an order as was made by *Buchanan* J., and that that order should be set aside. I think that the appeal should be allowed.

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McBRIDE v. SANDLAND [No. 2].

Appeal allowed. Order appealed from discharged. Respondent to pay costs of appeal.

Solicitor for the appellant, *H. G. Alderman.*
Solicitors for the respondent, *Bright & Bright.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

SNOW . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Criminal Law—Case reserved at the trial—Subsequent amendment of case asking new question—Misdirection—Misinterpretation of evidence—Special leave to appeal to High Court—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 72.

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MELBOURNE, *Sept.* 5, 12.

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

On a trial in the Supreme Court of a State for trading with the enemy the accused was convicted, and the trial Judge thereupon reserved a case for the Full Court pursuant to sec. 72 of the *Judiciary Act* 1903-1915. On appeal to the High Court from the decision of the Full Court thereon the case was remitted to the trial Judge for amendment by the addition, for the consideration of the Full Court, of certain evidence admitted at the trial. On the case as amended coming again before the Full Court, the trial Judge further amended it by stating that in his direction to the jury he had misinterpreted a part of that evidence and had told the jury upon that misinterpretation that they might find the accused guilty of an attempt to trade with the enemy,

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and he asked whether under these circumstances the verdict could stand. No attention had been called to this point at the trial. The Full Court held that the direction was wrong, and ordered a new trial.

The High Court refused special leave to appeal.

APPLICATION for special leave to appeal.

At the criminal sittings of the Supreme Court of South Australia held in November 1915, at Adelaide, Francis Hugh Snow was tried before *Murray* C.J. and a jury on an information charging him on two counts with trading with the enemy, and was convicted on the second count. *Murray* C.J. then reserved for the Full Court the question whether certain holdings and directions to the jury were right in law. The Full Court, upon the hearing of the question, ordered the conviction to be set aside and a verdict of not guilty to be entered. From that decision the Crown appealed to the High Court, and that Court allowed the appeal, and ordered that the order of the Supreme Court should be set aside, and that the case should be remitted to *Murray* C.J. for the addition to it for the consideration of the Full Court of copies of certain letters and telegrams which had been admitted in evidence at the trial, or of such portions thereof as, consistently with the reasons of the High Court and the order, he might deem material for the purpose of elucidating his direction to the jury in relation to the points reserved (*R.* v. *Snow* (1)). On the case being remitted *Murray* C.J. added all the letters and telegrams to it. The case subsequently came on for reargument before the Full Court of the Supreme Court, and during the argument a further statement and a further question were, on 17th June 1918, added by *Murray* C.J. as follows:— "When charging the jury I misinterpreted part of a cablegram dated 3rd September 1914 from George Smith & Son to the defendant. I read the last three words 'impossible Winter Rotterdam' together, and took them to mean that communication with Winter was impossible. It had been contended on behalf of the defendant, at the close of the case for the prosecution, that there was no evidence that letters were sent to or received by Winter, but I subsequently directed the jury as follows:—'Well, concerning these letters'

(1) 23 C.L.R., 256.

(meaning letters addressed to Winter after 12th September 1914): 'As I asked you yesterday were they of a commercial nature? Did they reach Winter? Smith & Son said that communication with Winter was impossible. Presumably they were sent direct. Once they were posted, you may infer that there was an attempt to have intercourse. If you think, from your knowledge of the course of delivery of letters through the post, that they reached Winter, you may find that they did reach him. If you are satisfied that they were despatched from here with the intention that they should reach him, and that Winter was really Hirsch & Sohn in Holland, then, gentlemen, you are justified, on the second count, in finding him guilty of attempting to trade with the enemy by having commercial intercourse. If you think they did reach him, you can find the defendant guilty under the second count of the offence charged.' No objection to this direction was made during delivery or subsequently at the trial, and I was not asked to reserve any question upon it for the consideration of the Full Court. It has now become clear to me that the correct interpretation of the cablegram is that a proposal to establish a certain Mr. Marshall in France was impossible and that Winter was in Rotterdam. Had I realized this I should not have said to the jury that presumably after the receipt of the cablegram letters addressed to Winter would be sent to him direct, or have made the remarks which followed on that statement. A later cablegram of 14th October 1914 from George Smith & Son did state that intercourse with Winter was impossible, but the defendant did not write any letters to him after that date. The further question for the consideration of the Court is whether under these particular circumstances the verdict of the jury can stand." Counsel for the Crown opposed this addition to the case, but the Full Court overruled the objections. The Full Court on 22nd August 1918 ordered the verdict of guilty to be set aside and a new trial to be had, by a majority of the Court on the sole ground that the direction of *Murray* C.J. referred to in the added statement was wrong.

The Crown now applied to the High Court for special leave to appeal from that decision.

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Mann, for the appellant. The learned Chief Justice had no jurisdiction to amend the case and ask the new question at the time he did so. Under sec. 72 of the *Judiciary Act* 1903-1915 the Court which is given power to state a case is "the Court before which" the accused "is tried." That means the Court at the trial and before or after judgment. The question of law which is to be reserved must be a question arising at the trial either before or after judgment. The section does not cover a question not mentioned at the trial and not thought of until some months afterwards. The particular question asked is not one of law. What the learned Chief Justice said to the jury was not a misdirection in any material sense; at most he merely misinterpreted the evidence, and it was open to the jury to put their own interpretation upon it.

Cur. adv. vult.

Sept. 12.

GRIFFITH C.J. In this case the Court is of opinion that special leave to appeal should be refused. In refusing special leave we express no opinion as to the points of law sought to be raised.

Special leave to appeal refused.

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

B. L.