FOLL. 31 L.G.R.A. 6.
FOLL. (1975) 13 S.A.S.R. 84.

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~~NOT FOLL~~ 77 W.N. 402 : 60 S.R. 550
APP. 1966 V.R. 239
8. F.L.R. 332

[HIGH COURT OF AUSTRALIA.]

BREBNER . . . . . APPELLANT;
COMPLAINANT,

AND

BRUCE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1950.

ADELAIDE, *Sept.* 27.

MELBOURNE, *Oct.* 23.

Latham C.J., McTiernan, Webb, Fullagar, and Kitto JJ.

Post and Telegraph—Telephones—Offences—Summary proceedings—Right to prosecute—Complaint laid by police constable—Whether authority of Postmaster-General necessary—Validity of regulations—Proof of regulations—Acts Interpretation Act 1901-1948 (*No.* 2 *of* 1901—*No.* 79 *of* 1948), *s.* 31—*Post and Telegraph Act* 1901-1949 (*No.* 12 *of* 1901—*No.* 35 *of* 1949), *ss.* 97, 151, 153—*Evidence Act* 1905-1934 (*No.* 4 *of* 1905—*No.* 43 *of* 1934), *s.* 5—*Crimes Act* 1914-1946 (*No.* 12 *of* 1914—*No.* 77 *of* 1946), *s.* 13—*Telephone Regulations* (*S.R.* 1927 *No.* 145—*S.R.* 1949 *No.* 39), *reg.* 63.

Section 13 of the *Crimes Act* 1914-1946 provides that, "Unless the contrary intention appears in the Act or regulation creating the offence, any person may . . . (*b*) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

Regulation 63 of the *Telephone Regulations* provides, *inter alia*, that, "(1) Any person who—(a) whilst using any telephone, associated with or connected to the telephone system, makes use of any unbecoming expression or of any language of an objectionable, obscene or offensive nature, or of a character calculated to provoke a breach of the peace . . . shall be guilty of an offence."

A police constable laid a complaint under this regulation without any authority from the Postmaster-General. The use of offensive language was proved.

Held by *Latham* C.J., *Webb*, *Fullagar* and *Kitto* JJ. (*McTiernan* J. dissenting), that the *Post and Telegraph Act* 1901-1949 did not manifest any intention on

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the part of the legislature to exclude the operation of s. 13 of the *Crimes Act* 1914-1946 and that the complaint was lawfully made.

Ex parte Edwards; *Re Norris*, (1932) 49 W.N. (N.S.W.) 5, overruled.

In re Jane Morrison, (1916) S.A.L.R. 237, approved.

Held, further, by *Latham* C.J., *Webb*, *Fullagar* and *Kitto* JJ., that reg. 63 was not invalid as being beyond the regulation-making power conferred by the Act, and that it was not necessary that the regulations should be tendered in evidence before the magistrate could take cognizance of them.

Decision of the Supreme Court of South Australia (*Napier* C.J.) reversed.

APPEAL from the Supreme Court of South Australia.

A complaint was laid against Donald Bruce in a court of summary jurisdiction at Renmark, in the State of South Australia. He was charged with a breach of reg. 63 of the regulations made under the *Post and Telegraph Act* 1901-1949, which provides that—"(1) Any person who—(*a*) whilst using any telephone, associated with or connected to the telephone system, makes use of any unbecoming expression or of any language of an objectionable, obscene or offensive nature, or of a character calculated to provoke a breach of the peace; or (*b*) mischievously uses any such telephone for the purpose of irritating any person, or of conveying any fictitious order or instruction or message, shall be guilty of an offence."

The complaint was laid by one Brebner, a police constable, without any authority from the Postmaster-General. The necessary facts to establish guilt were proved, but the special magistrate dismissed the complaint on the ground that the authority of the Postmaster-General to the laying thereof was necessary. Other points taken by the defendant Bruce were that the regulation was invalid, because it was outside the regulation-making power and also that the regulations could not be referred to because they had not been formally proved.

An appeal to the Supreme Court of South Australia was dismissed by *Napier* C.J. on the same ground as that relied on by the Special Magistrate.

The complainant appealed to the High Court.

Hannan K.C. (with him *Gordon*), for the appellant. In no section of the *Post and Telegraph Act* is there any indication of the legislature's intention to make the Postmaster-General the sole prosecutor for offences under the Act. There is no express provision to that effect. The respondent's contention is that it appears from a consideration of the Act as a whole: see *Ex parte*

Edwards; *Re Norris* (1), approved in *Ex parte Greene*; *Re Robertson* (2). These cases are wrongly decided. *In re Morrison* (3) is correct. Section 153 merely enables a person who is not a lawyer to appear in court on the Postmaster-General's behalf. Section 156 merely sets up a domestic tribunal for petty offences which runs concurrently with the court's jurisdiction, which it in no way impedes. All the provisions of the Act work perfectly well whether the Postmaster-General is the prosecutor or not.

R. F. Newman, for the respondent. Section 13 of the *Crimes Act* is displaced by the general intention of the *Post and Telegraph Act*. The remarks made by *Murray* C.J. in *In re Morrison* (3) were *obiter*. He was not considering the implications of the Act as a whole. In *Ex parte Edwards*; *Re Norris* (1) *Halse Rogers* J. looked at the Act as a whole and came to the conclusion that the contrary intention required by s. 13 of the *Crimes Act* was present. Section 156 shows that it is intended that the Postmaster-General should have sole control. The *Telephone Regulations* were not proved at the trial as required by the *Evidence Act*. Further, the regulation in question is *ultra vires* the regulation-making power conferred by the Act. To carry out the Act is to enforce its provisions, and this regulation goes beyond enforcement of the Act's provisions.

Hannan K.C., in reply.

Cur. adv. vult.

Oct. 23.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal by special leave from an order of the Supreme Court of South Australia (*Napier* C.J.) dismissing an appeal from a decision of a special magistrate dismissing a complaint against Donald Bruce for a breach of the *Telephone Regulations* made under the *Post and Telegraph Act*, 1901-1949. Bruce was charged with a breach of reg. 63, which provides, *inter alia*, that—"(1) Any person who—(*a*) whilst using any telephone, associated with or connected to the telephone system, makes use of any unbecoming expression or of any language of an objectionable, obscene or offensive nature, or of a character calculated to provoke a breach of the peace; or (*b*) mischievously uses any such telephone for the purpose of irritating any person, or of conveying any fictitious order or instruction or message, shall be guilty of an offence."

(1) (1932) 49 W.N. (N.S.W.) 5.
(2) (1948) 65 W.N. (N.S.W.) 142.
(3) (1916) S.A.L.R. 237.

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It was proved that Bruce had used offensive language over the telephone, addressing a person abusively as a bastard. The magistrate dismissed the complaint because the information had been laid by the complainant Brebner, who was a constable of police, without any authority from the Postmaster-General. An appeal to the Supreme Court failed, *Napier* C.J. following and applying the decision of *Halse Rogers* J. in *Ex parte Edwards*; *Re Norris* (1), approved by the Full Court of New South Wales in *Ex parte Greene*; *Re Robertson* (2). In *In re Morrison* (3), a contrary opinion had been expressed by the Full Court of South Australia.

The *Crimes Act* 1914-1946 (Cth.), s. 13, provides as follows:—"Unless the contrary intention appears in the Act or regulation creating the offence, any person may—(*a*) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or (*b*) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction".

Thus the presumption is that any person whosoever may institute a prosecution for any offence against a Commonwealth Act or regulation. In order to exclude the application of this presumption it is necessary that a contrary intention should appear in the legislation creating the offence.

The *Post and Telegraph Act* 1901-1949 does not contain any express provision requiring prosecutions for offences against the Act or regulations made thereunder to be instituted by the Postmaster-General or by a person authorized by the Postmaster-General to prosecute. But in the New South Wales cases cited it was held that an intention appeared in the *Post and Telegraph Act* that offences against the Act and regulations should be prosecuted only by the Postmaster-General or with his authority. This conclusion was reached by a consideration of various provisions of the Act, none of which in terms related to the institution of prosecutions. But it was held that these provisions, though they did not expressly require that prosecutions should be so instituted, were of such a character that the conclusion should be drawn that the authority of the Postmaster-General was required for any prosecution under the Act.

Section 5 of the Act provides that the administration of the Act and the control of the department are vested in the Postmaster-

(1) (1932) 49 W.N. (N.S.W.) 5.
(2) (1948) 65 W.N. (N.S.W.) 142.
(3) (1916) S.A.L.R. 237.

General. Such a provision is incidental to the establishment of any department under a statute. In my opinion it has no bearing whatever upon the particular question as to the manner in which offences against an Act are to be prosecuted.

Section 8 provides that in relation to any particular matters the Postmaster-General may by writing under his hand delegate any of his powers under the Act except the power of delegation. This section also has no bearing upon the question now under consideration. The question to be determined is whether the Postmaster-General has an exclusive power of instituting prosecutions, either directly or through a person authorized by him.

Section 65 provides that moneys collected on account of, *inter alia*, penalties, shall be paid to the Treasurer and placed to the credit of the Consolidated Revenue Fund. This provision has no relation to the question which arises as to the authority of any person to institute a prosecution. It is the normal rule that fines are paid into consolidated revenue. They are not paid to the prosecutor unless there is some specific provision to that effect.

Part VIII. of the Act contains a number of provisions relating to legal proceedings. It consists of six sections (ss. 151 to 156), each of which deals with a certain specific matter. The general law with respect to the institution and conduct of legal proceedings is to be found elsewhere—e.g., the *Judiciary Act* 1903-1948, Commonwealth or State Crimes Acts, and many State statutes and rules—Justices Acts, Supreme Court Acts, &c.

Section 151 provides that—" Offences against this Act or the regulations not declared to be indictable offences are punishable upon summary conviction by a police, stipendiary, or special magistrate."

This provision contains no indication whatever as to who is to be the informant in the cases of alleged offence. Section 152 provides that in the case of offences relating to property of various kinds under the management or control of the Postmaster-General it shall be sufficient to lay the property in the Postmaster-General. This again is a specific provision dealing with a particular case and has no bearing upon the question whether in the case of other offences, or even in the case of the particular offences to which s. 152 relates, the prosecution should be instituted by the Postmaster-General himself or a person authorized by him.

Section 153 is as follows : " The Postmaster-General or a Deputy Director may depute any postal or telegraph officer to appear on his behalf either as prosecutor or defendant, and his authority in writing to that effect shall be good and sufficient in law." This

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provision relates to authorizing a person to appear on behalf of the Postmaster-General. It assumes that a proceeding has been instituted and enables the Postmaster-General, whether he be prosecuting or defending, to be represented in court by any postal or telegraph officer, even though the officer may have no right of audience because he is not a legal practitioner. It relates to appearance in court in the course of a proceeding and not to the institution of a proceeding. It is obvious that an authorization to an officer to appear " as defendant " can have no bearing upon the question whether a person other than an authorized officer can institute a proceeding for an offence under the Act.

A further argument for the respondent was based upon s. 156 of the *Post and Telegraph Act*, which is in the following terms :— " Where any person admits to the Postmaster-General that he has committed a breach of this Act other than an indictable offence the Postmaster-General may with the consent in writing of such person determine the matter and may order such person to pay such pecuniary penalty as he may think proper and upon payment of such penalty such person shall not be liable to be further proceeded against in respect of the same matter ".

This again, in my opinion, is a provision which has no bearing whatever upon the question whether or not a person not authorized by the Postmaster-General can prosecute for an offence against the Act or regulations. The conditions of application of the section are as follows :—(1) an admission by a person (whether he is already a defendant or not) that he has committed a breach of the Act other than an indictable offence ; (2) such person has given a consent in writing to the Postmaster-General dealing with the offence ; (3) the Postmaster-General has determined the matter by ordering the person to pay a pecuniary penalty ; and (4) the penalty has been paid. These provisions obviously can be applied in cases where no prosecution has been instituted. Further, they can be applied if a prosecution has been instituted by the Postmaster-General. Also, they can be applied if a prosecution has been instituted by some other person. In each case the payment of the penalty fixed by the Postmaster-General in accordance with the section produces the result that the person who has paid the penalty " shall not be liable to be further proceeded against in respect of the same matter ". Accordingly, in each of the three cases the payment of the penalty would be an answer to a complaint. In the first case it would prevent a conviction under a prosecution thereafter initiated, and in the other two cases it would provide a defence to the pending prosecutions. There is, in

my opinion, no difficulty whatever in applying the section in every case which can occur.

I am therefore of opinion that the necessary contrary intention does not appear, either expressly or impliedly, in the *Post and Telegraph Act*, so that s. 13 of the *Crimes Act* applies, with the result that any person may institute a prosecution for an offence under the former Act, though the Postmaster-General can prevent any conviction for an offence punishable summarily in cases where s. 156 is applicable. *Ex parte Edwards*; *Re Norris* (1) should be overruled.

It was further argued for the respondent that reg. 63 of the *Telephone Regulations* was invalid because it was beyond the regulation-making power. The *Post and Telegraph Act*, s. 97, gives power to the Governor-General to make regulations not inconsistent with the Act "prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect" to the Act. A regulation preventing the use of the telephone system for offensive and abusive purposes is plainly authorized by this provision.

Finally it was contended for the respondent that, though the regulations were read in court before the magistrate, there was no evidence that they existed, because a copy of the regulations was not proved and put in evidence. Regulations under the *Post and Telegraph Act* are made by the Governor-General—s. 97. This section provides that all regulations made in pursuance of the section shall have effect as if they were enacted in the Act. The regulations, therefore, when made, became part of the law of the land. In *Marshall* v. *Wettenhall Bros.* (2), the Supreme Court of Victoria held that magistrates were entitled to act upon their knowledge of a proclamation made under an Act independently of proof of its contents. The learned judge (*a'Beckett* J.) referred to the manifest intention of the Act under which the proclamation was made—"that the proclamation should inform all persons of the state of the law, and the apparent absurdity of refusing to permit a judicial officer to act on his knowledge of the law so supposed to be made public". An application for special leave to appeal from this decision was refused by the High Court. In my opinion the decision in *Marshall* v. *Wettenhall Bros.* (2) precisely applies to the present case. The regulations made under the Act became part of the law and a tribunal takes judicial notice of the law, being at liberty to refresh memory by referring to the text of the regulations which, if there is any doubt about it, can be established by reference to a copy printed by the Government

(1) (1932) 49 W.N. (N.S.W.) 142. (2) (1914) V.L.R. 266.

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Printer: *Evidence Act* 1905-1934 (Cth.), s. 5; *Van Omeron* v. *Dowick* (1); *McQuaker* v. *Goddard* (2).

The *Evidence Act* 1905-1934 (Cth.), s. 5, provides, *inter alia*, that—"Evidence of any proclamation, commission, order or regulation issued or made by the Governor-General . . . may be given in all Courts—(*b*) by the production of a document purporting to be a copy thereof, and purporting to be printed by the Government Printer, or by the authority of the Government of the Commonwealth."

It was argued that this provision showed that a regulation must be proved in a manner stated in the section before it could be regarded by a court. But this provision for means of proof does not mean that the documents to which it applies cannot be taken into account by a court unless they are proved in the manner specified in the section—see *Grieve* v. *Lewis* (3), where *Barton* J. held that a provision in the *Rules Publication Act* 1903-1916, which was in substantially the same terms as the section quoted from the *Evidence Act*, did not preclude any other means of furnishing the evidence. In that case a printed paper purporting to be a copy of the statutory rule printed by the Government Printer was produced to the court and both sides dealt with it as being part of the material before the court, though it was not formally put in or marked as an exhibit. It was held that "Nevertheless it was made evidence by the course of the case." The position is exactly the same in the present case. Decisions to the same effect were given by the Full Court of the Supreme Court of Queensland in *Sankey* v. *Plover*; *Ex parte Plover* (4), and *Stewart* v. *Parsons* (5).

The *Acts Interpretation Act* 1901-1948, s. 31, provides as follows: "Judicial notice shall be taken of every Proclamation or Order by the Governor-General or by the Governor-General in Council made or purporting to be made in pursuance of any Act or Imperial Act."

There is much to be said for the proposition that regulations are made by Orders in Council in Australia as in England—see *Encyclopaedia of the Laws of England*, 1st ed. (1898), vol. 9, p. 398—"Order in Council": 2nd ed. (1908), vol. 10, p. 177—"Order in Council": 2nd ed. (1907), vol. 4, p. 486—"Delegated Legislation". (In England there is no provision corresponding to s. 31 of the *Acts Interpretation Act*.) In the Commonwealth the form adopted in

(1) (1809) 2 Camp. 42 [170 E.R. 1075].
(2) (1940) 1 K.B. 687, at p. 700.
(3) (1917) 23 C.L.R. 413, at p. 417.
(4) (1903) Q.S.R. 63.
(5) (1949) Q.W.N. 27.

making regulations under an Act is—" I, the Governor-General in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council hereby make the following regulation " under a specified Act. There is no definition in the *Acts Interpretation Act* of the word " orders " for the purposes of s. 31 of that Act. But, in view of the decisions already cited, it is not necessary to determine whether s. 31 applies to regulations.

I am therefore of opinion that the appeal should be allowed, the decision of the Supreme Court and of the special magistrate set aside and that the case should be remitted to the special magistrate to be dealt with according to law. In accordance with an undertaking given on behalf of the Crown upon the application for special leave to appeal, the Crown should pay the costs of the defendant of the appeal, including the application for special leave. In the circumstances of this case no order should be made with respect to costs in the Supreme Court. The costs of all proceedings before the special magistrate can be dealt with by the special magistrate.

McTIERNAN J. The first question is whether the appellant could lawfully institute the proceedings to which this appeal relates. He instituted these proceedings for the summary conviction of the respondent for a breach of reg. 63 of the *Telephone Regulations*. The appellant claims that s. 13 of the *Crimes Act* of the Commonwealth gave him authority to institute the proceedings. This section applies to indictable offences and offences punishable on summary conviction. Section 13 introduces into Commonwealth law the rule that any person may institute proceedings in respect of these two classes of offences. In the case of indictable offences, the authority is limited to the instituting of proceedings for the commitment of the offender for trial. In the case of offences punishable on summary conviction the authority extends to the institution of proceedings " for the summary conviction " of the offender. The terms in which authority is given in the latter case make it extend from the initiation to the termination of the proceedings.

The grant of authority made by s. 13 to institute proceedings is subject to a qualification expressed by the words " unless the contrary intention appears in the Act or regulation creating the offence." The principle which underlies s. 13 is that the enforcement of the criminal law is generally a concern of the public. *Wills* J. said in *Grant* v. *Thompson* (1), " Every person has an

(1) (1895) 72 L.T. 264, at p. 265.

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interest, and is allowed to put the law in motion in criminal matters." The qualification in s. 13 affects the second part of that proposition. Instances of the affirmation of the right at common law to initiate criminal proceedings are: *Back* v. *Holmes* (1); *Duchesne* v. *Finch* (2); *Young* v. *Peck* (3).

The qualification in s. 13 would apply if the contrary intention were expressly declared. The contrary intention is not expressly declared in the *Post and Telegraph Act* or the regulations. The words "unless the contrary intention appears" do not limit the application of the qualification to cases in which the contrary intention is expressly declared. The contrary intention would appear in the Act or regulation if an intention to depart from the general rule introduced by s. 13 could be inferred from one or the other.

Section 151 of the *Post and Telegraph Act* makes offences against the Act and regulations, except indictable offences, punishable upon summary conviction and cognizable by a magistrate. An offence against reg. 63 is not an indictable offence. The terms of s. 151 are clearly capable of drawing this offence within the scope of the general rule introduced by s. 13 of the *Crimes Act*.

It is argued for the respondent that an intention that the rule should not apply to offences created by the *Post and Telegraph Act* or Regulations is manifested by a number of sections of the Act. In this argument no distinction was made between indictable offences and offences punishable on summary conviction.

First, reliance was placed on s. 5 of the Act, which vests the administraton of it in the Postmaster-General. It was argued that this section reserved to the Postmaster-General authority to put the law in motion in criminal matters arising under the Act.

Secondly, it was argued that the nature and incidents of many of the offences created by the Act raise a presumption that the prosecution of persons who committed those offences was the concern only of the Postmaster-General.

Thirdly, reliance was placed upon s. 153 a section which facilitates the administration of the Act by the Postmaster-General in so far as his powers, duties and functions include the prosecution of persons who offend against the Act or the Regulations.

So far, I doubt whether there are grounds for inferring "the contrary intention" which excludes the general rule laid down by s. 13 of the *Crimes Act*.

In addition the respondent calls in aid s. 156 of the Act. This section provides a mode of procedure for the punishment of offences

(1) (1887) 51 J.P. 693.
(2) (1912) 76 J.P. 377.
(3) (1912) 77 J.P. 49.

which are not indictable. Section 151 overlaps s. 156. The two sections are confined to offences not declared to be indictable. By reason of the last paragraph of s. 97 of the Act, s. 156 applies to a breach of a regulation as well as of the Act. Section 156 provides that if any person who has committed an offence within the scope of s. 156 admits his guilt to the Postmaster-General and submits to his jurisdiction, he may "determine the matter" and order the offender to pay a pecuniary penalty. The section leaves the amount of the penalty to the discretion of the Postmaster-General. It also says that upon payment the offender shall not be liable to be further proceeded against in respect of the same matter.

If it be assumed that any person other than the Postmaster-General or his deputy may by reason of s. 13 of the *Crimes Act* institute proceedings in respect of any offence, which is not indictable, against the Act or the regulations, s. 156 could be a bar in some cases to the institution of the proceedings by such person, or if instituted by him, to their regular termination.

There is nothing in the *Post and Telegraph Act* to exclude the operation of s. 156 in a case where some person other than the Postmaster-General or his deputy intends to be or is the prosecuting party. Section 156 pays no regard to the interest which such a person would have as prosecuting party if he had lawful authority to initiate proceedings. The section proceeds in my opinion upon the assumption that the intention of the Act is that the prosecution of persons for offences which are within the scope of s. 156 should be a departmental affair and not a concern of persons outside the department. It is not possible to reconcile the discretion given by s. 156 to the Postmaster-General with the authority created by s. 13 of the *Crimes Act* under which any person could institute proceedings for the summary conviction of a person in respect of an offence and carry on the proceedings until they are terminated in the ordinary course of law.

In my opinion the intention of the *Post and Telegraph Act* is that the authority to institute proceedings in respect of breaches which are not indictable offences against the Act or regulations should not be governed by a general rule existing apart from the Act, under which anybody may prosecute for an offence punishable on summary conviction. The breach of reg. 63 is within the scope of s. 156. The appellant was not competent under s. 13 of the *Crimes Act* to institute the proceedings.

The result is in accordance with that reached in the cases in the Supreme Court of New South Wales, namely *Ex parte Edwards*;

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Re Norris (1), and *Ex parte Greene*; *Re Robertson* (2). In the case of *In re Morrison* (3), *Murray* C.J. decided that s. 151 of the *Post and Telegraph Act* did not manifest an intention to cut down the right to prosecute which s. 13 of the *Crimes Act* gives to the public: there is no view expressed about the effect of s. 156 of the *Post and Telegraph Act*.

In the view which I take it is not necessary to deal with the other questions raised in this appeal.

In my opinion the appeal should be dismissed.

WEBB J. I agree with the judgment of the Chief Justice.

FULLAGAR J. The prosecution in this case is of a very trivial character, but the question on which special leave to appeal was granted is of some importance in relation to the *Post and Telegraph Act* and the Regulations made thereunder.

The respondent was charged with using objectionable language over a telephone contrary to reg. 63 of the *Telephone Regulations*. The offence is an offence punishable summarily. The information was not laid by the Postmaster-General or by any person acting with his authority or by any officer of the Postal Department but by a police constable of the State of South Australia. Section 13 of the *Crimes Act* 1914-1946, however, provides that—"Unless the contrary intention appears in the Act or regulation creating the offence, any person may—(*a*) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or (*b*) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

In view of s. 13 of the *Crimes Act*, the question to be answered in the present case is, of course, whether a "contrary intention" appears in the *Post and Telegraph Act* or in the *Telephone Regulations*. But, before approaching that question, it is necessary, I think, to consider for a moment whether s. 13 alters the common law. The question of what persons are competent to lay informations for offences created by statute and made punishable on summary conviction has been considered, both in England and in Australia, in a very large number of cases in the absence of any such provisions as those contained in s. 13 of the *Crimes Act*. The cases are perhaps not very satisfactory. Many of them are

(1) (1932) 49 W.N. (N.S.W.) 5.
(2) (1948) 65 W.N. (N.S.W.) 142.
(3) (1916) S.A.L.R. 237.

referred to in *Paul's Justices*, (1936) pp. 166-167. The clearest statement of the position which I have been able to find is contained in the judgment of the Full Court of Victoria in *Steane* v. *Whitchell* (1). The passage is a fairly long one, but I think it desirable to quote it in full. *Hood* J., speaking for himself and *Cussen* and *Chomley* JJ., said :—" . . . we may start with the proposition that, generally speaking, any person may be the informer, but sometimes the Statute giving the penalty allows only particular persons to be informers. In the absence of sufficient indication to the contrary, if the penalty is given to the party aggrieved he must be the informer, or else it must appear that the information is laid at his instance, and if the enactment is framed solely and exclusively for the benefit of a particular body of persons, the information must be laid with the authority of that body of persons : *Burn's Justice of the Peace* (30th ed.), vol. i., p. 1106, title Conviction. The presumption thus being that any person may be the informant, we then look to the Statute imposing the penalty to see if there be any express or implied limitation. There are three classes of Statutes in the construction of which questions of this kind have frequently arisen. In the first class the fact that the offence is of a public nature—*Cole* v. *Coulton* (2) ; *Sargood* v. *Veale* (3) ; *Lizars* v. *Sabelberg* (4)—or that the Legislature has shown that it intended it to be dealt with as an offence of a public nature by providing that it be heard in the ordinary manner and before the ordinary tribunals (*R.* v. *Stewart* (5)), has led the Court to the conclusion, in the absence of some fairly plain indication to the contrary, that any member of the public may prosecute. In the second class the destination of the penalties or the nature and description of the offence, as one in which only certain persons or bodies, or certain classes of persons are interested, has resulted in a decision that the information must not be in the name of any person other than one of those indicated. In these cases, if nothing more appears, the information must be laid or exhibited by, or must at least show on its face that it is laid at the instance and with the authority of the persons or one of the persons interested : *R.* v. *Daman* (6) ; *R.* v. *Hicks* (7) ; *Anderson* v. *Hamlin* (8) ; *Foster* v. *Fyfe* (9) ; *Christie* v. *Permewan, Wright and Co. Ltd.* (10), and a number of Victorian cases cited in *Sargood* v. *Veale* (3). The

(1) (1906) V.L.R. 704.
(2) (1860) 2 El. & El. 695 [121 E.R 261.]
(3) (1891) 17 V.L.R. 660.
(4) (1905) V.L.R. 608.
(5) (1896) 65 L.J. M.C. 83.
(6) (1819) 2 B. & Ald. 378 [106 E.R. 405] ; 1 Chit. 147.
(7) (1855) 24 L.J. M.C. 94.
(8) (1890) 25 Q.B.D. 221.
(9) (1896) 2 Q.B. 104.
(10) (1904) 1 C.L.R. 693.

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third class differs from the second in that the Legislature has, by further or other provisions, shown an intention that an officer or employé, or it may be a person authorized for the purpose, may lay an information in his own name, though for the benefit of the person or persons interested " (1).

The importance of considering whether s. 13 of the *Crimes Act* has an effect other than merely declaratory of the common law seems to me to lie in this. If it has not, and if what is said in *Steane* v. *Whitchell* (2) is applicable to the present case, there is obviously much to be said for the view that a prosecution cannot be lawfully instituted without the authority of the Postmaster-General. It is difficult to say of the offence in question that it is an offence of a " public character ". The gist of it is the use of a telephone: the Commonwealth has no constitutional power to make the use of objectionable language *per se* an offence. The use of a telephone is peculiarly the concern of the Postmaster-General, and it may be argued with much force that the case falls within the principle of the second of the three classes mentioned by *Hood* J. Similar considerations apply to most, perhaps to all, of the numerous offences created by the *Post and Telegraph Act*. If, on the other hand, s. 13 is really directing us to look, without reference to cases decided in its absence, at each particular statute to see whether a " contrary intention " appears from express words or from necessary implication, it is difficult, I think, to point to anything sufficiently definite in the *Post and Telegraph Act* to warrant us in saying that the presumption created by s. 13 is rebutted.

The view that s. 13 is declaratory derives its support, of course, from the fact that at common law the question is always treated as a matter of interpretation of the particular statute which creates the offence and from many statements to the effect that prima facie any person may be the informer. These facts do suggest that the statute merely enacts what was already the rule of the common law. On the whole, however, I am of opinion that s. 13 is not merely declaratory. In spite of many more general statements of the presumption, I think it is most probably correct to say that it only exists at common law in the case of offences of a public character. See *Sargood* v. *Veale* (3). It may be added that the very fact that the legislature chose to enact it suggests that something more was in contemplation than a mere statement of the common law, and this consideration is reinforced by the

(1) (1906) V.L.R., at pp. 705-706.
(2) (1906) V.L.R. 704.
(3) (1891) 17 V.L.R., at p. 662.

generally not very satisfactory state of the authorities as they existed when s. 13 became law. But it is sufficient to say that I do not think that the section really does express what was the common law before its enactment. It was intended, I think, to clarify by a degree of simplification, and not merely to declare.

When this conclusion is reached, we at once eliminate, I think, all those merely general considerations which in *Ex parte Edwards ; Re Norris* (1), led *Halse Rogers* J. to the conclusion that proceedings under the *Post and Telegraph Act* can only be instituted by the Postmaster-General or by some officer duly authorized by him. Such general considerations would, in my opinion, be by no means without force if the position were as at common law. But general probabilities of intention based on the nature of the legislation in question will not, I think, suffice to displace the prima-facie position created by s. 13 of the *Crimes Act*. To provide that a certain position shall be taken to exist " unless a contrary intention appears " in an instrument is a common enough form of enactment. A well-known instance is to be found in s. 27 of the *Wills Act* 1837 (Eng.). Speaking of that section in *Scriven* v. *Sandom* (2), Sir *William Page Wood* V.C. said :—" There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power. It would not be a safe rule to proceed upon, to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power ; there ought to be shewn something which can fairly be described as inconsistent with such an intention." This provided, he said, " the only safe rule for discriminating between mere conjecture and the contrary intent required by the statute ". The " contrary intention " need not, of course, be stated in express words, but it must " appear ", and I think it can appear only by express words or by necessary implication.

Approaching the matter in this way, I regard s. 156 as the only provision in the *Post and Telegraph Act* which occasions any real difficulty. I do think that there is much force in what *Halse Rogers* J. says about this section in *Ex parte Edwards ; Re Norris* (3). The words " admits to " do seem to suggest an admission made by one party to legal proceedings to the other party, and the words " the matter " rather make one think that pending proceedings by or on behalf of the Postmaster-General are in contemplation. I am unable, however, to regard these considerations as

(1) (1932) 49 W.N. (N.S.W.) 5.
(2) (1862) 2 J. & H. 743, at pp. 744-745 [70 E.R. 1258, at p. 1259].
(3) (1932) 49 W.N. (N.S.W.), at p. 6.

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decisive. I feel that they hardly go beyond conjecture. The section can be made to "work" even in a case where a prosecution has been commenced by a member of the public, and in a proper case an adjournment could and should be granted by a magistrate even against the wish of an informant. I am of opinion that no relevant contrary intention appears from the Act. It was not suggested that any such intention appeared from the regulations. I think, with respect, that *Ex parte Edwards*; *Re Norris* (1), though approved by a majority of the Court of Criminal Appeal in *Ex parte Greene*; *Re Robertson* (2), was wrongly decided, and that the correct view is that which was expressed in *Re Morrison* (3).

On the other two points argued in the case I have nothing to add. I am of opinion that the appeal should be allowed, the order of the Supreme Court set aside, and the case remitted to the magistrate. The appellant, in accordance with his undertaking, must pay the costs of the appeal to this Court.

KITTO J. I agree with the reasons for judgment of the Chief Justice.

Appeal allowed. Appellant to pay costs of appeal. Orders of Supreme Court and of Special Magistrate discharged. Case remitted to Special Magistrate.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Newman, Sutherland, Sparrow and Williamson.*

C. C. B.

(1) (1932) 49 W.N. (N.S.W.) 5.
(2) (1948) 65 W.N. (N.S.W.) 142.
(3) (1916) S.A.L.R. 237.