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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

evidence, or to produce books or documents, in any civil or criminal trial or proceeding, such . . . summons may upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice by leave of such Court" or "Judge . . . on such terms as the Court" or "Judge . . . may impose be served on such person in any other State."

Held, that a summons issued in pursuance of sec. 123 of the *Companies Act* 1899 (N.S.W.), requiring a person to attend and to be examined (under sec. 124) before the Master-in-Equity concerning the affairs of a company that had gone into voluntary liquidation, was a summons to such person to appear and give "evidence" in a "civil proceeding," within the meaning of sec. 16 (1) of the *Service and Execution of Process Act* 1901-1924.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A company incorporated in New South Wales in the name of Williams Bros. Ltd. went into voluntary liquidation. On 5th November 1928 *Harvey* C.J. in Eq., on the authority of secs. 123 and 124 of the *Companies Act* 1899 (N.S.W.), made an order giving leave to the liquidator, Eric Sydney Spooner, to issue a summons to each of a number of persons, among whom was the appellant, Sidney Albert Cheney, a resident of Victoria, to attend and be examined before the Master-in-Equity respecting the affairs of the Company, and to produce books and documents. On 20th November 1928, in pursuance of that leave, the liquidator obtained a summons from the Master-in-Equity, summoning the appellant (*inter alios*) to attend on 3rd December 1928 to be examined for the purpose of proceedings directed by the Chief Judge in Equity to be taken before the Master-in-Equity in the matter of the liquidation, and to produce books and documents. The reference to the production of books, &c., was in general terms, no particular book or document being expressly referred to. On 22nd November 1928 *Harvey* C.J.

his custody or power relating to the company. (2) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment . . . the Court may cause such person to be apprehended and brought before the Court for examination." And by sec. 124, as follows: "The Court may examine upon oath, either orally or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same."

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in Eq., on the *ex parte* application of the liquidator, made an order giving the liquidator leave to serve the summons obtained from the Master-in-Equity on the appellant (*inter alios*) in Victoria. This order was made under the authority of sec. 16 of the *Service and Execution of Process Act* 1901-1924.

An application by the appellant to his Honor to have the order of 22nd November 1928 set aside was dismissed.

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

Jordan K.C. (with him *Weston*), for the appellant. The substantial question in this matter is whether the order of 22nd November is an order properly made in regard to persons outside the jurisdiction. The summons of 20th November is a summons to attend for examination and to produce documents, &c., but in order to come within the operation of sec. 16 of the *Service and Execution of Process Act* the summons must be to appear and give evidence (*In re Norwich Equitable Fire Insurance Co.* (1)). As the result of a rule of Court promulgated in 1895, the decision in *In re Standard Gold Mining Co.* (2) is no longer the law. The process of answering questions is not the process of giving evidence in a civil proceeding. The fact that the summons also requires the person named therein to produce books and documents does not make it capable of being served under sec. 16. Evidence is of two kinds, namely, "proof" and "testimony." The evidence required under the summons meant testimony, and not an evidentiary fact which, if tendered and admitted, is evidence but, if not tendered or admitted, is not evidence. Assuming that the Court agrees with the appellant on this point, it is submitted that the fact that the summons purports to order him to come to New South Wales to answer questions on oath is, in itself, a ground on which no order should be made giving leave to serve that summons out of the jurisdiction (*Dyson* v. *Attorney-General* (3)). The power to order the production of documents is ancillary only to the power of ordering to attend and be examined, and a person cannot, by a summons under sec. 123

(1) (1884) 27 Ch. D. 515, at pp. 521, 522.
(2) (1895) 2 Ch. 545.
(3) (1911) 1 K.B. 410, at pp. 420, 421.

of the *Companies Act* 1899, be ordered to attend for that purpose only. If the order is bad as to part it is bad as to the whole. Also, the order, to be valid, must specify the documents, &c., required: the Court has no power to cast on the person summoned the onus of determining what documents, &c., are or are not relevant. The effect of the summons is to obtain discovery against the person summoned, and for that there is no jurisdiction (*Burchard* v. *MacFarlane*; *Ex parte Tindall* (1)). Even if the appellant were within New South Wales, the order would be bad as to that aspect. An examination under sec. 124 of the *Companies Act* 1899 is neither a " trial " nor a " proceeding " within the meaning of sec. 16 of the *Service and Execution of Process Act* (*In re Greys Brewery Co.* (2)). The summons was issued by the Master, and is not a summons by the Court or a Judge.

Bonney K.C. (with him *Abrahams*), for the respondent. In *Re Auto Import Co.* (*Australia*) *Ltd.* (3) the Court, applying *In re Appleton, French & Scrafton Ltd.* (4), held that an examination under secs. 123 and 124 of the *Companies Act* 1899 is a civil proceeding. " Evidence " is defined in *Stephen's Digest of the Law of Evidence*, art. 1, as being either statements made by witnesses in Court, under a legal sanction, in relation to matters of fact under inquiry, or documents produced for the inspection of the Court. That definition absolutely covers examinations of the kind under review. The word " evidence " is used in sec. 16 of the *Service and Execution of Process Act* in the sense of testimony. It is not necessary for the purpose of the summons to put before the Court the questions it is proposed to ask. An examination under sec. 124 of the *Companies Act* 1899 is an examination on oath, either orally or upon written interrogatories, for the purpose of informing the Court, and the information so obtained must be evidence.

Cur. adv. vult.

April 29.

The following written judgments were delivered :—

ISAACS AND GAVAN DUFFY JJ. The company called Williams Bros. Ltd. went into voluntary liquidation in New South Wales.

(1) (1891) 2 Q.B. 241.
(2) (1883) 25 Ch. D. 400.
(3) (1925) 25 S.R. (N.S.W.) 587.
(4) (1905) 1 Ch. 749.

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On 5th November 1928 *Harvey* J. made an order giving leave to the liquidator to issue a summons to each of a number of persons—among whom the appellant was included by name—to attend and give evidence before the Master-in-Equity, respecting the affairs of the Company and to produce books and documents. On 20th November 1928, in pursuance of that leave, the liquidator obtained a summons from the Master-in-Equity summoning the appellant (*inter alios*) to attend on 3rd December 1928 to be examined for the purpose of proceedings directed by the Chief Judge in Equity to be taken before the Master in the matter of the liquidation and to produce books, &c. So far the statutory authority were secs. 123 and 124 of the New South Wales *Companies Act* 1899. On 22nd November 1928 *Harvey* J., on the *ex parte* application of the liquidator, made an order giving him leave to serve the summons of 20th November on the appellant (*inter alios*) in Victoria. This was made as under the authority of sec. 16 of the Federal *Service and Execution of Process Act*. On 17th December 1928 the same learned Judge dismissed an application on behalf of the appellant to set aside his Honor's order of 22nd November. Against this dismissal the present appeal is brought.

For the appellant the contention is that the order of 22nd November was made without jurisdiction, because (1) there was no "trial or proceeding" in which the appellant could be lawfully required to give evidence or produce books, &c.; (2) secs. 123 and 124 do not require a person to give "evidence" but merely information; (3) the production of books and documents required by these sections is ancillary to giving "evidence" and not an independent subject.

(1) As to the first point, sec. 16 uses the words "any civil or criminal trial or proceeding." The argument is that sec. 123 and, therefore, also sec. 124 of the New South Wales *Companies Act* 1899 do not give rise to a "proceeding" in any legal sense and do not contemplate evidence; that they contemplate mere gathering of information which may result in nothing or may result in the subsequent initiation of some proceeding. A "proceeding," used broadly as it is used in sec. 16 of the Federal *Service and Execution of Process Act*, is merely some method permitted by law for moving

a Court or judicial officer to some authorized act, or some act of the Court or judicial officer. In the case of a compulsory winding-up no doubt could exist. The application by petition under sec. 89 would initiate the necessary "proceeding," which would comprehensively cover also all subsequent steps in the winding-up. In the case of a voluntary winding-up sec. 137 makes express provision for an "application" to the Court in any matter, as if the winding-up were compulsory. The "application" is necessarily made in the equitable jurisdiction, and presumably made and heard in the regular method followed in that jurisdiction. The Court is to be satisfied that granting the application in whole or in part will be "just and beneficial." So there is a distinct judicial proceeding. The application of 5th November 1928 instituted a proceeding which did not end with a refusal, but continued by the order of the same date and the summons of 20th November. The required evidence would therefore be given in a civil proceeding within the meaning of sec. 16 of the Federal Act, constituted by the application, summons and examination. The case of *In re Appleton, French & Scrafton Ltd.* (1) is a clear authority that the examination takes place in a "proceeding."

(2) As to the second point, it seems to rest on the view that the term "evidence" is appropriate only where some issue of fact is raised for judicial or quasi-judicial determination. That is too narrow a limitation of the term. "Evidence," says *Best* (12th ed., p. 6) practically repeating *Bentham*, is "any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." In this case, the law places on the liquidator, in a voluntary winding-up, the responsibility of working out the affairs of the company. It affords him the means of obtaining information, that is evidentiary facts, enabling him to come to a conclusion as to ultimate facts. The information obtained as prescribed through the instrumentality of the Court and on oath is properly described as "evidence." It is "evidence" for the purpose intended by the law. The effect of the evidence on the mind of the liquidator, whether it

(1) (1905) 1 Ch. 749.

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brings him to an affirmative or a disaffirmative opinion or to none, is immaterial.

If the law, for its own purposes, provides a Court with compelling power to obtain the disclosure of facts that may or may not prove persuasive, then following the legal method to obtain them is a proceeding, and the facts when elicited are evidence within the meaning of the section.

(3) As to the third point, it becomes unnecessary.

The appeal should be dismissed with costs.

STARKE J. An appeal by special leave has been brought to this Court against an order made by the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) giving leave to serve in the State of Victoria a summons issued out of that Court, and also against an order refusing to set that leave aside. The order giving leave was made pursuant to the powers conferred by the *Service and Execution of Process Act* 1901-1924 (Federal), sec. 16, which enacts: "When a . . . summons has been issued by any Court or Judge . . . in any State . . . requiring any person to appear and give evidence or to produce books or documents in any civil . . . trial or proceeding, such . . . summons may upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice by leave of such Court" or "Judge . . . on such terms as the Court" or "Judge . . . may impose be served on such person in any other State" &c.

The summons was issued under the powers conferred upon the Supreme Court of New South Wales by the *Companies Act* 1899, secs. 123, 124 and 137. It is what is known as an "examination summons"—that is, the persons named therein are summoned for examination concerning the affairs, dealings, estate or effects of Williams Bros. Ltd., a company formed under the *Companies Act* but in voluntary liquidation, and also to produce any books and papers in their custody or power relating to the Company.

This summons, it was argued, was not issued in any civil proceeding, as required by the *Service and Execution of Process Act*. A civil proceeding, I apprehend, includes any application by a suitor to a

Court in its civil jurisdiction for its intervention or action. The application for the issue of a summons in this case was such a proceeding: the cases of *In re Beall* (1) and *In re Appleton, French & Scrafton Ltd.* (2) are decisive in favour of this view.

Next, it was argued that the appellant was not required "to appear and give evidence" within the meaning of the section. It is true enough, no doubt, that the examination is of an inquisitorial nature: that the facts or statements elicited are not offered to any legal tribunal for the purpose of any judicial determination or decision. Indeed, the depositions are only admissible in evidence in other legal proceedings against the deponent, and not against third parties (see *R.* v. *Coote* (3); *Palmer's Company Precedents*, 13th ed., Part II., p. 665). Still, in my opinion, a person who is summoned to appear in Court and testify as to matters of fact under inquiry is required to appear and give evidence within the meaning of the *Service and Execution of Process Act* (cf. *Stephen's Digest of the Law of Evidence*, 9th ed., pp. 1-2).

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.

(1) (1894) 2 Q.B. 135 (C.A.). (2) (1905) 1 Ch. 749.
(3) (1873) L.R. 4 P.C. 599.