[HIGH COURT OF AUSTRALIA.]

CORBET . . . . . APPELLANT;
COMPLAINANT,

AND

LOVEKIN AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF WESTERN AUSTRALIA.

H. C. OF A. 1915.

MELBOURNE, *March* 22.

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

Practice—Appeal to High Court in criminal matter—Inference to be drawn from facts—Judiciary Act 1903-1910 (*No.* 6 *of* 1903—*No.* 34 *of* 1910), *sec.* 35 (1) (*b*) —*War Precautions Act* 1914 (*No.* 10 *of* 1914), *sec.* 4—*Statutory Rules* 1914, *No.* 154, *reg.* 10.

On a complaint for publishing information which might be directly or indirectly useful to the enemy the magistrate found that the information published was not of such a character that it might be directly or indirectly useful to the enemy, and he dismissed the complaint.

Held, that special leave to appeal to the High Court from the decision should be rescinded :

By *Griffith* C.J. and *Gavan Duffy*, *Powers* and *Rich* JJ., on the ground that the only question was what inference should be drawn from the facts ;

By *Isaacs* J., on the ground that the case was governed by *Eather* v. *The King*, 19 C.L.R., 409.

APPEAL from a Court of Petty Sessions of Western Australia.

At the Court of Petty Sessions at Perth on 25th January 1915 a complaint was heard whereby Hugh Annan Corbet, Chief of the Censorship Staff of Western Australia, charged that on 15th December 1914 Arthur Lovekin, Paul William Herman Thiel and

Alfred Edward Morgans, proprietors of the *Daily News* newspaper, did, without lawful authority, publish information with respect to measures connected with the defence of the Suez Canal, the information being such as might be directly or indirectly useful to the enemy.

The publication in question purported to be extracts from the diary of a passenger on board the steamship *Maloja* on a voyage from England to Australia. The relevant extracts were those dated 25th and 26th November 1914, and were as follows:—"In Suez Canal. At various points trenches were being made by Indian soldiers; at others trenches had been completed, and were manned by our soldiers. These were on both banks of the Canal, and extended for some miles on the east side. There was an Indian regiment on the east bank of the Canal, near Port Said, provided and maintained by the Maharajah of Patiala. At the point on the Canal where the cable crosses, our troops, consisting of British, Indians, and Soudanese, were encamped. Trenches had been dug and sand-bagged, and apparently were very secure fighting places. Camel and mule corps, machine guns."

Evidence was given on behalf of the prosecution by witnesses, whom the magistrate considered to be military experts, to the effect that the information might be useful to the enemy, and who gave their reasons for that conclusion. No evidence was called for the defence. The magistrate found that the information was not such as might be directly or indirectly useful to the enemy, and he dismissed the complaint. In delivering his judgment, he stated that he was not satisfied that the reasons given by the witnesses for their conclusion were good ones.

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

Starke, for the appellant.

Mitchell K.C. and *Owen Dixon*, for the respondents, were not called upon.

GRIFFITH C.J. It is now admitted that the only argument which can be urged upon this appeal is whether the conclusion

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of the magistrate, who was not satisfied that the publication complained of was calculated to be, or might be, of use to the enemy, was wrong, as being against the weight of evidence. There is no instance in which this Court has granted special leave to appeal on such a ground, and certainly the Judicial Committee of the Privy Council has never done so in any case, either civil or criminal. That being the only question really sought to be raised, the appeal cannot be allowed. In this Court under such circumstances we have been in the habit of rescinding the leave; in the Judicial Committee it has been the practice to dismiss the appeal. The result is the same in either case.

ISAACS J. If I were not precluded by the case of *Eather* v. *The King* (1) I would have no doubt whatever that we ought to entertain this appeal and to decide it according to the view which we, as an appellate tribunal, take of the circumstances. The matter is one of the very gravest nature. It is not an ordinary case which involves consequences to one individual alone, but it is a case which arises under legislation passed by the Parliament of the Commonwealth as a component part of the British Empire doing its duty to maintain the very existence of the Empire. There are some facts which are so much part of the common knowledge of this country, and of the whole nation, that we need no testimony in a Court of law either to establish or to explain them. One is that the Suez Canal was and is a point of attack by our enemies, and that to defend that important highway of the Empire we have sent from Australia our own troops, which, with other troops from other parts of the Empire, are there now. In the middle of December 1914 it was well known that enemy troops were making their way across Asiatic Turkey to attack the British troops defending the Canal. While that was so, and while therefore it was of the utmost importance to conceal as far as possible everything that was being done there, there was published, in the widest sense of the word, and so as to be available to anyone disposed to and having the opportunity to communicate it to the enemy, information which, to my mind, could not but be of immense importance to the enemy, viz., the

(1) 19 C.L.R., 409.

existence and position of trenches and their defence by British, Indian and Soudanese troops, the presence of camel corps and machine guns, and their position relative to the place where the cable crosses the canal.

The statutory regulation forbidding the publication of information in the Commonwealth does not assume that the information has reached or will inevitably reach the enemy. It is said that such information shall not be published except by permission, that is, for fear that it may reach the enemy. The ways of reaching the enemy are not always discernible. We know that they are very devious. I should have thought that this was a matter in which this Court ought to exercise the powers given by sec. 35 of the *Judiciary Act*, which are very simple and shortly expressed. Mr. *Starke* referred to the words "any judgment, ... whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal."

If my judgment were not bound by *Eather's Case* I should think, as I thought then, that that Act leaves this Court full discretion, with no arbitrary rule—with a duty as well as a power to look at the whole circumstances without any distinction between matters of fact and matters of law, and then to say whether an appeal should be entertained. *Eather's Case* (1) does lay down a rule in these words:—"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* (2) and *Arnold* v. *The King-Emperor* (3)."

That states the practice of this Court; and when the case of *Arnold* v. *The King-Emperor* (4) is looked at, it seems to me that the decision was for the very purpose, and only for the purpose, of laying down the practice of the Privy Council, and it lays it down in these terms, that the case must be one in which "justice itself in its very foundations has been subverted."

But the reason for laying down that rule is that the Privy Council regarded themselves as an interposition in the course of

(1) 19 C.L.R., 409, at p. 412.
(2) (1914) A.C., 599.
(3) (1914) A.C., 644.
(4) (1914) A.C., 644, at p. 650.

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Isaacs J.

justice, and they said that they were not going to interpose to stop the ordinary course of justice in self-governing communities unless justice in its very foundations had been subverted. But that is not so in the case of this Court, which is part of the ordinary course of justice of this self-governing Commonwealth.

In *Eather's Case* (1) the judgment of the majority of the Court proceeded:—"We are also of 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."

So that the facts in that case were not looked at in order to determine what the rule of practice was, but to see whether they brought the case within the rule of practice, and as it was found that the facts did not bring the case within the rule, leave to appeal was rescinded.

The question here being one of fact only, and there being no subversion of justice, this case of course is included among the cases which fall within *Eather's Case*. It seems to me, therefore, willing and desirous as I am to hear the appeal, that I am precluded from doing so by the decision in *Eather's Case*. Still, notwithstanding that decision, I should be willing to hear the appeal if the rest of my colleagues agreed with me to do so. That would, of course, be to decide that *Eather's Case* was no longer a binding authority.

I regret the conclusion of the Court not to hear the appeal, because, apart from all technicalities, in view of the position in which we are, seeing that Parliament has passed the Act and the proper authority has made the regulation, I think we ought to give every assistance to see whether in fact this law, made not merely for the safety of the Empire but for the defence of our fellow Australians, has been broken. I think that consideration ought to lead us to help as far as we can, free from technical rules of practice, the elucidation of the question whether a publication of this kind can be made with impunity in Australia.

Being bound by the decision in *Eather's Case* (1) I acquiesce, but reluctantly, in rescinding the special leave to appeal.

GAVAN DUFFY J. Mr. *Starke* has very fairly put the real point of the case, and as it is merely a question of what inference

(1) 19 C.L.R., 409, at p. 412.

is to be drawn from the facts proved, I think that the special leave to appeal ought to be rescinded.

POWERS J. I agree with the judgment of the learned Chief Justice. I wish to add that before the decision in *Eather's Case* (1) this Court had never granted special leave to appeal where the only ground of appeal was that the decision appealed from was against the weight of evidence. I think that this appeal is one on that ground, and that the special leave to appeal should be rescinded.

RICH J. I agree with what the learned Chief Justice has said.

GRIFFITH C.J. I think it my duty, in view of what has fallen from my brother *Isaacs*, to add a few words, partly with respect to the merits of this case so far as the Court knows them, and partly with respect to the case of *Eather* v. *The King* (1). As to the merits of the case, if I am asked to form an opinion on the question of fact, I think that the publication complained of was not, in any rational sense of the words, one which was calculated to be or which might be advantageous to the enemy. I should not have expressed an opinion upon the matter had not my brother *Isaacs* expressed one so strongly to the contrary effect, and I only do so in order that the opinion expressed by him may not be taken as that of the Bench. So far as the merits are concerned, I can see none on the facts.

As my brother *Isaacs* has thought fit to refer again to *Eather's Case*, I wish to say that in my opinion that case has nothing to do with this. That was an appeal by a convicted criminal, and the Judicial Committee has on many occasions—as this Court also has done—laid down the practice applicable to allowing such appeals. The case of an appeal by the Crown in a case where a subordinate Court of the Empire has misunderstood the law which it is called upon to administer, so that the arm of the Crown is tied, was not taken into consideration in *Eather's Case*, or in the two cases we referred to in our judgment in that case. It is obvious that quite different considerations arise in

(1) 19 C.L.R., 409.

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determining whether appeals should be allowed to be brought by the Crown in such cases.

Special leave to appeal rescinded. Appellant to pay costs.

Solicitor, for appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for respondents, *James & Darbyshire*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONERS OF TAXATION (NEW SOUTH WALES) . . } APPELLANTS;

AND

MEEKS (PUBLIC OFFICER OF THE SULPHIDE CORPORATION LIMITED) . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *April* 23, 26, 29.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Income Tax—Company—Taxable income—Profits—Source of income—Business carried on partly in New South Wales—Contract made abroad for sale of goods to be manufactured and delivered in New South Wales—Money paid in advance under contract—Cancellation of contract—Money retained by company—Income Tax (Management) Act 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *secs.* 4, 10, 19 (2)*—*Income Tax Management (Amendment) Act* 1914 (*N.S.W.*) (*No.* 9 *of* 1914), *sec.* 3*.

* By sec. 4 of the *Income Tax (Management) Act* 1912 "income" is defined as meaning "income derived from any source in the State, and shall be deemed to exclude the incomes, revenues, and profits exempted from the operation of this Act by sec. 10"; "income derived from personal exertion" is defined as meaning "income consisting of the proceeds of any business, earnings, salaries, wages, fees, bonuses, pensions, or payments made upon superannuation or retirement from employment"; and "income derived from property" is defined as meaning "income derived from any source in the State other than from personal exertion." By sec. 10, as