[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

GATES AND ANOTHER;

Ex Parte MALING.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES TO THE HIGH COURT.

H. C. of A. 1928.

SYDNEY, *Nov.* 12, 13, 14, 26.

Knox C.J., Isaacs, Gavan Duffy, Powers and Starke JJ.

Constitutional Law—Inconsistency of laws—Commonwealth and State Acts—Contract—Construction—Trade and commerce with foreign countries or between States—Secret commission paid to agent—Evidence—Voluntary statements—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (I.)—*Secret Commissions Act* 1905 (*No.* 10 *of* 1905), *sec.* 4*—*Secret Commissions Prohibition Act* 1919 (*N.S.W.*) (*No.* 26 *of* 1919), *sec.* 3*—*Judiciary Act* 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *sec.* 40A.

In a prosecution for an offence under sec. 3 of the *Secret Commissions Prohibition Act* 1919 (N.S.W.) the accused was convicted of and sentenced for corruptly receiving from a certain company a sum of money as a reward for

* The *Secret Commissions Act* 1905 provides, by sec. 4, as follows:—"(1) Any person who, without the full knowledge and consent of the principal, directly or indirectly—(*a*) being an agent of the principal accepts or obtains or agrees or offers to accept or obtain from any person for himself or for any person other than the principal; or (*b*) gives or agrees to give or offers to an agent of the principal or to any person at the request of an agent of the principal any gift or consideration as an inducement or reward—(I.) for any act done or to be done, or any forbearance observed or to be observed, or any favour or disfavour shown or to be shown, in relation to the principal's affairs or business, or on the principal's behalf; or (II.) for obtaining or having obtained or aiding or having aided to obtain for any person an agency or contract for or with the principal—shall be guilty of an indictable offence. Penalty: In the case of a corporation, one thousand pounds; in the case of any other person, two years' imprisonment or five hundred pounds, or both. (2) A gift or consideration shall be deemed to be given as an inducement or reward if the receipt or any expectation thereof would be in any way likely

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having recommended the Sydney Municipal Council to accept the company's tender for erecting a steam-raising plant in the Council's electric power station in New South Wales. The Council did accept the tender; and from the contract between the Council and the company it was apparent that a considerable part of the material to be used would be manufactured in Great Britain and elsewhere and imported into Australia after the date of the agreement.

Held, by the whole Court, (1) that the Council in relation to the contract was not engaged in "trade and commerce with other countries, and among the States" within the meaning of sec. 51 (I.) of the Constitution; (2) that the Commonwealth Act, the *Secret Commissions Act* 1905, had no application to the case; and (3) that the provisions of sec. 3 of the State Act, the *Secret Commissions Prohibition Act* 1919, were not invalid.

By *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Powers* JJ.: The contract, on its true construction, was an entire and indivisible contract to do the necessary work and to provide the necessary materials to bring into existence, complete and ready for commercial use, a distinct unit, namely, a steam-raising plant affixed to the soil of New South Wales.

By *Starke* J.: The company's offer was made in Australia and was to create a steam-raising plant here; that offer being purely local or domestic, the fact that the company would itself engage in an act of foreign trade in bringing to Australia materials necessary for the plant in no wise altered the local or domestic character of the offer.

APPEAL removed from the Supreme Court of New South Wales.

On 31st July 1928 Silas Young Maling was charged before a Stipendiary Magistrate for that between 5th September 1926 and 5th February 1927 he, being an agent within the meaning of the *Secret Commissions Prohibition Act* 1919 (N.S.W.), of the Municipal Council of Sydney, did at Sydney corruptly receive from Babcock & Wilcox Ltd. (a corporation registered under Part III. of the *Companies*

to influence the agent to do or to leave undone something contrary to his duty."

The *Secret Commissions Prohibition Act* 1919 (N.S.W.) provides, by sec. 3, as follows:—"If any agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—(*a*) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or (*b*) the receipt or any expectation of which would in any way tend to influence him to show, or to forbear to show, favour or disfavour to any person in relation to his principal's affairs or business; or if any person corruptly gives or offers to any agent any valuable consideration—(*a*) as an inducement or reward for or otherwise on account of the agent doing, or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or (*b*) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his principal's affairs or business, he shall be guilty of an offence against this Act."

(*Amendment*) *Act* 1906 (N.S.W.) and carrying on business in the State of New South Wales) a valuable consideration, to wit, the sum of £10,600, as a reward for having done an act in relation to the affairs of his said principal, the Municipal Council of Sydney, to wit, for having recommended his said principal to accept a certain offer made by Babcock & Wilcox Ltd. to his said principal for and in connection with steam-raising plant for Bunnerong power station in the said State. Babcock & Wilcox Ltd. was an English company which also carried on business in New South Wales. The offer referred to in the charge was accepted by the Council, the contract being contained in articles of agreement dated 5th May 1926, and certain conditions, plans, specifications and letters expressly incorporated therein. The articles recited that the Council was desirous of having certain works done and materials supplied, namely, steam-raising plant, at Bunnerong power station (all thereinafter referred to as the said works) and that Babcock & Wilcox Ltd. had agreed to execute the said works for the sum of £603,477 and Babcock & Wilcox Ltd. agreed in consideration of such sum to execute and complete the said works. Clause 1 of the specifications, which formed part of the contract, was (so far as is material) as follows :—" This specification covers the supply, delivery, erection, testing and maintenance at the purchaser's power station, in the Municipality of Randwick, on the shore of Botany Bay, New South Wales, of steam boilers and auxiliary plant, automatic stokers, mechanical draft plant, piping valves and fittings as hereafter specified. The whole of the works shall be carried out to the satisfaction of the engineer in accordance with the regulations of the New South Wales Government and the recommendations of the British Engineering Standards Association. . . . The contract includes the provision and fixing into place of everything proper, necessary, or usually supplied for the effective and convenient working of the plant and for the protection of the purchaser's employees " &c. Clause 33 of the general conditions incorporated in the agreement provided that the plant, when erected, should be deemed to have been taken over by the Council when the engineer certified in writing that the plant fulfilled the contract conditions. " Plant " was defined as meaning and including plant and materials

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to be provided and work to be done by the contractor under the contract. It was apparent from the documents incorporated in the agreement that a considerable part of the material to be used in the performance of the contract would be manufactured in Great Britain or elsewhere and imported into Australia after the date of the agreement. At the hearing evidence was given that, prior to the date when the charge was preferred against him, Maling was interviewed in New Zealand in respect to the matter by Inspector MacKay of the New South Wales police. After some conversation had passed between them, during which certain documents were shown to Maling, the inspector said: "Well, Mr. Maling, what explanation have you got to make in connection with the sum of £10,600 that was paid to you?" Maling asked: "What is the position; is it a case of going back voluntarily or a case of going back?" To this the inspector replied: "You know me Mr. Maling and I know you, and I am in a position to inform you that the sum of £10,600 was sent to Buckle of Pyrmont, and that Albert and Miss Gordon have made statements that the money was handed to you." Maling's counsel objected to the admission in evidence of any statements made by Maling to the inspector subsequent to the above reply, on the ground that such statements were made after clear indication that, if Maling did not answer, it would be the worse for him. The magistrate overruled the objection, convicted Maling and, in addition to imposing a fine of £500, sentenced him to imprisonment with hard labour for a term of six months.

Maling applied to the Supreme Court of New South Wales for a writ of prohibition to be directed to the magistrate and to the informant. The principal grounds relied upon in support of the application to make absolute the rule nisi were: that evidence should not have been allowed to be given of certain conversations which took place in New Zealand between Maling and Inspector MacKay as such conversations had been induced by the threat of the latter; and that the offence with which Maling was charged was punishable under sec. 4 of the *Secret Commissions Act* 1905 as it took place in relation to trade and commerce with other countries within the meaning of sec. 2 of that Act and of sec. 51 (I.)

of the Constitution, and hence was not punishable under the *Secret Commissions Prohibition Act* 1919 (N.S.W.), which to the extent of its inconsistency with the Commonwealth Act was *ultra vires*.

The Full Court of the Supreme Court was of opinion, as to the first ground, that there was nothing to suggest that whatever Maling said to Inspector MacKay was not said perfectly voluntarily, and there was nothing on which to base any submission that he was induced to speak by any threat made or promise held out. As to the second ground the Court was of opinion that a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales and that, by virtue of the provisions of sec. 40A of the *Judiciary Act* 1903-1927, the matter must be removed to the High Court.

Following the decision in *The King* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (1), the Court made no order in the matter but caused an indorsement to be made on the rule nisi to the effect that but for the constitutional question involved it would have made an order discharging the rule with costs, but that, having regard to that question and to the provisions of sec. 40A of the *Judiciary Act*, it would not proceed further.

The matter now came on for hearing before the High Court.

Other material facts are stated in the judgments hereunder.

H. V. Evatt (with him *Kinkead*), for the applicant. The act of the applicant for which punishment was imposed was the receipt of money for assisting a tenderer to obtain a contract with the principal of the applicant for the supply and delivery from overseas to the principal in Australia of a large quantity of goods. That act was also punishable under sec. 4 of the Commonwealth *Secret Commissions Act* 1905, as it took place in relation to trade and commerce with other countries within the meaning of sec. 2 of that Act and sec. 51 (1) of the Constitution. If sec. 3 of the *Secret Commissions Prohibition Act* 1919 (N.S.W.) extends to transactions in trade and commerce with other countries, it is inconsistent with sec. 4 of the *Secret Commissions Act* 1905 and therefore void. Even if sec. 3 of the former Act has no application to a transaction punishable

(1) (1919) 27 C.L.R. 249.

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under sec. 4 of the latter Act, in both instances the conviction would be bad under the authority of *Hume* v. *Palmer* (1). The New South Wales Act seeks to achieve the same object as the Commonwealth Act, but sec. 4 of the latter Act covers every possible avenue in which a secret commission might be given, which clearly shows the intention of the Commonwealth Legislature to exclude State legislation from this field. The difference in the sanction applied by the Commonwealth and the State to the same act is most material (*Hume* v. *Palmer* (2)). The offence, being in relation to a contract involving trade and commerce with other countries, should have been dealt with under the Commonwealth Act and not under the New South Wales Act. Where the contract was made is quite immaterial (*W. & A. McArthur Ltd.* v. *Queensland* (3)).

[ISAACS J. referred to *Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4).]

The erection of plant and other matters to be attended to by the contractors within New South Wales do not alter the essential feature of the contract. The matter cannot be determined by any consideration of the technical law of contract (*Rearick* v. *Pennsylvania* (5); *Dozier* v. *Alabama* (6); *North Pacific Railway Co.* v. *Washington* (7); *Minnesota Rate Cases* (8); *York Manufacturing Co.* v. *Colley* (9); *United States* v. *New York Central Railroad Co.* (10)). The fact that Babcock & Wilcox Ltd. was represented in New South Wales by an attorney does not alter its character as a foreign company. As the Commonwealth law applies the magistrate should have dismissed the charge.

[ISAACS J. referred to *Western Union Telegraph Co.* v. *Foster* (11) and *Commonwealth Oil Refineries' Case* (12).]

The magistrate was in error in allowing in evidence the conversations between the inspector of police and the applicant alleged to have taken place in New Zealand, as the words used by the inspector in reply to Maling's query were in the nature either of a threat

(1) (1926) 38 C.L.R. 441.
(2) (1926) 38 C.L.R., at p. 462.
(3) (1920) 28 C.L.R. 530, at p. 540.
(4) (1926) 38 C.L.R. 408.
(5) (1906) 203 U.S. 507, at p. 512.
(6) (1910) 218 U.S. 124, at pp. 127-128.
(7) (1912) 222 U.S. 370, at p. 375.
(8) (1912) 230 U.S. 352, at p. 399.
(9) (1918) 247 U.S. 21, at pp. 23-25.
(10) (1926) 272 U.S. 457, at p. 464.
(11) (1918) 247 U.S. 105.
(12) (1926) 38 C.L.R., at p. 429

or of a promise (*The Queen* v. *Thompson* (1); *R.* v. *Childs* (2)). The test is not what the inspector intended but what Maling might reasonably have understood him to mean (*R.* v. *Rue* (3)).

[GAVAN DUFFY J. referred to *Attorney-General (N.S.W.)* v. *Martin* (4).]

It is necessary for the Court to determine whether a constitutional question within the meaning of sec. 40A of the *Judiciary Act* arises in this matter.

Flannery K.C. (with him *Shortland*), for the respondents. The Municipal Council of Sydney was not engaged in trade and commerce with other countries when the offence was committed, that is to say, when the money was received by the applicant, or at any time. Even if it were, the New South Wales legislation dealing with the particular act which is charged as an offence is not inconsistent with the Commonwealth legislation. The contract does not involve foreign trade and commerce: although importation might be necessary, it was not essential to the carrying out of the contract. The fact that the price is known to include freight and customs duties does not constitute the transaction one of trade with a foreign country. An offence is committed under the *Secret Commissions Act* 1905 when the money is received secretly, but, in order to constitute an offence under the *Secret Commissions Prohibition Act* 1919, it is necessary for the money to be received corruptly as well as secretly. There is nothing in the New South Wales Act which conflicts with the Commonwealth law (*Vigliotti* v. *Pennsylvania* (5)). The Court must consider the terms of the legislation creating the offence, and must satisfy itself that the State legislation is inconsistent with the Commonwealth legislation. The position is not the same as in *Clyde Engineering Co.* v. *Cowburn* (6), as here it is a mere prohibition by the Commonwealth and not the granting of rights. [Counsel also referred to *R.* v. *Barron* (7).]

H. V. Evatt, in reply. The transaction involved trade and commerce between States just as much as the transaction dealt with in *McArthur's Case* (8).

(1) (1893) 2 Q.B. 12.
(2) (1923) 24 S.R. (N.S.W.) 57.
(3) (1876) 13 Cox C.C. 209.
(4) (1909) 9 C.L.R. 713.
(5) (1922) 258 U.S. 403.
(6) (1926) 37 C.L.R. 466.
(7) (1914) 2 K.B. 570.
(8) (1920) 28 C.L.R. 530.

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[ISAACS J. referred to *Anglo-Egyptian Navigation Co.* v. *Rennie* (1).]

The dominant character of the contract was the sale of goods, and those goods were to be imported into Australia in order to fulfil the contract.

Cur. adv. vult.

NOV. 26.

The following written judgments were delivered :—

KNOX C.J., ISAACS, GAVAN DUFFY AND POWERS JJ. The applicant, Silas Young Maling, was charged with and convicted of an offence against the provisions of the New South Wales *Secret Commissions Prohibition Act* 1919, in that he, being an agent, within the meaning of that Act, of the Municipal Council of Sydney, did corruptly receive from Babcock & Wilcox Ltd. a sum of money as a reward for having recommended the Council to accept a tender submitted by the Company to the Council in connection with steam-raising plant for an electric power station.

He applied to the Supreme Court of New South Wales for a prohibition on a number of grounds, of which the following only are now material to be stated : " (6) that on the undisputed facts the offence charged was punishable under the Federal *Secret Commissions Act* 1905 and not under the New South Wales *Secret Commissions Prohibition Act* 1919 ; (7) that on the true construction of the New South Wales *Secret Commissions Prohibition Act* 1919 it did not apply to the facts proved in evidence ; (8) that, if on the true construction of the New South Wales *Secret Commissions Prohibition Act* 1919 that Act applied to the present case, it was inconsistent with the Commonwealth *Secret Commissions Act* 1905 and void to the extent of the inconsistency ; (9) that the magistrate was in error in allowing in evidence the conversations between Inspector of Police MacKay and the defendant alleged to have taken place in New Zealand."

The Supreme Court held that all the grounds relied on by the applicant in support of his application except those numbered 6, 7 and 8 failed, but, being of opinion that under the last-mentioned

(1) (1875) L.R. 10 C.P. 271, at p. 283.

grounds a question arose within the meaning of sec. 40A of the *Judiciary Act* as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales, proceeded no further in the matter; which thereupon by force of that section was removed into this Court. The only grounds relied on in argument before this Court were those set out above, namely, 6, 7, 8 and 9. Mr. *Flannery* for the respondents contended that it was not open to the applicant to rely in this Court on ground 9, the matter raised by that ground having been decided by the Supreme Court; but, as the Court after hearing Dr. *Evatt* was unanimously of opinion that the ground referred to could not be sustained, it became unnecessary to express any opinion on the question raised by Mr. *Flannery*. As to this ground it is sufficient to say that there is nothing in the evidence to suggest that the statements made by the applicant to Inspector MacKay were not made voluntarily or that they were induced by any untrue representation made to him or by any threat or promise held out to him by the inspector of police.

The argument for the applicant in support of grounds 6, 7 and 8 was that the conviction under the State Act was bad because the facts proved disclosed an offence against the provisions of the Federal Act, which were intended to and did cover the whole subject of secret commissions received in connection with trade and commerce with other countries or among the States. This argument was necessarily founded on the proposition that in the transaction between the Council and Babcock & Wilcox Ltd. in connection with which the money was received by the applicant the Council was engaged in trade and commerce with other countries or among the States, for the application of the Federal Act is by sec. 2 expressly limited to such trade and commerce and to certain agencies and contracts not material to this case. The first question for decision, therefore, is whether the contract between the Council and Babcock & Wilcox Ltd. comes within the description "trade and commerce with other countries and among the States." That contract is contained in articles of agreement dated 5th May 1926 and certain conditions, plans, specifications and letters expressly incorporated

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Knox C.J. Isaacs J. Gavan Duffy J. Powers J.

therein. The articles recite that the Council was desirous of having certain works done and materials supplied, namely, steam-raising plant Bunnerong power station (all thereinafter referred to as the said works), and that the Company had agreed to execute the said works for the sum of £603,447, and the Company thereby agrees in consideration of the sum above mentioned to execute and complete the said works. Clause 1 of the specification, which forms part of the contract, is, so far as material, in the words following :—" This specification covers the supply, delivery, erection, testing and maintenance at the purchaser's power station, in the Municipality of Randwick on the shore of Botany Bay, New South Wales, of steam boilers and auxiliary plant, automatic stokers, mechanical draft plant, piping, valves and fittings as hereafter specified. The whole of the works shall be carried out to the satisfaction of the engineer, in accordance with the regulations of the New South Wales Government and the recommendations of the British Engineering Standards Association last published prior to the date for closing of tenders so far as they apply. Where this specification conflicts with those recommendations this specification shall be adhered to. The contract includes the provision and fixing into place of everything proper, necessary or usually supplied for the effective and convenient working of the plant and for the protection of the purchaser's employees, whether such thing is specified, mentioned or shown on the drawings or not." Clause 33 of the general conditions incorporated in the agreement provides that the plant, when created on the site, shall be deemed to have been taken over by the Council when the engineer shall have certified in writing that the plant has fulfilled the contract conditions. " Plant " is defined as meaning and including plant and materials to be provided and work to be done by the contractor under the contract.

It is apparent from the documents incorporated in the agreement that both parties to it contemplated and intended that a considerable part of the material to be used in the performance of the contract was to be manufactured in Great Britain or elsewhere and imported into Australia after the date of the agreement. Dr. *Evatt* argued that the agreement was one for the sale of goods or for the supply

of materials to be imported into Australia from other countries, that the importation of goods into Australia from abroad constituted trade and commerce with other countries, and that it followed that the Council in entering into this contract was engaged in such trade and commerce. He argued further that the mere fact that the contract provided for work and labour to be done by the contractor in New South Wales in relation to the materials supplied did not alter its character.

In our opinion this contention cannot be sustained. The contract on its true construction is not a contract for the supply in New South Wales of parts necessary for the construction and erection of a steam-boiler and mechanical draft plant but an entire and indivisible contract to do the necessary work and to provide the necessary materials to bring into existence, complete and ready for commercial use a distinct unit, namely, a steam-raising plant affixed to the soil of New South Wales. This view is supported not only by the language of par. 1 of the specification set out above, but also by par. 33 of the general conditions, the effect of which, read in conjunction with par. 24 of the same conditions, is to make the right of the contractor to receive payment of the contract price dependent on a certificate of the engineer that the plant, including work agreed to be done, has fulfilled the contract conditions—a certificate which could only properly be given after the "tests on completion" provided for by par. 32 had been made. It appears from the specification that these tests could not be carried out until the plant was erected and ready for working (specification, par. 39). Adopting the words of *Denman* J. in *Anglo-Egyptian Navigation Co.* v. *Rennie* (1), "a careful perusal of the specification seems to us to establish that the contract was for one entire job." This being the character of the contract, we think it is clear that it is not "trade or commerce with foreign countries or among the States." It follows that the Council in relation to this contract was not engaged in such trade or commerce and that the Federal *Secret Commissions Act* has no application.

For these reasons we think the rule nisi for prohibition should be discharged.

(1) (1875) L.R. 10 C.P., at p. 283.

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Starke J.

STARKE J. Silas Young Maling was convicted under the *Secret Commissions Prohibition Act* of 1919 of New South Wales of corruptly receiving a bribe of £10,600 for recommending the Municipal Council of Sydney to accept a tender of Babcock & Wilcox Ltd. to the Council for the erecting of a steam-raising plant in the Bunnerong power station in the State of New South Wales. He was sentenced to imprisonment with hard labour for six months and to pay a fine of £500.

The conviction, it is said, is erroneous, not because Maling did not receive the bribe, but because he received it in connection with an act or transaction in foreign trade, or, to adapt the words of the Constitution, sec. 51 (I.), in connection with trade and commerce with another country, namely, Great Britain, and was liable to prosecution under the Federal Act only—the *Secret Commissions Act* of 1905.

The contention is based on the proposition that if the State Act purports to apply to the facts of this case, it is invalid because of the provisions of sec. 109 of the Constitution, and it raises the question whether the bribe received by Maling was in respect of an act or transaction in foreign trade. *McArthur's Case* (1) gives the expression "trade and commerce" a very comprehensive meaning. Foreign trade, I apprehend, "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries" (*Welton* v. *Missouri* (2)). Every movement of commodities between Australia and England, and every negotiation, contract and dealing looking to that movement falls within its scope. The expression "foreign trade" embraces not only the movement of commodities, but also the carriage of persons and the interchange of information between Australia and other countries (*Western Union Telegraph Co.* v. *Pendleton* (3)). "All the commercial dealings and all the accessory methods . . . to initiate, continue and effectuate the movement of persons and things" between Australia and other countries are "parts of the concept, because they are essential for

(1) (1920) 28 C.L.R., at pp. 546-550. (2) (1875) 91 U.S. 275, at p. 280.
(3) (1887) 122 U.S. 347.

accomplishing the acknowledged end" (*McArthur's Case* (1)). Foreign trade "is a practical conception," and the character of a given transaction must be determined, as a matter of fact, in each particular case.

Babcock & Wilcox Ltd., an English company which also carried on business in Australia, lodged a tender with the Municipal Council of Sydney, and offered to supply, deliver, erect, test and maintain, at the Council's power station on the shore of Botany Bay, New South Wales, steam-boilers and auxiliary plant, automatic stokers, mechanical draft plant, piping, valves and fittings, and to fix in place everything proper, necessary or usually supplied for the effective and convenient working of the plant. Maling recommended this tender to the Council and corruptly accepted the bribe already mentioned for so doing.

Now, it was said that the tender constituted an offer to sell plant on the part of Babcock & Wilcox Ltd., and to move goods in fulfilment of that offer between Great Britain and Australia. The offer was clearly not an offer of a contract for the sale of goods, but of a contract for work and labour, and the supply of plant and materials as accessory to the offer (*Lee* v. *Griffin* (2); *Benjamin* on *Sales*, 5th ed., pp. 151-168). It was very truly said, however, that there may be foreign trade without a sale of commodities, and that the real question to be determined in this case is whether the contract or dealing between the parties looked to the movement of commodities between Australia and another country. The tender of Babcock & Wilcox Ltd. to the Municipal Council of Sydney merely offered to erect a plant in the power-house at Botany Bay, and described the place of manufacture and the country from which Babcock & Wilcox Ltd. would despatch that plant to Australia. The offer was made in Australia and was to erect a plant here. That offer was purely local or domestic, and the fact that Babcock & Wilcox Ltd. would itself engage in an act of foreign trade in bringing the plant to Australia in no wise alters the domestic and local character of the offer. And no inspection or right of inspection of the plant here or abroad could or does alter the domestic character of the offer or render it an act or transaction in foreign trade.

(1) (1920) 28 C.L.R., at p. 549. (2) (1861) 1 B. & S. 272.

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It is unnecessary, in this view, to consider the argument that the State Act is inconsistent with the Federal Act, and therefore rendered invalid to the extent of the inconsistency by the provisions of sec. 109 of the Constitution.

The rule nisi for a writ of prohibition should be discharged, and the conviction thereby affirmed.

Rule nisi for writ of prohibition discharged.

Solicitors for the applicant, *R. D. Meagher, Sproule & Co.*

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

J. B.

Appl *Re Darlington Commodities Pty Ltd (No 1)* 12 ACLR 65

Dist *Forrest v Kelly* (1991) 105 ALR 397

Refd to *Aheam v Wornalds Australia* (1994) 119 FLR 167

Cons *Pearson, Re Application of* (1999) 162 ALR 248

Refd to *Westpac Banking Corp v Paterson* (1999) 167 ALR 377

Cons *DCT v Currockbilly Pty Ltd* (2002) 172 FLR 99

[HIGH COURT OF AUSTRALIA.]

CHENEY . . . . . APPELLANT;
APPLICANT,

AND

SPOONER . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 11, 29.

Isaacs, Gavan Duffy and Starke JJ.

Company—Voluntary liquidation—Examination summons—Examination before Master-in-Equity—Civil proceeding—Evidence—Service and Execution of Process Act 1901-1924 (*No.* 11 *of* 1901—*No.* 26 *of* 1924), *sec.* 16—*Companies Act* 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *secs.* 89, 123*, 124*, 137.

Sec. 16 (1) of the *Service and Execution of Process Act* 1901-1924 provides that "when a . . . summons has been issued by any Court or Judge . . . in any State . . . requiring any person to appear and give

* The *Companies Act* 1899 (N.S.W.) provides, by sec. 123, as follows:—"(1) The Court may, after it has made an order for winding up a company, summon before it—(*a*) any officer of the company; or (*b*) any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company; or (*c*) any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and may require any such officer or person to produce any books, papers, deeds, writings, or other documents in