[HIGH COURT OF AUSTRALIA.]

McGUINNESS . . . . . APPELLANT;
RESPONDENT,

AND

THE ATTORNEY-GENERAL OF VICTORIA . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1940.

MELBOURNE, *Feb.* 29; *Mar* 1.

SYDNEY, *April* 3.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Crown—Royal Commission—Validity of appointment—Inquiry and report on commission of criminal offence—Evidence before commission—Materiality—Sources of information for newspaper articles—Refusal of editor to answer questions—Offence—Evidence Act 1928 (*Vict.*) (*No.* 3674), *secs.* 17, 19.

Evidence—Privilege—Newspaper proprietors and editors—Sources of information.

The appointment of a Royal Commission to inquire into and report upon the question whether a criminal offence has been committed and, if so, by whom, is not an interference with or invasion of the ordinary course of justice and is not invalid.

Case of Commission of Inquiry, (1608) 12 Co. Rep. 31, considered.

Clough v. *Leahy*, (1904) 2 C.L.R. 139, followed.

Cock v. *Attorney-General*, (1909) 28 N.Z.L.R. 405, not followed.

No privilege attaches to proprietors of newspapers, editors and writers, which entitles them to refuse to disclose at a trial the sources of the information which they have used in producing the contents of the newspaper. The rule of practice that in an action of defamation in respect of an article published in a newspaper the proprietor, editor and writer of the newspaper will not, on an application for discovery or for answers to interrogatories, be compelled to disclose the source of the information contained in the article complained of, is not founded on the existence of such a privilege.

The Governor in Council issued a commission under the seal of the State of Victoria constituting and appointing a commission to inquire into the question whether there had been any bribery of, or attempt to bribe, any member

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

of Parliament, and, if so, what persons were involved. (By virtue of sec. 17 of the *Evidence Act* 1928 (Vict.) the commission had power to summon witnesses before it to give evidence material to the subject matter of the inquiry, provided that no person shall be compelled to answer any question that he would not be compelled to answer at the trial of an action in the Supreme Court, and it was enacted by sec. 19 of the Act that any person present before the commission who, without lawful excuse, refused or failed to answer any question touching the subject matter of the inquiry should be guilty of an offence.) The editor of a newspaper was called before the commission as a witness and was asked to give the source of certain statements in his paper relating to the subject matter of the inquiry. He refused to answer the question on the grounds (1) that the appointment of the commission was invalid because the object of the commission was to inquire into offences which were punishable in courts of law, (2) that the editor of a newspaper or a journalist cannot be compelled to disclose the sources of information confidentially obtained, and (3) that the question which he refused to answer did not touch the subject matter of the inquiry and was not material thereto.

Held that the editor failed on all three grounds of excuse set up, and, accordingly, was guilty of an offence under sec. 19 of the *Evidence Act* 1928.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Frank Vincent McGuinness was the editor of the *Truth* newspaper and in the issues of that paper, on 2nd September and 9th September 1939, he wrote and published articles suggesting that certain persons were collecting funds for the purpose of bribing members of the Victorian Parliament to prevent the passing of a Money Lenders Bill and a Milk Board Bill.

In consequence of the suggestions that an attempt had or might be made to bribe members, on 24th November 1939 the Governor in Council in Victoria appointed the Honourable Charles Gavan Duffy, one of His Majesty's Judges of the Supreme Court of Victoria, as a Royal Commissioner " to inquire into and report upon whether in connection with the Money Lenders Bill in 1938 or the Milk Board Bill in 1939 and whether before or after the introduction into Parliament thereof (*a*) any bribe was accepted or agreed to be accepted by any member of Parliament and, if so, by whom, (*b*) any bribe was offered to any member of Parliament and, if so, by whom, (*c*) any persons entered into any agreement or formed any combination to bribe or to attempt to bribe any member of Parliament and, if so, what persons ? "

On 11th December 1939, the Royal Commissioner required McGuinness to give evidence before him and after being sworn and questioned about the above-mentioned articles appearing in the *Truth*, the following examination took place :—

His Honour : " In writing the articles that have been mentioned, had you any other source of information than the witnesses who have already appeared and given evidence at this commission ? " A. " Yes ".

Q. " What was that source ? "

Counsel for McGuinness then intervened and asked for leave to appear for McGuinness before the Royal Commission. Leave having been granted, argument then ensued as to whether the question should be answered by McGuinness. The Royal Commissioner ruled that it should be answered and the questions and answer set out above were read from the shorthand notes. The following examination then took place :—

" His Honour : I understand from what your counsel says that you propose to refuse to answer that question. I suppose that is so ? A. Yes."

On 15th December 1939 the Royal Commissioner certified to the Attorney-General for Victoria that in his opinion McGuinness had been guilty of an offence under sec. 19 of the *Evidence Act* 1928 (Vict.) and that he had refused to answer the question " What was that source ? "

On 15th December 1939, *O'Bryan* J. of the Victorian Supreme Court, on the application of the Attorney-General, granted an order nisi directed to McGuinness requiring him to show cause why he should not be dealt with for an offence against the *Evidence Act* 1928 and why any such order as may be just should not be made. On 19th December 1939 the order nisi was made absolute by *Macfarlan* J. and McGuinness was fined the sum of fifteen pounds.

On 19th February 1940 the High Court granted special leave to appeal to the High Court from the order absolute.

Gorman K.C., *Reynolds* K.C. and *A. L. Read*, for the appellant.

Gorman K.C. The principle is now well established that newspaper publishers and editors are not required to disclose to a plaintiff

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

on discovery in a defamation case the name of their informant (*Hennessy* v. *Wright* [*No.* 2] (1); *Parnell* v. *Walter* (2); *Hope* v. *Brash* (3); *Harle* v. *Catherall* (4); *In the Matter of a Special Reference from the Bahama Islands* (5); *Plymouth Mutual Co-operative and Industrial Society Ltd.* v. *Traders' Publishing Association Ltd.* (6); *Adam* v. *Fisher* (7)). All these cases show that if the newspaper is one that is well able to pay damages to the plaintiff for the libel, then the publisher or editor is not bound on interrogation to disclose his informants (*Lyle-Samuel* v. *Odhams Ld.* (8)). If this case is correctly decided the exculpation not only applies to interlocutory proceedings, but gives a privilege to an editor at all times. It may be compendiously described as "the freedom of the press" and, even at the trial, it is submitted an editor could not be asked who his informants were. In *South Suburban Co-operative Society* v. *Orum* (9), *Scott* L.J., in the Court of Appeal, has made a full review of the authorities. [Counsel referred to *Oswald* on *Contempt, Committal and Attachment*, 3rd ed. (1910), p. 96.] The special circumstances under which the rule would not apply are those which contemplate treason or sedition. The New-South-Wales decisions on this matter are reviewed in an article in the *Australian Law Journal*, vol. 9, p. 265. At the stage at which the witness was called all the evidence had been completed and a question was framed preparatory to his entering the box. The witness's answer was: "I have no other information than that which has already been called before the Commission." This was a public inquiry and this witness was to be called for one purpose only.

[DIXON J. referred to *Wigmore* on *Evidence*, 2nd ed. (1923), vol. 5, sec. 2086.]

Our text-book writers have abstained from discussing the "newspaper" rule.

[DIXON J. Privileges were undecided up to the second half of the eighteenth century, when privileges were more or less defined. The

(1) (1888) 24 Q.B.D. 445.
(2) (1890) 24 Q.B.D. 441.
(3) (1897) 2 Q.B. 188.
(4) (1866) 14 L.T. 801.
(5) (1893) A.C. 138.
(6) (1906) 1 K.B. 403.
(7) (1914) 110 L.T. 537; 30 T.L.R. 288.
(8) (1920) 1 K.B. 135, at pp. 137, 140, 143, 145.
(9) (1937) 2 K.B. 690, at p. 699.

press escaped the restriction. In the *Duchess of Kingston's Case* (1) privileges were definitely restricted and limited.]

The appellant also relies upon the fact that the commissioner was not entitled under the proviso to sec. 17 of the *Evidence Act* 1928 to ask the witness the question that was asked of him. The only questions that could be asked were those which could be asked at a trial. This question is quite irrelevant to any issue which came before the commission. Two matters arise under the proviso: Is the question material? Even if it is material, still the witness is not compelled to answer it, as one cannot conceive of any action in the Supreme Court in which the question could be asked. [Counsel also referred to secs. 18 and 19 of the *Evidence Act* 1928.]

Reynolds K.C. The Royal Commission was not one which the Governor in Council had power to appoint. There is no power either by statute or common law. There must be some limitation on the prerogative of inquiry. That limitation is necessary so there will be no interference with the due administration of justice. It is conceded that the Crown may make inquiries into the administration of a State department or in order that the executive may be advised as to future legislation. But the main purpose of an inquiry cannot be an investigation by the commission of a particular offence triable by the ordinary courts. The executive can inform itself as to the administration of a department, but cannot go outside that and inform itself as to the behaviour of an individual. [Counsel referred to *Magna Carta* (1297) 25 Edw. I. c. XXIX. (reprinted in the *Imperial Acts Application Act* 1922, Div. 13, *The Victorian Statutes* 1929, vol. 2, p. 1166,) and (1368) 42 Edw. III. c. III.] 25 Edw. I., c. XXIX. (*Magna Carta*) prohibits the inquiry as to the alleged commission of a criminal offence by an individual, "but by the lawful judgment of his peers or the law of the land." "Law of the land" has been interpreted as "due process of law."

[DIXON J. referred to the footnote in *The Victorian Statutes* 1929, vol. 2, p. 1166.]

In 42 Edw. III., c. III., "put to answer" means "put a man on his trial." No man can be put on his trial save before the proper

(1) (1776) 20 State Trials 356, at p. 573.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

judicial tribunals. The persons before the Royal Commission here are being put on their trial. No sentence can be imposed but there will be a finding of guilt or innocence. [Counsel referred to 18 Edw. III. c. 1 and 34 Edw. III. c. 1 (reprinted in *The Victorian Statutes* 1929, vol. 2, p. 1167); *Holdsworth, History of English Law*, vol. 4, p. 69.] Prior to the reign of James I. there had been controversies as to the appointment of commissions of inquiry but they were finally settled in *Case of Commissions of Inquiry* (1) (*Holdsworth's History of English Law*, vol. 5, p. 433). [Counsel referred to opinions expressed in *University of Oxford Commission* (*Reports of Commissions* (1850), p. 25).] The present commission is illegal because its inquiry is into a criminal offence and is asked to name the persons committing the same (*Law Review*, vol. 15, p. 292; *Clough* v. *Leahy* (2)). Offer to bribe is a common-law misdemeanour. It is not a statutory offence in Victoria. The early English statutes prevent the Crown from setting up commissions which inquire into criminal offences. The *Evidence Act* 1928 only allows commissions to be set up that can validly inquire into matters referred to them. The words in *Coke's Reports* (1) were not given their full weight in *Clough* v. *Leahy* (3). The case has been criticized in an article by *Pitt Cobbett* in *Commonwealth Law Review*, vol. 2, p. 145, at pp. 154 and 156. [Counsel referred to *Cock* v. *Attorney-General* (4).] *Clough's Case* (3) may be distinguished on the ground of the different character of the commission involved. In this case the Royal Commission interferes with the course of ordinary justice.

[McTIERNAN J. referred to *Ex parte Walker* (5).]

That case is based on *Clough's Case* (3), and therefore suffers from the defects of its origin. It is right on the point, as the inquiry was as to the commission of an offence. If this case correctly states the law, persons could be deprived of their privileges in the administration of criminal justice, such as the right of challenge, right to refuse to go into the witness box, right to have the charge specifically laid in the indictment, and so on.

(1) (1608) 12 Co. Rep. 31 [77 E.R. 1312].
(2) (1904) 2 C.L.R. 139, at pp. 146, 156, 160.
(3) (1904) 2 C.L.R. 139.
(4) (1909) 28 N.Z.L.R. 405, at p. 422.
(5) (1924) 24 S.R. (N.S.W.) 604; 41 W.N. (N.S.W.) 162.

Tait, for the respondent. As to the first argument for the appellant, a new sort of privilege was being sought to give immunity to newspaper proprietors and editors. All the authorities show that the immunity on discovery was discretionary and it was repeatedly pointed out that in special circumstances the rule did not apply (*South Suburban Co-operative Society* v. *Orum* (1); *Lyle-Samuel* v. *Odhams Ltd.* (2); *Plymouth Mutual Case* (3)).

[LATHAM C.J. We do not want to hear you further on that point.]

As to the interpretation of sec. 17 of the *Evidence Act* 1928, two points arise for consideration:—(*a*) Whether the question proposed to be asked by the commission is material to the subject matter of the inquiry; (*b*) Whether the proposed question is one that is compellable to be answered in an action in the Supreme Court. As to the first question *Macfarlan* J., in the court below, applied the correct test that materiality was something wider than relevancy in an ordinary action in the Supreme Court. The commissioner was appointed and required to report on the matters referred to him and it might well be that the only information was that contained in the newspaper. If he got no further information he would then have to decide whether on that evidence alone he could say that bribes had been offered. It was only proper that he should test the statements in the newspaper by finding out the sources of them. As to the second matter, whether the question was compellable in the Supreme Court did not limit it to an action in the Supreme Court about the matter before the commission, but to any matter which might possibly arise. For example, any question would have to be answered before the commission if it had to be answered in a libel action on the same matter. As to the argument that the commission was invalid, first, it must be shown that the proceedings before the commission were judicial proceedings (*Shell Co. of Australia* v. *Federal Commissioner of Taxation* (4); *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (5)). Secondly, the foundation of the argument is based on the exact meaning of words contained in early English statutes. It is a difficult and dangerous basis, as the

(1) (1937) 2 K.B. 690.
(2) (1920) 1 K.B. 135.
(3) (1906) 1 K.B. 403.
(4) (1931) A.C. 275, at p. 295.
(5) (1923) 32 C.L.R. 518, at p. 569.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

meanings are not clear. In *Magna Carta* the words " will not pass on him " mean a decision of a sovereign administering the King's justice, and therefore amount to some judicial determination or decision which would affect liberty or property of individual. In 42 Edw. III. c. III., the words " no man shall be put to answer " refer to some charge made against an individual which he is required to answer and would have no application to a mere inquiry such as this. As to the *Case of Commission of Inquiry* (1) and the opinions on the *Oxford Commission*, the illegality of a commission to inquire as discussed in those cases is found in the compulsory powers to require attendance and answer questions at such a commission. That was the point in the minds of the persons dealing with the matter; not whether the King had the prerogative power to appoint a commission such as this. This was the view expressed by *Griffith* C.J. in *Clough's Case* (2). In *Clough's Case* (2), although the subject matter was not expressly whether a criminal offence had been committed, the inquiry was dealing with a matter ordinarily litigated in the courts and an objection was taken on this very ground (3). [He referred to *Ex parte Walker* (4).] As to *Cock* v. *Attorney-General* (5), in the judgment reference is made to *Coke's Reports* (1) and the opinions given to the *Oxford University Commission* and it is there pointed out that at common law the commission would have no compulsory powers to make witnesses attend before the commission, but it was doubtful in that case whether these compulsory powers were to be derived from statute or from the terms of reference.

Reynolds K.C., in reply. The proviso in sec. 17 of the *Evidence Act* 1928 limits the power of the commissioner to asking questions contained in the former part of the section. It gives witnesses the same protection that they have under the ordinary rules of evidence; they are imported into the proceedings of the commission by the proviso. If the range of discovery in a trial is wider than the range of interrogation at the trial of an action and an editor or publisher cannot on interrogatories be asked for the name of his informant,

(1) (1608) 12 Co. Rep. 31 [77 E.R. 1312].
(2) (1904) 2 C.L.R. 139.
(3) (1904) 2 C.L.R., at p. 142.
(4) (1924) 24 S.R. (N.S.W.) 604; 41 W.N. (N.S.W.) 162.
(5) (1909) 28 N.Z.L.R. 405.

a fortiori, he cannot be asked that question at a trial. A witness cannot be asked irrelevant or oppressive questions. It is on this ground that editors are not bound to answer the interrogatories and if that ground applies at the trial, as it should, then, because of the proviso to sec. 17, a witness before a Royal Commission can refuse to answer irrelevant or oppressive questions. The answer to the question whether the Crown by appointing a commission of inquiry could do anything to interfere in the administration of justice, even though the compulsory powers to give evidence are conferred on the commissioner by the *Evidence Act* 1928, lies in the fact that the Crown, knowing of the powers conferred on the commissioner by the *Evidence Act* 1928, appointed a commission to inquire into matters which should be judged by the ordinary courts. The intrusion into the system of the administration of justice must be taken as a whole, including the deprivation of an accused person's rights to a clear presentment, proper arraignment and trial with its protection and immunities. As to the history of the protest against the interference with the administration of justice, counsel referred to *Stubbs, Constitutional History of England*, vol. II., p. 658 ; *Holdsworth's History of English Law*, vol. 1, p. 61.

Cur. adv. vult.

April. 3.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from a decision of the Supreme Court of Victoria (*Macfarlan* J.) whereby the appellant Frank Vincent McGuinness was fined £15 under the provisions of sec. 20 of the *Evidence Act* 1928 of Victoria for refusing, without lawful excuse, to answer a question touching the subject matter of an inquiry by a commission appointed by the Governor in Council.

The appellant is the editor of the newspaper *Truth*, published in Melbourne. He wrote articles in the newspaper in which he in effect charged unspecified members of Parliament with accepting bribes in connection with a Money Lenders Bill and a Milk Board Bill. He challenged public inquiry into the allegations or suggestions made in the articles. The Governor in Council appointed his Honour Mr. Justice *Gavan Duffy* as a Royal Commissioner to inquire into and report upon " whether in connection with the Money Lenders

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Latham C.J.

Bill in 1938 or the Milk Board Bill in 1939 and whether before or after the introduction into Parliament thereof—(*a*) any bribe was accepted or agreed to be accepted by any member of Parliament and, if so, by whom, (*b*) any bribe was offered to any member of Parliament and, if so, by whom, (*c*) any persons entered into any agreement or formed any combination to bribe or to attempt to bribe any member of Parliament and, if so, what persons."

The question which the appellant refused to answer was a question which inquired after the sources of the information upon which the articles were based.

Upon the appeal to this court the appellant relied upon three grounds as justifying his refusal to answer the question :—(1) That the appointment of the commission was invalid and unlawful because the object of the commission was to inquire into offences which were punishable in courts of law ; (2) that the editor of a newspaper or the writer of an article published in a newspaper can never be compelled to disclose the source of information which he has used in writing articles in the newspaper ; (3) that the question which the appellant refused to answer did not touch the subject matter of the inquiry being made by the commission and was not material thereto.

(1). The first objection was supported by reference to the *Case of Commissions of Inquiry* (1). This case contains a statement that certain commissions were against law for the reason that the commissions were " only to inquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy." It may be observed that this reason implies that the commissions in question assumed authority to compel witnesses to give evidence upon oath. The learning upon the subject may be discovered by reference to *Holdsworth, History of English Law*, vol. 5, pp. 432, 433, to an article by Sir *William Harrison Moore* on *Executive Commissions of Inquiry*, *Columbia Law Review*, vol. 13, p. 500, to the authorities there mentioned and particularly *Law Review*, vol. 15, p. 269. These authorities show that the commissions to which objection was strongly taken in the seventeenth century were commissions which compelled the attendance of

(1) (1608) 12 Co. Rep. 31 [77 E.R. 1312].

witnesses who gave evidence upon oath and, at least in some cases, framed presentments as a foundation for criminal proceedings.

It is, I think, clear that, apart from statutory provisions, a commission appointed by the Crown has no power to compel the attendance of witnesses. The court has not been referred to any authority which gives any support to a contrary view.

In the present case, however, the *Evidence Act*, sec. 17, provides that where a commission is issued by the Governor in Council to any persons to make an inquiry, the president or chairman or the sole commissioner may summon persons to attend to give evidence. Sec. 18 provides that any commissioner may administer an oath to a witness. Thus the objections to which the earlier commissions mentioned were open are not applicable in the case of commissions appointed in Victoria by the Governor in Council. The *Evidence Act* confers the statutory authority the absence of which would prevent the lawful exercise of the compulsory powers mentioned.

But it is contended that, independently of the particular objections mentioned, the Crown has no power to appoint a commission to inquire whether or not any person has been guilty of a crime. It is argued that such a commission attempts to supersede the ordinary courts of justice and to do so without affording to accused persons the rights or privileges and protective procedures which are an essential part of the administration of justice in our community.

In my opinion this objection is conclusively answered by the decision given in *Clough* v. *Leahy* (1). In that case no question arose of inquiry into a crime, but the principal objection taken was that the commission in question usurped the jurisdiction of the Industrial Arbitration Court by inquiring into a matter which fell within the jurisdiction of that court. This objection was answered by stating that it was not unlawful for either an individual or for the Crown to make an inquiry. *Griffith* C.J. (2) distinguished between such a commission and the commissions which were referred to in *Coke's Reports* (3). The latter commissions were "in effect an attempt to institute new courts with coercive jurisdiction." The Crown has no prerogative power of establishing new

(1) (1904) 2 C.L.R. 139.
(2) (1904) 2 C.L.R., at p. 158.
(3) (1608) 12 Co. Rep. 31 [77 E.R. 1312].

H. C. OF A. 1940. McGUINNESS v. ATTORNEY-GENERAL (VICT.). Latham C.J.

courts, and if it were attempted to confer upon a Royal Commission by order in council, or by any means short of a statute, the powers of a court (other than the powers specified in the *Evidence Act*) there is, in my opinion, no doubt that the commission would be unlawful in the sense that the attempt would fail. But the commission in the present case, though authorized to inquire into the subject matter of alleged bribery of members of Parliament, has no power to find any person guilty of giving or receiving a bribe or to convict him of an offence or to impose any penalty of any kind upon him. The commissioner can only make a report upon the matter to the Governor in Council. It may be noted that sec. 30 of the *Evidence Act* provides that statements made by a witness before a commission are not admissible against him in any civil or criminal proceedings, and of course it is obvious that statements made by other witnesses are not so admissible. The result is that the present commission does not in any respect usurp the functions of any court of justice.

A view contrary to that expressed in *Clough* v. *Leahy* (1) was taken in a New-Zealand case (*Cock* v. *Attorney-General* (2)). The reasoning in this case was considered in detail by the Full Court of New South Wales in the case of *Ex parte Walker* (3). I agree with the comment made in the latter case upon the New-Zealand decision and do not think it necessary to repeat it, more particularly because this court is plainly bound by the decision in *Clough* v. *Leahy* (1).

I am therefore of opinion that the first objection of the appellant fails.

The case would be very different if the commission were acting as a court or if its proceedings interfered with the course of justice. In *Clough* v. *Leahy* (4) it was said :—" There is one objection which probably would be a good one if it could be sustained. Any interference with the course of the administration of justice is a contempt of court, and is unlawful. If, therefore, any person, purporting to act under the authority of a Royal Commission, were to do an act amounting to an interference with the course of justice, he could not claim any protection on the plea that he was acting for the Crown."

(1) (1904) 2 C.L.R. 139.
(2) (1909) 28 N.Z.L.R. 405.
(3) (1924) S.R. (N.S.W.) 604; 41 W.N. (N.S.W.) 162.
(4) (1904) 2 C.L.R., at p. 161.

If, for example, a prosecution for an offence were taking place, the establishment of a Royal Commission to inquire into the same matter would almost certainly be held to be an interference with the course of justice and consequently to constitute a contempt of court. There are other circumstances in which such an inquiry might prejudice proceedings in the civil or the criminal courts. It is neither necessary nor desirable to attempt to enumerate in an exhaustive manner the circumstances which might raise a case of contempt of court. But it is important, I think, that there should be no doubt with respect to two propositions—(1) the executive government cannot by the exercise of the prerogative create new courts; and (2) the executive government cannot by any exercise of the prerogative interfere with the due course of the administration of justice.

(2). The second objection is based upon a provision in sec. 17 of the *Evidence Act* that no person shall be compelled to answer any question before a commission that he would not be compellable to answer at the trial of an action in the Supreme Court. It is argued that there is a special newspaper privilege, attaching to proprietors of newspapers, editors, and writers, which entitles them to refuse to disclose at a trial the sources of information which they have used in producing the contents of the newspaper. Probably the proposition is intended to be limited to cases where information has been provided upon a confidential basis.

Reference was made to a number of cases (of which the latest is *South Suburban Co-operative Society* v. *Orum* (1)) in which it has been held that as a general rule a defendant in a defamation action will not be required to give discovery of the source of his information in a case where the defamatory matter has been published in a newspaper. This rule is stated as a general rule subject to exceptions in special circumstances. See, for example, *Lyle-Samuel* v. *Odhams Ld.* (2). All the cases mentioned, however, refer to interlocutory applications for discovery. They establish only a general rule of practice in relation to such matters. The industry of counsel was unable to discover any case in which it had been either decided or

(1) (1937) 2 K.B. 690.
(2) (1920) 1 K.B., at pp. 141, 142.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Latham C.J.

suggested that a witness at a trial could not be compelled to answer such a question where it was relevant.

In my opinion the second objection fails.

(3). It is objected that the particular question asked in the present case was not a question "touching the subject matter of inquiry" (sec. 19 (*b*)) or a question "material to the subject matter of inquiry" (sec. 17).

The Royal Commissioner was appointed to inquire into a specified subject matter, namely, the suggested bribery of members of Parliament. He was not appointed to determine an issue between the Crown and a party, or between other parties. The commission was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation—an inquisition as distinct from the determination of an issue. In the course of such an inquiry it would or at least might be a valuable step forward if the identity of the persons giving information to the editor of the newspaper could be discovered so that they could be summoned for the purpose of giving evidence on oath as to their knowledge, or as to the source of their information if they had no direct personal knowledge of the matters in question.

In my opinion the question asked was plainly a question touching the subject matter of inquiry and material to that subject matter, and therefore the third objection also fails.

The appeal should be dismissed.

RICH J. The importance of the contentions advanced for the appellant rather than any expectation that they might find favour with the court induced me to concur in granting special leave in this case. Divided duty has produced many martyrs. The appellant was called upon to choose between his duty under the law to answer questions relevant to the inquiry, unless he had some lawful excuse for refusal, and what he conceives to be his duty as a pressman to his informant to maintain silence. He chose to observe the latter supposed duty and to refuse to divulge the source of his information. The small fine imposed upon him as a result scarcely entitles him to a high place in the rank of martyrs to a cause. But

it is enough to enable him to proceed by way of appeal in an attempt to uphold the cause. The cause, I think, is not worthy of even so much martyrdom. It seems to me to be itself founded on a paradox. For it is said that newspapers will not be able to discover the truth and publish it unless when the courts of justice in their turn want the truth pressmen in whom it has been confided are privileged to withhold it. It is easy to understand that editors and other journalists would find it some help in their search for news if they were able to assure those in possession of information that they could secretly impart it without fear that courts of law would be able to discover its source. But this is probably true of a great many other trades, businesses and pursuits. Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country. It was found necessary to make exceptions in favour of state secrets, confidences between counsel and client, solicitor and client, doctor and patient, and priest and penitent, cases presenting the strongest possible reasons for silencing testimony. But hitherto no one has entertained a claim that courts should not be allowed to know what a journalist has discovered. It is true that in the process of interrogatories and discovery of documents before the trial of an action of libel, courts of common law have exercised a statutory discretion as to what they shall allow by refusing to compel a newspaper defendant to say who wrote the libel or where the newspaper got the information on which the libel is founded. But that depends on special considerations affecting liability for defamation and the discretionary nature of discovery. It is quite a different thing to claim protection on the hearing of a suit or trial of an action for a witness able to state relevant facts because he obtained knowledge of the facts confidentially as an editor or journalist. By the statute law of Victoria a Royal Commission is put in the same position as a court trying an action. In my opinion the appellant has no lawful excuse for refusing to answer the question put to him by the commissioner. As to the point that the question was not material I agree that in the circumstances it was relevant to inquire what persons had knowledge and that is

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Rich J.

what the commissioner's question was aimed at. The point that the commission was unlawful and void was taken in this court for the first time. It involved no matter of fact; so doubtless it was open once unrestricted special leave was obtained. I have had the advantage of reading the reasons of some of my colleagues for the conclusion that the objection fails and as I agree in that conclusion I do not propose to add to those reasons.

The appeal should be dismissed with costs.

STARKE J. In 1939 the Governor for the State of Victoria by and with the advice of the Executive Council thereof issued a commission under the seal of the State to the Honourable Charles Gavan Duffy, one of His Majesty's judges of the Supreme Court of Victoria, to inquire into and report upon whether in connection with the Money Lenders Bill in 1938 or the Milk Board Bill in 1939 and whether before or after the introduction into Parliament thereof (*a*) any bribe was accepted or agreed to be accepted by any member of Parliament and, if so, by whom; (*b*) any bribe was offered to any member of Parliament and, if so, by whom; (*c*) any persons entered into any agreement or formed any combination to bribe or to attempt to bribe any member of Parliament and, if so, what persons.

The commission gave and granted unto the commissioner full power and authority to call before him such person or persons as he should judge likely to afford him any information upon the subject of the commission and to inquire of and concerning the premises by all other lawful ways and means whatsoever.

The *Evidence Act* 1928 (Vict.), sec. 17, enacts that where a commission is issued by the Governor in Council to any person to make any inquiry the commissioner may by writing under his hand summon any person to attend the commission at a time and place named in the summons and then and there to give evidence or to produce any document in his custody, possession or control material to the subject matter of the inquiry or to give evidence and produce any such document. Provided that no person shall be compelled to answer any question or to produce any document that he would not be compellable to answer or produce at the trial of an action in the Supreme Court. And sec. 19 enacts that any person present before

the commission who without lawful excuse refuses or fails to answer any question touching the subject matter of the inquiry shall be guilty of an offence. Under sec. 20 the commissioner may certify the facts to a law officer who may apply to the Supreme Court for an order calling upon such person to show cause why he should not be dealt with for an offence against the Act, which order the court is empowered to make.

The appellant, who is the editor of a newspaper called *Truth*, was present before the commission and was sworn as a witness. It appeared that he had written articles in his newspaper suggesting that bribes had been offered to and accepted by members of Parliament in connection with the Money Lenders Bill and the Milk Board Bill and that persons had conspired to bribe members of Parliament in connection with those Bills. He was examined by the commissioner as follows :—

Question : " In writing the articles that have been mentioned, had you any other source of information than the witnesses who have already appeared and given evidence at this commission ? " Answer : " Yes."

Question : " What was the source ? I understand from what your counsel says that you propose to refuse to answer that question. I suppose that is so ? " Answer : " Yes."

The commissioner certified the facts to the Attorney-General, who thereupon applied to the Supreme Court for an order calling upon the appellant to show cause why he should not be dealt with for an offence against the Act. In December of 1939 an order nisi was issued calling upon the appellant to show cause accordingly. Upon the return of this order nisi it was made absolute and the appellant was fined for his offence. An appeal, by special leave, is now brought from this order to this court.

It was submitted on this appeal that the appointment of the commission was an unlawful and unconstitutional exercise of the Royal prerogative in that the commission was directed to inquire into and report upon criminal offences triable in the ordinary courts of the State, thus interfering with or invading the ordinary course of justice. But no such submission was made before the commissioner or the Supreme Court, which is not, perhaps, surprising in view of the decision of this court in *Clough* v. *Leahy* (1).

(1) (1904) 2 C.L.R. 139.

H. C. OF A. 1940. McGUINNESS v. ATTORNEY-GENERAL (VICT.). Starke J.

"It is a settled constitutional principle or rule of law that, although the Crown may by its prerogative establish courts to proceed according to the common law, yet that it cannot create any new court to administer any other law; and it is laid down by Lord *Coke* in the *4th Institute* (188-200) that the erection of a new court with a new jurisdiction cannot be without an Act of Parliament" (*In re The Lord Bishop of Natal* (1)). The constitutional right, however, of the Crown to issue commissions of inquiry cannot, in modern times, be well denied. "Since ministerial responsibility has been properly defined and understood, commissions have become a recognized part of our governmental machinery and it is now fully admitted that when confined to matters of legitimate inquiry they serve a most useful and beneficial purpose" (*Todd, Parliamentary Government in England*, ed. 1869, vol. 2, p. 348). Indeed, the *Evidence Act* 1928, in its provisions, recognizes this right.

The critical question is the extent of the constitutional right of the Crown. In England, the authority of justices of oyer and terminer is by commission, inquirendum, audiendum, terminandum, *secundum legem consuetudinem regni nostri Angliae* (*Coke, 4th Inst.* 162). These commissions are, however, part of the established legal system of England and are regulated by its laws and customs. But in my opinion the Crown cannot now set up, by virtue of its prerogative, any new jurisdiction, whether it is a court, a tribunal, or a person, to inquire into, hear and determine any civil or criminal cause without the sanction of an Act of Parliament. Nor, in my opinion, can the Crown alter by virtue of its prerogative the established legal procedure whether for the purpose of trying causes or matters or bringing persons to trial. All this results from the constitutional principle or rule of law referred to in the *Bishop of Natal's Case* (1) and the development of responsible government. But commissions merely *ad inquirendum* are not open to the same constitutional objections. Their activities and reports may in a loose sense affect subjects detrimentally but have no effect upon their legal rights and duties.

The question has been elaborately and learnedly discussed in an article "Commissions of Inquiry" in the *Law Review* vol. 15,

(1) (1864) 3 Moo. P.C. N.S. 114, at p. 152 [16 E.R. 43, at p. 57].

p. 269, and more recently by the late Professor *Harrison Moore* of the University of Melbourne in an article "Executive Commissions of Inquiry" in the *Columbia Law Review*, vol. 13, p. 500. The latter article, particularly, contains a full citation of relevant charters, statutes, works and authorities, and in truth exhausts the subject so far as material is available in Australia. Nothing is to be gained by going over again the ground which those learned authors have covered. The conclusion of both is that there is no rule of law which attaches illegality to the issue of a commission of inquiry by the Crown or to the act of investigation in pursuance of such a commission. And this was the decision of this court in *Clough* v. *Leahy* (1), which binds us, and should be followed.

But perhaps I should add that it is established by the article in the *Law Review* (*supra*) that the commissions referred to in the *Case of Commissions of Inquiry* (2) were not merely *ad inquirendum* but operated and were used apparently as presentments for offences. The passages in *Hale's Pleas of the Crown*, vol. 2, p. 21, and *Hawkins' Pleas of the Crown*, ch. 5, are based upon this case and require no further comment. The case of *Cock* v. *Attorney-General* (3) is, to some extent, contrary to the views already expressed, but the *Commissions of Inquiry Act* 1908 (N.Z.) referred to in that case is at the foundation of the case and possibly also the principle which was later expounded in *Attorney-General* v. *de Keyser's Royal Hotel* (4).

Some reliance was placed upon the power and authority of the commissioner to call before him such persons as he should judge likely to afford any information upon the subject of the commission. This power or authority is not, I think, illegal, but it confers no compulsive power upon the commissioner. A subject can only be compelled to attend as a witness according to the laws of the land or pursuant to some statute as the *Evidence Act* 1928 in the present case.

Next it was submitted that the source of the appellant's information upon which the newspaper articles were based was privileged and that he could not be compelled to disclose it. No such privilege

(1) (1904) 2 C.L.R. 139.
(2) (1608) 12 Co. Rep. 31 [77 E.R. 1312].
(3) (1909) 28 N.Z.L.R. 405.
(4) (1920) A.C. 508.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Starke J.

exists according to law. Apart from statutory provisions, the press, in courts of law, has no greater and no less privilege than every subject of the King. But in actions against newspapers or trade periodicals the rule of practice in the King's Bench Division is to refuse to compel the defendant to disclose the name of the writer of an article or the source of the newspaper's information (*Plymouth &c. Society Ltd.* v. *Traders Publishing Association Ltd.* (1); *Lyle-Samuel* v. *Odhams Ld.* (2)). It is a rule founded, I apprehend, upon convenience and to limit fishing and oppressive inquiries. And the rule is not confined to actions against newspapers (*Maass* v. *Gas Light and Coke Co.* (3))—Cf. *South Suburban Co-operative Society* v. *Orum* (4). But the application of the rule must depend upon the circumstances of the case and the discretion of the judge or other authority. The commissioner in the present case was not bound by the practice of the King's Bench Division and, in any case, considered that the circumstances in the present case were such, as indeed they were, that the appellant should be required to disclose the source of his information.

Lastly it was submitted that the information sought from the appellant was not material to and did not touch the subject matter of the inquiry (*Evidence Act* 1928, secs. 17, 19). It is enough to say that the inquiry was what might be described as a fishing inquiry and very wide in its terms. The question was clearly material to and touching the subject matter of such an inquiry.

The appeal should be dismissed.

DIXON J. This is an appeal by special leave from an order absolute of the Supreme Court of Victoria imposing a fine upon the appellant for an offence consisting in a refusal without lawful excuse to answer a question touching the subject matter of an inquiry under a commission issued by the Governor in Council.

The appellant is the editor of a newspaper in the columns of which some circumstantial allegations appeared that members of the Victorian Parliament had received bribes. The Governor in Council issued a commission under the seal of the State of Victoria

(1) (1906) 1 K.B. 403.
(2) (1920) 1 K.B. 135.
(3) (1911) 2 K.B. 543.
(4) (1937) 2 K.B. 690, at p. 703.

constituting and appointing a commissioner to inquire into three questions therein set out, namely, whether (*a*) any bribe was accepted or agreed to be accepted by any member of Parliament and, if so, by whom, (*b*) any bribe was offered to any member of Parliament and, if so, by whom, (*c*) any persons entered into any agreement or formed any combination to bribe or to attempt to bribe any member of Parliament and, if so, what persons.

The appellant was called before the commission as a witness and was asked to give the source of the information published in his newspaper. He was represented before the commissioner by counsel, and objected to state the source of his information on the ground that it would be a breach of the confidence which his informant or informants reposed in him as an editor and that an answer was not compellable. In the end he formally refused to give an answer to the question. For this refusal an order was made upon him to show cause why he should not be dealt with under secs. 19 and 20 of the *Evidence Act* 1928 (Vict.). *Macfarlan* J. made the order absolute and imposed a fine, holding that an answer was compellable, and that the refusal by the appellant was without lawful excuse.

Three independent grounds are taken in support of the appeal from this order. It is said that the commission issued by the Governor in Council was unlawful and void. Next it is said that the law recognizes that the editor of a newspaper or a journalist ought not to be required to disclose the source of information confidentially obtained and on that ground a lawful excuse existed for the appellant's refusal to answer the question before the commissioner. Thirdly it is said that the question was not material to and did not touch the subject matter of the inquiry.

1. The reason for denying validity to the commission lies in the nature of the inquiry which it commands. Each of the three questions formulated by the instrument is whether an offence against the criminal law has been committed and if so by whom. The statute, though authorizing a commissioner to command the attendance of witnesses and the production of documents and to examine witnesses on oath and penalizing a failure to attend or a refusal to answer, is not the source of the power of the Governor in Council to issue a commission of inquiry. The source of the power is the

H. C. OF A 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

prerogative of the Crown. The statute assumes the existence of the power to constitute and appoint a commissioner, and proceeds to arm every commissioner with additional authorities. The contention of the appellant is that under the prerogative the Crown cannot grant a commission, outside the regular course of the criminal law, to inquire whether criminal offences have been committed and by what persons. Courts of criminal jurisdiction are established for the purpose of determining guilt or innocence of crime; and the process of inquiry and accusation by which men are put upon trial is fixed and regulated by law. Therefore, it is said, the Crown may not, under the prerogative, set up an *ad-hoc* commission of inquiry to examine into the question whether and by whom a crime has been committed. "There are," wrote Sir *W. Harrison Moore* in 1910, "opinions of eminent lawyers which suggest that an inquiry instituted by the Crown for the purpose of ascertaining whether an offence has been committed and by whom, or whether any penalty or forfeiture has been incurred, is an invasion of the judicial power of the courts even though the inquiry is not for the purpose of awarding any legal penalty" (*Commonwealth of Australia*, 2nd ed., p. 309). The position put by the appellant could not be better expressed and in a note the author collects the authorities upon which the argument is founded. They include no English judicial decision; but nevertheless respectable modern support is forthcoming for such a limitation upon the power of the Crown to appoint commissions of inquiry. That lawyers should hold such an opinion needs little explanation; for the proposition appears reasonable as a check upon an executive power, the abuse of which may be alike unjust to the individual and prejudicial to the due and orderly administration of criminal justice. At the same time it receives apparent support from the course of historical development curtailing the use of special commissions of inquisition.

We have obtained the modern commission of inquiry by a particular application to present uses of an ancient power of the Crown which played a great part in the foundation and development of our legal institutions. "Commission (*commisio*) is taken for the warrant or letters patent, which all men exercising jurisdiction either ordinary or extraordinary, have to authorize them to hear or

determine any cause or action: as the commission of the judges &c. Commission is with us as much as *delegatio* with the civilians: and this word is sometimes extended further than to matters of judgment as the commission of purveyance &c." (*Jacobs' Law Dictionary*, s.v. commission). Eyres which in the twelfth and thirteenth centuries were sent out to transact the judicial and fiscal business of the Crown in the counties of England were commissions. When at the close of the thirteenth century and in the fourteenth century the judicial circuits were established, they too were commissions. The jurisdiction exercised at the "assizes" depends, according to a traditional though perhaps inaccurate statement, upon five commissions, the commissions of assize, of gaol delivery, of oyer and terminer, of nisi prius, and of the peace. The long history of the restriction of monarchical power includes the limitation by charter, statute and constitutional custom of the prerogative to issue special commissions for the exercise of authority over the subject, particularly authority of a judicial nature. *Coke* was, therefore, able to say "legall commissions have their due forms as well as originall writs, and none can be newly framed without Act of Parliament, how necessary so ever they seem to be" (*4th Inst.* 478).

Amid the general reliance placed in the seventeenth century upon the twenty-ninth clause of *Magna Carta* and the like clauses in confirmations and in such statutes as 37 Edw. III. c. 18 and 42 Edw. III. c. III—Cf. *Vinogradoff*, *Collected Papers*, pp. 312, 313—it was natural that they should also form part of the justification put forward for denying to the Crown a power to set up new commissions of inquisition. Such a denial is contained in the *Case of Commissions of Inquiry*, printed in the posthumously published twelfth part of *Coke's Reports*, (1). The printed report is unsatisfactory, but a learned and scholarly, though anonymous, contributor to the *Law Review*, vol. 15, pp. 285-292, has given us a better account of the case from the manuscripts, together with a full explanation. The commission there considered related to the enclosure of arable land and its conversion into pasture, with the consequences of rural decay and depopulation, which have been the subject of repeated legislation for more than a century (*Holdsworth*,

(1) (1608) 12 Co. Rep. 31 [77 E.R. 1312].

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

History of English Law, vol. 4, p. 365). Under a statute, 5 Eliz. c. 2, at the time of the commission no longer in force, a special commission to deal with offences against that and previous legislation might have been issued. But it appears that in 5 Jac. I. a much wider commission was issued to inquire in certain counties into offences and abuses stated in articles annexed thereto. The commission, though in English and not in Latin, the language at that time of instruments giving judicial authority, nevertheless required the commissioners to inquire by the oaths of twelve lawful men and examination of witnesses and other lawful ways of the matters mentioned in the articles. It contained two directions, usual in commissions of *oyer* and *terminer* and gaol delivery, to appoint certain days and for a *venire facias*, the form of which can be seen in Latin in the *Fourth Institute*, ch. 28, p. 162, and in English in *Chitty's Criminal Law*, vol. 4, pp. 135, 147 and 156. The commissioners were commanded to return the inquisitions, when taken, into Chancery before a day specified. A return was made accordingly and a further commission issued empowering the commissioners to compound with the offenders to exonerate them and to make out pardons. At some date the validity of the first commission or of both commissions was passed upon by the two Chief Justices and seven other judges, probably at the Privy Council or in the Star Chamber.

The correctness and meaning of the version of their resolution printed in *Coke's Reports* (1) are alike doubtful, but in the *Law Review* (p. 289) the text of one manuscript, with which three others had apparently been collated, is transcribed and translated. The translation is as follows :—" It was resolved that the said commissions were against law for three causes : (1) For this that it (the commission) was in English. (2) That the offences inquirable were not contained within the commission itself, but in a schedule annexed thereto. (3) For this that it was to inquire only, which is against law ; for by this a man may be unjustly accused by perjury, and he shall have no remedy for it, for such commission is not within the Statute 5 Eliz. &c., and so the party shall be defamed and have no traverse to it. A like commission to inquire only might (or may) be granted

(1) (1608) 12 Rep. 31.

of treason, felony &c., and no such commission was ever seen to be allowed in our books to inquire only."

The contributor to the *Law Review* states the effect of the third reason thus :—" Substantially, the third ground of objection to the commission is this, that, if it were legal, then a man might be charged by the regular presentment of a jury with an indictable offence, which he would have no means of putting in issue ; for the court so constituted could not try it, nor could the presentment (not being a record) be removed for traverse and trial in the King's Bench ; nor was the commission within the Act 5 Eliz. ch. 2, for that Act had expired ; nor within the Acts 39 Eliz. ch. 1 and ch. 2, for those had appointed a trial by indictment or presentment at the Assizes of Quarter Sessions ; that, if legal, then a like commission might issue even in such cases as treason or felony, for which there is no precedent in any of our books."

The distinction between such a process and a commission of inquiry only is emphasized by one of the grounds given in the case of James Whitelocke by the Act of Council of 1613 the composition of which is attributed to Sir *Francis Bacon*. Whitelocke as counsel had been consulted by Sir Robert Mansell, Treasurer of the Navy, in reference to a commission inquiring into some misconduct among officers of that service. The Act of Council recites that Mansell " seeking to cross the said commission repaired to the said Whitelocke and earnestly moved him in the name of the Lord High Admiral of England to set down what exceptions he could possibly devise and as fully as he could to the form and substance of that commission." Whitelocke drew up a paper containing objections which moved the council to great wrath. It is recited that he " in all the course of his writing never used so much as a modest phrase of tenderness or loathness to deal in so high a cause." In the result he and his client were brought before the Council for contempt ; but after receiving their submission and administering " certain grave admonitions for their behaviour " thereafter, the Council enlarged them. It appears that the tenor of the commission was to inquire, examine and find out certain deceits and abuses and upon the discovery of them as well to give order for the due punishment of the offenders for the time past as likewise to devise and set

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

down fit ordinances and rules for the well governing of the navy and all the incidents thereof for the time to come with reasonable pains to be inflicted upon the offenders, provided that all should be agreeable to law. One of Whitelocke's objections must have been that the commission gave authority to punish for offences and was therefore void. The Council construed the commission otherwise and took the important distinction between mere inquiry and judicial authority. The Act of Council in stating his contempts recites that "Secondly he did tax the commission that by the tenor thereof the punishment of offences was left to the discretion of the commissioners; which is but a calumniation: for it appears by the words of the same commission that the scope thereof was but *ad inquirendum*, and that the order to be given was to be intended of a direction to refer the offence to the course of justice as appertaineth, and not to an immediate or judicial hearing and determination of them" (*Works of Bacon*, ed. *Spedding* (1868), vol. II. (vol. 4 of *Letters and Life*), pp. 346-357).

It is upon the same distinction that the resolution of the judges in the *Case of the Commissions of Inquiry* (1) depends. All the reasons for their opinion that the commission was bad show that they regarded it as conferring judicial powers of hearing and determination. It must, therefore, be in Latin and the offences must be specified not by articles annexed but in the body of the instrument. Authorizing as it did the summoning of juries, the compulsory examination of witnesses on oath and an inquisition returned into Chancery, both in procedure and result it went beyond a commission *ad inquirendum* and needed the support of a statute.

What, if any, coercive powers the Crown might give by a special commission of inquiry under the prerogative remained a matter of doubt up to the last century. But gradually it has come to be understood that no power of compelling testimony can be so conferred, notwithstanding that a clause purporting to enable the commissioners to call witnesses before them is commonly inserted in a commission of inquiry. *Alpheus Todd* in his *Parliamentary Government in England*, (1869), p. 352, stated in unqualified terms

(1) (1608) 12 Co. Rep. 31 [77 E.R. 1312].

that unless expressly empowered by Act of Parliament no commission can compel the production of documents or the giving of evidence or can administer an oath. But a commission granted at common law is not invalidated as a whole by an attempt to confer such powers, as Lord *Lyndhurst* seems to have conceded in expressing his objections to the Municipal Corporation Commission of 1835: Cf. *Law Review*, vol. 15, p. 294. Before the *Tribunals of Inquiry (Evidence) Act* 1921 (11 Geo. V. c. 7) such powers were given in England only by special statutes, but in Australia, in every State, general legislation had long existed arming commissions of inquiry with the power of compelling testimony. For the purpose of considering the validity of a commission this fact must be left out of account. At common law it may be beyond the prerogative power of the Crown to set up commissioners with the same authority as a court to compel the attendance of persons to testify and to submit to its directions when the purpose is to determine whether or not offences against the law have been committed. But a commission valid at common law cannot be invalidated because under statute powers of compulsion arise when the commission is issued.

During the 19th century attacks against the legality of particular Commissions of Inquiry were made from time to time. In 1806 Lords *Erskine*, *Grenville*, *Spencer* and *Ellenborough* were named as commissioners to inquire into the conduct of the Princess of Wales (afterwards Queen Caroline). In a memorandum said to have been drawn by Lord Eldon, Sir Thomas Plomer and Mr. Perceval, she protested against "the legality of such a commission to inquire even in the case of high treason or any other crime known to the laws of the country" (*Law Magazine* (1834), vol. 11, p. 70). The Royal Commissions issued in 1850 to inquire into the state, discipline, studies and revenues of the Universities and Colleges of Oxford and Cambridge were condemned "as not constitutional nor legal or such as the University and its members are bound to obey." Such was the opinion given by counsel as eminent as Sir G. J. Turner, Mr. Bethell, Mr. Keating and Mr. J. R. Kenyon, but it was met by a contrary opinion from Sir J. Dodson, Sir A. Cockburn and Sir W. Page Wood: See *W. Harrison Moore, Commonwealth of Australia*, 2nd ed., p. 310, note 1; *Law Magazine*, N.S., vol. 15, pp.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

79 et seq.; *Law Review*, vol. 15, p. 269 et seq. No inquiry into crime was expressly authorized nor in contemplation, and the opinions against the validity of the commission would now, I think, be supported by no one.

The more limited objection, however, remained unimpaired, namely, that the Crown could not lawfully appoint a special commission to perform the fundamental duty of a court of criminal jurisdiction, to determine the guilt or innocence of persons said to have committed offences against the law. In a discussion of this, among other questions relating to commissions of inquiry, in his *Studies in Australian Constitutional Law*, the late Mr. Justice *Inglis Clark* wrote: "But whatever may be the correct interpretation of Lord *Coke's* language and notwithstanding repeated appeals to it in the British Parliament as an authority condemnatory of commissions appointed to inquire into alleged offences, we find a succession of commissions to inquire into the circumstances attending alleged or supposed crimes have been appointed in England under the immediate advice and approval of some of the most eminent Lord Chancellors and judges who have sat upon the Bench in that country." He proceeds to give a list of examples.

An inquiry into crimes and offences committed by particular individuals, crimes which are cognizable by the ordinary courts of law, is nevertheless said to be "unconstitutional" that is, contrary to constitutional propriety or convention (*Todd, Parliamentary Government in England*, p. 348). But at length the day came when a Royal Commission of Inquiry was declared by a court of law to be unlawful and void. In New South Wales the Supreme Court decided that a commission of inquiry was unlawful on the ground that its purpose was to inquire into a subject matter over which a court, the Industrial Arbitration Court, had jurisdiction and which it had determined and to usurp part of that court's function (*Ex parte Leahy* (1)). The decision was reversed in this court on the ground that the commission did not affect any rights declared by the Arbitration Court to exist and in no way impeached the proceedings of that court and did not interfere with the course of its justice. It was conceded in the judgment that the Crown would exceed its

(1) (1904) 4 S.R. (N.S.W.) 401; 21 W.N. (N.S.W.) 129.

powers if ever a commission issued having for its purpose some interference with the course of justice; but, incidentally, the rhetorical question was asked, Why is an inquiry into the question of guilt or innocence of an individual—a mere voluntary inquiry—contrary to law? (*Clough* v. *Leahy* (1)).

In New Zealand, however, a different answer has been given to the question from that implied in its rhetorical form. In *Cock* v. *Attorney-General* (2) a commission of inquiry was held bad because the question to be inquired into was the truth of certain allegations of bribery, that is, whether offences against the law had been committed. For authority the decision rests upon the *Case of Commissions of Inquiry*, upon 42 Edw. III. c. 3, and upon 16 Car. I. c. 10 (Abolition of the Star Chamber). Four years after this case, Sir *W. Harrison Moore*, in a paper entitled *Executive Commissions of Inquiry*, *Columbia Law Review*, vol. 13, p. 500, examined the scope of Royal Commissions. The paper contains an enumeration of the Charters and Statutes from *Magna Carta* to the *Bill of Rights* which have been invoked by opponents of the legality of particular commissions and the learned author in each case shows briefly the true effect of the declaration. Arguments founded upon such Charters and Statutes are sufficiently answered by a reference to his paper and to the relevant parts of such works as *McKechnie*, *Magna Carta* Cf. Part IV., "Historical Sequel to Magna Carta," pp. 139-164, chs. 38, 39 and 40, pp. 369-398, particularly 380, 381, 385, 394—and *Holdsworth*, *History of English Law*—Cf. vol. 1, pp. 59-63, 487; vol. 2, pp. 214-216; vol. 5, pp. 432-433; vol. 9, p. 104. In the result Sir *Harrison Moore* concluded that no rule of law attached illegality in any definite sense to the mere issue by the Crown of a commission of inquiry or to the act of investigation in pursuance of such a commission and that at common law there was no limitation upon the executive power of inquiry even though the matter inquired of were of a private nature or some matter of offence or right capable of being brought to adjudication.

From the foregoing discussion it will be seen that the appellant's argument reproduces what may almost be described as a traditional contention which for over three centuries has found from time to

(1) (1904) 2 C.L.R. at pp. 156, 157. (2) (1909) 28 N.Z.L.R. 405.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

time a place in objections raised to some exercise of the Crown's power to appoint commissions of inquiry. The objection has seldom been brought before a court of law and, except in New Zealand, has not the support of a judicial decision. The colour which it receives from the course of constitutional development will not survive close examination. For while the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of right and into supposed offences, the principle does not affect commissions of mere inquiry and report involving no compulsion, except under the authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*.

In my opinion the appellant's objection to the validity of the commission fails.

2. The second ground of appeal claims that his refusal to state the source of his information had a good legal foundation ; that the question from what source an editor obtained confidential information for the purpose of his journal is one which he would not be compellable to answer at the trial of an action and that the appellant did not refuse without lawful excuse to give an answer.

No one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well as of honour, they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a

pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box. Claims have been made from time to time for the protection of confidences to trustees, agents, bankers, and clerks, amongst others, and they have all been rejected. Upon the trial of the Duchess of Kingston two witnesses sought privilege for confidences reposed in them by the peeress at the bar, viz., her surgeon and Viscount Barrington. The first claim was based upon the nature of the witness' profession, the next upon the point of honour. The House, at the instance of Lord *Mansfield*, ruled that the surgeon had no privilege. Lord *Mansfield* allowed that for him voluntarily to reveal secrets learned in the course of his profession would be a breach of honour and a great indiscretion, but said that it was otherwise in a court of justice where he was bound by law to give the information. Lord Barrington made a stiffer resistance, notwithstanding that the Duchess of Kingston herself intervened to release him of every obligation of honour. But Lord *Camden* made the telling remark that he hoped their Lordships, sitting in judgment in criminal cases, the highest and most important that might affect their lives and liberties and properties, should not think it befitting the dignity of the Court of the Lord High Steward to be debating the etiquette of honour at the same time as they were trying lives and liberties (1).

The case of a journalist was dealt with in the course of the proceedings of the Parnell Commission, which consisted of Sir *James Hannen* P. and *Day* and *A. L. Smith* JJ. McDonald, manager of *The Times*, was called as a witness, and during his cross-examination by Mr. Asquith was asked for the names of the writers of certain articles. He objected, saying that the conductors and the editor of *The Times* would be responsible for the statements contained in the paper and he considered, that being so, that counsel were not entitled to demand or to force from the conductors of the *Times* the names of the contributors. Sir *J. Hannen* said that there was no such privilege as that suggested by the witness; and after a discussion of the materiality of the question and the duty of the witness to make inquiries, his Lordship gave the ruling of the commission that counsel were entitled to ask the witness as to specific statements

(1) (1776) 20 Howell St. Tr. R. 355, at p. 586-591.

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

Dixon J.

made in some of the articles and ascertain from him who was the writer, if he knew it. If he did not, they must take it that they had exhausted all the information they could get from that source (*The Times* of 20th February 1889, p. 6, columns 3-6, reporting the 52nd day).

But although all authority is against the existence of any rule of evidence under which an editor or journalist is protected when called as a witness on the trial of an action from the necessity of deposing to the source of the information contained in his publication or to statements made in confidence to him in the exercise of his calling, yet a special exception is made in favour of publishers, proprietors and editors of newspapers as defendants in actions of libel from the general rule that discovery by affidavit of documents and answer to interrogatories must be made of all relevant matters.

By a long line of cases a practice is recognized of refusing to compel such a defendant to disclose the name of the writer of an article complained of as a libel or of the sources of information he has relied upon. The foundation of the rule is the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity. The cases are collected in *Lyle-Samuel* v. *Odhams Ld.* (1) and *South Suburban Co-operative Society Ltd.* v. *Orum* (2), which are the latest authorities upon the application of the rule. The appellant stands upon these decisions and says that they disclose a development which, in reason and logic, should not stop at discovery, but should supply a general justification for withholding the names of contributors and the sources of information at all stages of any legal proceeding. The answer is that it is not a rule of evidence but a practice of refusing in an action of libel against the publisher, &c., of a newspaper to compel discovery of the name of his informants. It " rests not on a principle of privilege but on the limitations of discovery ", to quote the comment of Professor *Wigmore*, who expresses himself somewhat strongly against the

(1) (1920) 1 K.B. 135.

(2) (1937) 2 K.B. 690.

pretensions to a privilege on the part of journalists (*Treatise on Evidence*, 2nd ed., vol. 5, sec. 2286, n. 7).

In my opinion the existence of the practice and the reasons on which it is based can form no ground for holding that a lawful excuse existed for the appellant's refusal to answer as to his sources of information. Lawful excuse means a reason or excuse recognized by law as sufficient justification for a failure or refusal to produce documents or answer questions.

3. The third ground upon which the appeal is supported is a denial that the source of the appellant's information was material to the inquiry and that it was a question touching the subject matter of the inquiry.

Upon an issue of the guilt or innocence of a given member of parliament or a specific person supposed to have given or offered a bribe, the question would not be relevant, or at all events only exceptional circumstances would give it relevancy. But the inquiry commanded by the commission is not the trial of an issue, but the ascertainment of unknown facts. The tracing of informants and the discovery of sources of knowledge fell, in my opinion, within the scope of the inquiry and to that the question put to the appellant as a witness was material.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. I agree that the appeal should be dismissed. The appellant was convicted of an offence under sec. 19 (*b*) of the *Evidence Act* 1928 of Victoria. There are three grounds of appeal against the conviction. One is that the commission of inquiry, in the course of which the appellant refused, as it is alleged, without lawful excuse to answer a question touching the subject matter of the inquiry, was issued for the purpose of inquiring and reporting upon the question whether a crime was committed and, if so, who was the offender, and for that reason the commission was in excess of the powers of the Governor in Council and consequently unlawful. If this objection is a good one, the conviction cannot, of course, stand. I agree that this ground of appeal is not tenable. The objection is, in my opinion, disposed of adversely to the appellant

H. C. OF A. 1940.

McGUINNESS v. ATTORNEY-GENERAL (VICT.).

McTiernan J.

by the decision of this court in the case of *Clough* v. *Leahy* (1). In that case reliance was placed on the passage in 12 *Coke*, at p. 31, to support the attack on the commission. That passage is relied upon by the appellant in the present case. It is to be observed that *Griffith* C.J., after examining the nature of the commissions to which this passage referred, said: "This authority has clearly no bearing on the general question whether a commission to inquire and collect such information as witnesses voluntarily give it is lawful" (2). In the present case the letters patent appointing the Royal Commissioner do not by their own form pretend to confer any powers on him to compel any person to give him any information on the matters within the scope of the commission. It is a Royal Commission of Inquiry. By sec. 17 of the *Evidence Act* 1928, powers to send for witnesses and documents are conferred on a Royal Commissioner to whom a commission is issued by the Governor in Council to make any inquiry. But the question of the legality of the commission must be considered independently of this section. All that the section does is to take the commission when it is issued and arm the commissioner with certain coercive powers: See *Ex parte Walker* (3), per *Ferguson* J. In that case the Full Court followed *Clough* v. *Leahy* (1) and rejected a contention similar to that made by the appellant in the present case.

Another ground of appeal is that it was lawful for the appellant as the editor of the newspaper in which the articles appeared which gave rise to the Royal Commission to refuse to disclose to the commissioner the source of the information on which the articles were based. I agree that the law does not recognize any such privilege in a newspaper editor when giving evidence in a court of law. The appellant is not, therefore, protected by the proviso to sec. 17 of the *Evidence Act* which says: "Provided that no person shall be compelled to answer any question or to produce any document that he would not be compellable to answer or produce at the trial of an action in the Supreme Court." The cases upon which the appellant relies to support this ground of appeal show no more than that in interlocutory proceedings for discovery or to compel

(1) (1904) 2 C.L.R. 139.
(2) (1904) 2 C.L.R., at p. 158.
(3) (1924) 24 S.R. (N.S.W.), at p. 616.

answers to interrogatories it is a rule of practice that the court will not, except in special circumstances, exercise its discretionary power to compel the editor of a newspaper to make the kind of disclosure which the appellant refused to make to the Royal Commissioner, even if it is relevant to the issues in the action.

The third and remaining ground of appeal is that the question which the appellant refused to answer was not one touching the subject matter of the inquiry. It is an ingredient of the offence under sec. 19 (*b*) that the question which the appellant has refused without lawful excuse to answer should be one "touching the subject matter of inquiry." I agree that the question which the appellant refused to answer was clearly within this category and that this ground of appeal should also fail.

Appeal dismissed with costs.

Solicitors for the appellant, *Moule, Hamilton & Derham.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

O. J. G.