[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AND

COWAN AND OTHERS . . . . . DEFENDANTS:

IN RE BOTTEN . . . . . APPELLANT.

ON APPEAL FROM THE HIGH COURT (STARKE J.).

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MELBOURNE, *June* 18, 19.

Starke J.

SYDNEY, *Aug.* 19, 20.

Knox C.J., Gavan Duffy, Rich and Dixon JJ.

Contempt of Court—Committal—Subpœna duces tecum—Refusal to obey—State documents—Public policy—Minute books of Government department—Subpœna served on Acting Secretary of Dried Fruits Board—Production refused under direction of Minister—Claim of privilege—Prejudice to public interest—Judiciary Act 1903-1927 (*No.* 6 *of* 1903—*No.* 90 *of* 1927), *sec.* 24—*Dried Fruits Act* 1924-1927 (*S.A.*) (*No.* 1657—*No.* 1835)—*High Court Rules* 1928 (*Statutory Rules* 1928, *No.* 118), *O. XLIX., r.* 1.

B., the Acting Secretary of the Dried Fruits Board of South Australia, was served with a subpœna *duces tecum* to produce certain minute books of the Board at the hearing of an action against the Minister for Agriculture for the State of South Australia and others. Acting on the direction of the Minister B. refused to bring the books into Court, but produced a certificate by the Minister that the disclosure of the books would be contrary to public policy and prejudicial to the public interest. *Starke* J. committed B. to prison for contempt of Court. On appeal to the Full Court of the High Court,

Held, that the order to bring the books into Court as directed by the subpœna being made by a competent Court, the refusal to obey that order was a defiance of the authority of the Court and therefore a contempt of Court.

Order of *Starke* J. affirmed.

APPEAL from *Starke* J.

In an action in the High Court brought by Frederick Alexander James against John Cowan (the Minister of Agriculture for the

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State of South Australia) and others, Leonard Herbert Botten was served with a subpœna to produce certain minute books, the property of the Dried Fruits Board of South Australia, of which Botten was the Acting Secretary.

At the hearing of the action in Melbourne before *Starke* J. Botten stated that he had not been directed by the Board not to produce the books nor had he any express instructions from the Board to produce them. He admitted that the books were then in Melbourne and in his possession, but refused to bring them into Court, advancing as his reason that the Minister of Agriculture for South Australia, who was charged with the administration of the *Dried Fruits Act* 1924-1927 (S.A.), refused to allow him to do so. Botten produced and tendered a document addressed to the Chairman and Secretary of the Dried Fruits Board, which was not sworn to, and not verified in any way, purporting to be signed by the Minister; which document, so far as material, is set out in the judgment of his Honor.

STARKE J. ordered Botten to bring the books into Court, but after an adjournment he again refused to produce them.

Cleland K.C. and *K. L. Ward*, for the plaintiff.

F. Villeneuve Smith K.C., *Robert Menzies* K.C. and *A. J. Hannan*, for the defendants and for Botten.

STARKE J. delivered the following judgment:—

I regret that it is necessary to assert what I believe to be the proper authority of this Court against a gentleman who is only obeying what I take liberty to say is an improper action on the part of the Minister of Agriculture of South Australia. The witness has been served with a subpœna to produce certain minute books. The minute books are the property of the Dried Fruits Board of South Australia. The books are in his possession. The Chairman was called on his subpœna and said that the proper custodian of the books was the Secretary. The witness has stated that he has not been directed by the Board not to produce the books, and that he has no express instructions by it to produce them, but he is the person in whose custody they are lawfully residing, and he is

the person who can produce them or not, as he thinks right, so far as the statements go. The witness admits that the books are in Melbourne, and in his possession, and that he refuses to bring them into Court. The only reason for refusing to act on his subpœna and bring the books in his possession into Court is that the Minister of South Australia—the Minister of Agriculture I think it is of South Australia—refuses to allow him to do so, and he has produced a document which is not sworn to, not verified in any way, purporting to be signed by the Minister, which I take to be the Minister's signature, asserting that "The said minute books are State documents and are communications relating to a department of the Government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State and made by officers of State to other officers of State in the course of their official duty. I direct you that the disclosure of the said minute books is contrary to public policy and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said minute books, and I direct you not to produce or disclose the said minute books to any person or persons. The above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff, or upon any desire to defeat the plaintiff's claim in the action, but solely upon and in the interests of the public welfare and the public service." Whether the claim to privilege is good or bad is a matter which I suppose I should have to determine when the books are brought into Court pursuant to the subpœna. Yesterday I referred to a case of *R.* v. *Greenaway* (1) which I think rather shows that, if the witness has the lawful custody of the books, it is his duty to obey the subpœna, and then any question of privilege arising on the documents so brought into Court pursuant to the subpœna will be determined by the Court, but the question I have to determine is whether the witness is right in refusing to produce them, to bring into Court and produce documents according to his subpœna. I think that is simply a defiance of the law in saying that he will not do it upon the authority of somebody who claims to be, as I venture

(1) (1845) 7 Q.B. 126.

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to think, above the law. If the books are produced, I am in a position, I think, to determine the question of privilege, but I am in no position to determine it when a witness says he will do nothing; who will neither obey his subpœna nor act upon the decision of the Court nor indeed take the slightest notice of what the Court thinks proper or right. There is only one result, I am sorry to say, but I must commit the witness to prison for his contempt of Court, and I do not know that I can tell him at what time he will be released until he purges his contempt. I regret the fact, because it seems to me that I am impelled, forced into a position which I think is unfortunate for the witness. He is doing a grievous wrong to the plaintiff. Witness, I regret, but I must commit you to prison for your contempt of Court.

From this order Botten now appealed to the Full Court of the High Court.

F. Villeneuve Smith K.C. (with him *A. J. Hannan*), for the appellant. The Dried Fruits Board of South Australia, of which the appellant is the Acting Secretary, is only the agent of the Minister for the time being administering the *Dried Fruits Act* 1924-1927 (S.A.) and must act in conformity with his directions. In proper circumstances the production of a document under a writ of subpœna *duces tecum* will not be enforced by the Court (*Amey* v. *Long* (1)). Where a person failed to produce vouchers under a writ of subpœna *duces tecum* and did not even attend at Court, a rule to attach him was discharged (*R.* v. *Dixon* (2)). In view of the certificate by the Minister and his instructions to the appellant, the latter should not be punished. No good purpose could have been served by merely producing the books and therefore, under an application of the maxim *de minimis non curat lex*, the terms of the subpœna should not be enforced (*Broom's Legal Maxims*, 8th ed., p. 119). The question arises: Was the proper order made? (*Republic of Costa Rica* v. *Erlanger* (3)). The order could only be justified if the dignity of the Court had been offended. This is not a case of the wilful flouting of the Court, and the act of the appellant was no impediment to

(1) (1808) 9 East 473, at p. 485.
(2) (1765) 3 Burr. 1687.
(3) (1877) 36 L.T. 332.

the fullest investigation of the plaintiff's claim. Even if the books had been produced in Court they could not have been examined by the Judge (*Griffin* v. *South Australia* (1)). Unless the decision in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* [*No.* 2] (2) was founded on fact, it is in conflict with *Griffin* v. *South Australia*, in which event the latter case should be followed. The Minister is in a better position than the Court to determine whether or not certain documents are State documents. The words of *Wills* J. in *Hennessy* v. *Wright* (3) are applicable to this case. It is a rule of law that a certificate of a Minister is not examinable unless it appears from outside the documents that the Minister has made a mistake. Even though the documents are not of a political or administrative character production will not be ordered if the information contained therein cannot be disclosed without injury to the public interest (*Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (4)). Although the appellant had physical possession of the minute books, such possession was in his capacity as an officer of the Board, that is to say, of the Minister, and before he can be committed for failing to comply with the terms of a writ of subpœna *duces tecum* it must be shown that the Minister has not expressly forbidden him to produce the books and, on the contrary, that he has express permission to do so (*Eccles & Co.* v. *Louisville and Nashville Railroad Co.* (5)). The Court will not attach a person for non-production if production by him would be in violation of his duty to his master (*Crowther* v. *Appleby* (6)). The procedure as to the committal of the appellant was not in accordance with Order XLIX., rule 1, of Statutory Rules 1928, No. 118, inasmuch as he was not afforded an opportunity to show cause (*Chang Hang Kiu* v. *Piggott*; *In re Lai Hing Firm* (7)).

K. L. Ward, for the plaintiff. The appellant's act must be regarded as a criminal act. Sec. 24 of the *Judiciary Act* 1903-1927, confers on this Court the same power to punish contempts of its power and authority as was possessed at the commencement of the Act by

(1) (1925) 36 C.L.R. 378, at p. 385.
(2) (1913) 16 C.L.R. 178.
(3) (1888) 21 Q.B.D. 509, at pp. 518-519.
(4) (1916) 1 K.B. 822.
(5) (1912) 1 K.B. 135.
(6) (1873) L.R. 9 C.P. 23.
(7) (1909) A.C. 312.

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the Supreme Court of Judicature in England, and, as under sec. 16 of the *Judicature Act* no appeal lies from the latter Court in these matters, it follows that there can be no appeal from similar decisions of this Court. The plaintiff has an interest in this matter and, having received a notice of the appeal, is entitled to be present at the hearing.

THE COURT delivered the following judgment:—

The appellant, who was and is the Acting Secretary of the Dried Fruits Board constituted by the *Dried Fruits Acts* 1924 to 1927 was served with a subpœna *duces tecum* requiring him to bring with him into Court the minute books of the Board. He appeared in Court and admitted that the books in question were in his possession, but did not bring them into Court according to the exigency of the writ, saying that he had an order of the Minister of Agriculture of the State of South Australia not to do so. This order was exhibited, and purports to show that the Minister's direction was based on the statement that the minute books were State documents and that their disclosure was contrary to public policy and that the public interest would be prejudiced thereby. The trial Judge directed the appellant to bring the books into Court on the following day. On the following day the appellant, on being asked by the Judge whether he had the books in his possession, admitted that he had, and, in answer to further questions, said that he refused to bring them into Court acting on instructions from his Minister. He was then told that if he persisted in his refusal he would be committed for contempt of Court. After argument and some questions, from the answers to which it appeared that the appellant had brought the books to Melbourne and that the Board had not forbidden him to bring them into Court, the learned Judge after another refusal by the appellant to bring the books into Court committed him for contempt of Court; and it is from this order that he now appeals. Much of the argument in support of the appeal was addressed to the questions as to what use could be made of the books when brought into Court and whether the order is one we ourselves would make, but it is not necessary for us to express

an opinion on these questions because it is enough for us to say that the order to bring the books into Court as directed by the writ of subpœna was made by a competent Court, and that a refusal to obey that order was a defiance of the authority of the Court and therefore a contempt of Court.

Reference was also made in support of the appeal to Order XLIX., r. 1, of the High Court Rules, but in our opinion the facts to which we have referred establish that the provisions of this rule, if applicable, were complied with.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia, by *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the plaintiff, *Edmunds, Jessop & Ward*, Adelaide, by *Dawson, Waldron, Edwards & Nicholls*.

J. B.