases) was still in operation.

(5) That the distinction between criminal and civil cases rested upon these constitutional considerations. For in civil cases concerning individuals, the administration of justice on behalf of the public is not touched. *Dillet's Case* (1) is a clear instance of this distinction. A question there arose of quite sufficient importance for the civil aspect, but was outweighed by constitutional considerations in its criminal aspect.

(6) That the Judicial Committee of the Privy Council not being a Court of Criminal Appeal, but *constitutional advisers of the King in matters of law*, are not bound to do what an ordinary Court of Criminal Appeal would be bound to do. It accordingly frames its practice so as best to carry out the duties of its high and special position, and in criminal cases frames it on the lines set out on p. 648 of the report.

(7) That only in an extreme case will the Privy Council interfere, by advising "the *interposition* of His Majesty the King with the course of criminal justice in the Colonies or dependencies." That phrase shows at once how the matter is regarded. The Privy Council appeal is not in the course of regular judicial determination. It is the interposition of the King with the course of criminal justice. It is entirely outside ordinary judicial administration, and is a separate power of the Crown, as the ultimate source of British justice.

(8) Then the rule of the Privy Council in criminal cases, based on those special considerations, is thus stated by Lord *Shaw* (2):—"That extreme case is this, that it must be established clearly that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial

(1) 12 App. Cas., 459.

(2) (1914) A.C., 644, at p. 650.

concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire."

(9) Next, the reason for laying down the rule is that the procedure and rules applicable to Courts of Criminal Appeals are not applicable to the Privy Council, because they "apply to a different system, a different procedure, and a different structure of principle." That different system, procedure and structure, I may observe, is our own.

As to civil cases, the statement of the rule in *Prince* v. *Gagnon* (1) begins in this way:—Their Lordships are not prepared "to advise Her Majesty to exercise her prerogative by admitting an appeal," &c. Again, and necessarily, the position is rested on prerogative, and on the function of *advising the Crown.* And that also involves the fact that the appeal is an *interposition* in the course of regular judicial procedure.

In view of those considerations, it seems to me, with the utmost respect for the opposite opinion, impossible to place this Court on the same footing. To adopt a rule founded only, as the Privy Council says, on the special and unique constitutional position of that body, from which our own Court fundamentally differs, seems to me, with all deference, to be inexplicable. *Cessante ratione, cessat lex.*

We are, as I have said, a strictly judicial body; we have no duty of advising the Sovereign; we are not charged with constitutional functions of an Imperial character. We have simply the same judicial duty that any other Court in Australia, or in England, has when it is empowered to allow or disallow an appeal. We have to consider the case on its merits and circumstances, and to see whether there is *primâ facie* error that ought to be corrected.

But there is nothing, so far as I can see, to warrant our stipulating in advance that the error complained of must be one of fundamental character. Our granting leave is not an "impediment" in legal administration; it is not an "interposition" into the judicial arena; it is part of the course of justice itself; that is, this Court in so acting does so as part of the recognized judicial system of Australia and its apex in the

(1) 8 App. Cas., 103, at p. 105.

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Commonwealth. As already pointed out, the same principle must apply to the case of an illegal conviction in federal jurisdiction or a civil appeal from the decision of a single Justice of this Court, and it would be the acme of absurdity to suggest that this Court's revision of such a conviction or decision can be considered an impediment to or an interposition in the administration of justice. But take away these considerations, on which alone the Privy Council proceeds, and what foundation is left for adopting the Privy Council rule? I have heard none suggested in any quarter.

If, therefore, for any reason the Court considers the cause of justice better served by granting than by refusing leave to appeal, there is nothing, in my opinion, to counterbalance that opinion, as there is in most applications in the case of the Privy Council. I cannot bring myself to believe that the Parliament of Australia intended this Court to give greater protection to money and property than to liberty and life. I cannot believe—until by this decision I am hereafter compelled to—that Parliament intended the principle of *Dillet's Case* (1) to prevail, namely, that for the very same miscarriage of justice the Court would defend a man's rights to property, but would refuse to protect him from unauthorized imprisonment and disgrace as a criminal.

The more I have considered this matter, the more I am convinced—until judicially bound to consider otherwise—that Parliament has in effect said to the Court, as the highest local Australian Court, this:—"In criminal cases we draw no line, consider each case as it comes up on its merits, and say whether broad justice or the due interpretation of the criminal law makes revision proper or not. If it does, revise the decision; if not, refuse to do so."

No narrower interpretation can, I conceive, be with propriety adopted, or would be consistent with the law conferring our jurisdiction, and requiring its exercise. The point of law not only has occasioned grave and substantial injustice in this particular case, but the interpretation of the relevant section of the *Crimes Act* 1900, as declared by the majority of the Supreme Court, will form a precedent for all future cases of similar kind.

(1) 12 App. Cas., 459.

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And similarity of legislation in other parts of Australia adds to the desirability of authoritatively declaring the law.

In my opinion, the motion to rescind the leave should be refused, and the appeal should be allowed.

GRIFFITH C.J. In order to remove any impression that any injustice has been done in this case, which might perhaps arise from what has been said by my brother *Isaacs*, I think it right to say that at least a statutory majority of the Court take a very different view of the facts from that stated by him, and a different view of the law applicable to them.

Special leave to appeal rescinded.

Solicitor, for the appellant, *J. W. Abigail.*

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH, MORT & CO. LTD. . . APPELLANTS; DEFENDANTS,

AND

CARTER . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 27, 30; *Dec.* 1, 16.

Griffith C.J., Barton and Isaacs JJ.

Contract—Breach—Sale of sheep—Specific goods—Estimate of number—Delivery of lesser number—Warranty of number—"More or less"—"About."

By a contract in writing dated 26th June 1912 the defendants by their agents sold to the plaintiff "the undermentioned stock, more or less, namely,