[HIGH COURT OF AUSTRALIA.]

JOHN FAIRFAX & SONS PTY. LTD. . . APPELLANT;
RESPONDENT,

AND

McRAE . . . . . RESPONDENT.
APPLICANT,

REYNOLDS . . . . . APPELLANT;
RESPONDENT,

AND

McRAE . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1954, SYDNEY, *Aug.* 27, 30, 31;

1955, MELBOURNE, *Mar.* 18.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Contempt of court—Publication by newspaper—Allegations of police violence—Charges pending in court of petty sessions—Tendency to prejudice proceedings—Summary jurisdiction of Supreme Court—Public interest—Similar allegations—Judicial inquiry already ordered.

The Supreme Court has power to deal summarily not only with contempt of itself, but with contempt of any inferior court.

Re Syme; *Ex parte Worthington* (1902) 28 V.L.R. 552, overruled.

The appellant company (the proprietor of a newspaper), the editor of that newspaper and a solicitor were summarily charged, before the Supreme Court of New South Wales, with contempt of court in relation to a publication in the newspaper. The publication, which dealt with certain matter relating to the arrest of a person and contained allegations of violent and unprovoked assaults upon him by police officers on and shortly after his arrest, was headed "Police Violence Alleged" and consisted of a statutory declaration by the accused. The text of a letter, written by the solicitor for the accused to the Premier referring to the accused as having been falsely charged and seeking an investigation, was included in the publication, which also stated that the

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truth of the allegations made could only be determined by judicial process but were considered by the newspaper to be sufficiently grave to require investigation by Royal Commission. Three charges had been preferred against the accused before the publication and were pending at the time of publication. One of the charges was punishable summarily in a court of petty sessions only. The other two charges, as laid, were punishable summarily, but could have been the subject of indictments. On the third charge the accused could have been committed for trial by the justices. On the day before the publication complained of, the appointment of a judicial inquiry into certain allegations of a similar nature, made in a statutory declaration published in another newspaper, had been announced by the Government.

Held, that the matter published, having regard to all the circumstances attending its publication, did not have that real and definite tendency to prejudice or embarrass pending proceedings which is the essence of a contempt of the kind alleged.

A mere tendency to create a general prejudice against the police is insufficient to relate the publication to the charges pending.

The summary jurisdiction to punish for contempt should be exercised with great caution, and, in this particular class of case, only if it is made quite clear that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case.

The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration, but is always regarded as relevant, its importance varying according to circumstances.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte McRae*; *Re John Fairfax & Sons Pty. Ltd.* (1954) 54 S.R. (N.S.W.) 165; 71 W.N. 113, reversed.

APPEALS from the Supreme Court of New South Wales.

These were appeals from decisions of the Supreme Court of New South Wales (Full Court) (1), which convicted the appellants, the proprietor of a newspaper, its editor, and a solicitor respectively, of contempt of court. The proceedings arose out of publication of certain material in the newspaper. For some two years prior to the publication, the newspaper, and other newspapers, had published material highly critical of the conduct of some members of the police force of New South Wales. In February 1954 a statement of one A. P. Rigby was received at the office of the proprietor. This statement made allegations of repeated and brutal assaults by police officers on Rigby, on and after his arrest. Rigby had been charged, under s. 8A (a) of the *Vagrancy Act* 1902 (N.S.W.), with behaving in a public street in an offensive manner;

(1) (1954) 54 S.R. (N.S.W.) 165; 71 W.N. 113.

under s. 494 of the *Crimes Act* 1900 (N.S.W.) with unlawfully assaulting an officer of the police force while in the execution of his duty; and under s. 59 of the *Police Offences Act* 1901-1951 (N.S.W.), with resisting arrest. At the time of the publication, these charges were pending. No consideration was apparently given to the question of publishing Rigby's statement at the time of its receipt. The newspaper received a statutory declaration by one Studley-Ruxton on 8th March 1954. This contained allegations of a similar nature to those made in Rigby's statement. The declaration was published in another Sydney newspaper on 9th March 1954 (see *Consolidated Press Ltd.* v. *McRae* (1)). On the following day the State Government announced the appointment of a judge of the Supreme Court as a Royal Commissioner to conduct an inquiry into the allegations made by Studley-Ruxton. The appellant company, having taken counsel's advice that the publication of Rigby's statement, in the form of a statutory declaration, would not amount to a contempt of court, and, even if it did, would not be regarded as a serious contempt, published Rigby's statutory declaration. It also published a letter, addressed to the Commissioner of Police, from Rigby's solicitors. References to the matter appeared in the newspaper the next day, including a statement that Rigby had been "falsely charged". Further facts appear in the joint judgment.

The company, the editor and Rigby's solicitor were found guilty of contempt by the Full Court of the Supreme Court of New South Wales (*Street* C.J., *Owen* and *Clancy* JJ.) and were fined £250, £50 and £50 respectively. Each appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *A. V. Maxwell*), for the appellants John Fairfax & Sons Pty. Ltd. and Pringle. The principal matter in the statutory declaration did not bear on the trial of the charges. Its object was to complain of ill-treatment at the police station. It is not alleged that this caused any statement to be made. The three offences pending at the time of the publication were offences exclusively triable by the magistrate. The jurisdiction of the Supreme Court is limited to contempts of itself, or at most limited to punishing offences relevant to charges which could, by dint of its own processes, come before itself. The Supreme Court did not determine that point, but said that there existed in the statute book indictable offences in identical terms with two of the offences charged. Therefore, it was said, it was possible for indictments to be brought for the same happenings. The offence

(1) (1955) 93 C.L.R. 325.

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which matters is the proceeding actually pending. There is no identity between an offence triable summarily and an indictable offence, even though both are in the same terms and could arise out of the same circumstances. By no process of the Supreme Court could the offence triable summarily be converted into an indictable offence. [He referred to the *Justices Act* 1902-1951, ss. 21, 22, 52, 55, 133, 153; the *Vagrancy Act* 1902, s. 8A (a); the *Police Offences Act* 1901-1951, s. 59; the *Crimes Act* 1900, ss. 58, 494.] So far as the evidence goes, at the time of the publication, Rigby was on remand on three charges triable summarily, in respect of which there appeared to be no information or complaint nor any details as to how the charge was sought to be proved. [He referred to the *Justices Act* 1902-1951, s. 80.] The burden of the statutory declaration is the assaulting and the failure of senior police officers to interfere. The early paragraphs were prefatory, and they amounted to an assertion that he was innocent. He had already said that in court, on remand. Three things are relevant:—(1) the relative unimportance in the publication of the matters which could bear on the police proceedings; (2) the announcement that there would be a Royal Commission into allegations of a similar nature published in the press; (3) the publication is a part of a long-standing public discussion of police administration and its need for overhaul. Adding those three things together, it could not be said that this publication was calculated to interfere with any proceedings, or such interference as it might have was of minor importance compared with the other matters involved. Basically the offence of contempt is one of intent—either express or presumed. The presumption is drawn from the degree to which the publication must necessarily interfere with the proceedings. However much the publication might harm the proceedings, unless the publisher knew of them he could not be convicted. We submit that the matter must be looked at as if the statements in the declaration were true. There was a long-standing reluctance by the Government to take any steps. This sort of conduct can, in the last resort, be controlled only by public exposure. The Premier had requested information on statutory declaration of police illegalities. There had been an inquiry ordered on the publication of the statutory declaration by Studley-Ruxton. These are reasons for immediate publication. There being no express intent to influence proceedings, the appellants could be found guilty only if there is a substantial probability that the publication would influence the proceedings in question. It must be a real and substantial probability. There is, in the evidence, so little likelihood

of prejudice that, in default of an express intent, and considering the main purpose of the article, no contempt is feasible. As to the jurisdiction of the Supreme Court in this matter, we make two main submissions. First, these charges could never come before the Supreme Court. Secondly, there is no power in the Supreme Court to punish for contempt of a magistrate having exclusive jurisdiction to try the charges. Committal on a summary charge is void: *Bannister* v. *Clarke* (1); *Reg.* v. *Hughes* (2). The distinction between an indictable offence and a summary offence in practically the same words is observed. They are two distinct offences. Under s. 80 of the *Justices Act* 1902-1951 what the magistrate does is, at best, to commit the accused on another charge. There is a local antecedent to s. 80—46 Vic. No. 17, ss. 445, 471. Where there is a charge triable only summarily, an indictment would be of another offence. [He referred to the *Crimes Act* 1900, ss. 493, 494, 495, 496, 497; the *Justices Act* 1902-1951, s. 41.] As to the second submission, the Supreme Court has no jurisdiction to try summary contempts other than contempts of itself: *Packer* v. *Peacock* (3); *R.* v. *Parke* (4); *R.* v. *Davies* (5). The Court of Star Chamber exercised a jurisdiction to punish for contempt of any court. Such jurisdiction did not survive the abolition of that chamber.

[DIXON C.J. referred to *R.* v. *Almon* (6); *R.* v. *Clement* (7).]

The cases cited in *R.* v *Davies* (5) show that when the Central Criminal Court was not a part of the King's Bench, the latter court refused to punish contempts of the former. [He referred to *Onslow's and Whalley's Case* (8); *R.* v. *Parke* (4); *R.* v. *Daily Mirror*; *Ex parte Smith* (9); *R.* v. *Clarke*; *Ex parte Crippen* (10).] The common law has not gone to the extent of saying there can be contempt before there is process. In *R.* v. *Parke* (4) and *R.* v. *Davies* (5) the judges denied they were extending the doctrine. This Court is not bound by the divisional court. This is not a mere case of statutory interpretation; it is the attraction of a very large jurisdiction, if taken literally. The court should say that the jurisdiction is confined, as it was traditionally, to contempt of itself, or with the extensions accepted. In any case, there was an overriding public interest which, even if the court was of the opinion that the publication was calculated to interfere with the proceedings, overbore the other public interest of this case. This is not a

(1) (1920) 3 K.B. 598, at p. 606.
(2) (1879) 4 Q.B.D. 614, at pp. 623, 624, 626.
(3) (1912) 13 C.L.R. 577, at p. 582 et seq.
(4) (1903) 2 K.B. 432.
(5) (1906) 1 K.B. 32.
(6) (1765) Wilm. 243 [97 E.R. 94].
(7) (1821) 4 B. & Ald. 218 [106 E.R. 918].
(8) (1873) L.R. 9 Q.B. 219.
(9) (1927) 1 K.B. 845.
(10) (1910) 103 L.T. 636.

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manufactured case. If the facts in the statutory declaration can be true, there is a matter which transcends the individual interest in the administration of justice. The Court should be astute to see that this process is not used to stifle public discussion: *Re Clements* (1); *Hunt* v. *Clarke* (2); *Re Fairfax*; *Ex parte Compagnie des Messageries Maritimes* (3); *Reg.* v. *Payne* (4); *Ex parte Myerson* (5).

L. W. Street, for the appellant Reynolds, adopted the submissions of the other appellants. In the case of Reynolds there is a further ground for the appeal, namely, that the judgment of the Supreme Court is contrary to the evidence, and cannot be supported. The part played by Reynolds was no more than adjusting the form of the statement.

G. Wallace Q.C. (with him *E. H. St. John*), for the respondent in each case. As to the appellant Reynolds, the evidence shows that he signed a letter addressed to the police commissioner, with a clear intention of having it published. He knew that a statutory declaration was a condition precedent to publication; he then prepared the declaration and handed it to the only persons who could publish it. For the other appellants three points were raised. As to the question of jurisdiction, the appellant argued that in no circumstances were the charges triable other than summarily. Section 497 of the *Crimes Act* in clear terms deals with the assaults referred to in ss. 493 et seq. In the case of the second charge, it was open to the justices under s. 497 to say that it is an assault under s. 494, similar to one of the charges in s. 58, and a proper charge for indictment. If found guilty the penalty would be that prescribed by s. 58—it is the same offence: *R.* v. *Barron* (6). The doctrine of *autrefois acquit* is applicable. If, in any way, the charge might be tried in the higher Court, then it is sufficient. The fact that the case does not go to the higher Court is irrelevant: *R.* v. *Tibbits* (7). On the question of the lack of a written information, it is clear that an information could be oral: *Ex parte Walker*; *Re Goodfellow* (8); *Reg.* v. *Hughes* (9). *R.* v. *Parke* (10) and *R.* v. *Davies* (11) have been followed for so many years, and in so many courts that they should not be departed from. [He referred to *Packer* v. *Peacock* (12); *Porter* v. *The King*; *Ex parte Yee* (13);

(1) (1877) 46 L.J. (Ch.) 375.
(2) (1889) 58 L.J. (Q.B.) 490.
(3) (1911) 11 S.R. (N.S.W.) 508; 28 W.N. 152.
(4) (1896) 1 Q.B. 577.
(5) (1922) 39 W.N. (N.S.W.) 260.
(6) (1914) 2 K.B. 570.
(7) (1902) 1 K.B. 77.
(8) (1944) 45 S.R. (N.S.W.) 103; 62 W.N. 58.
(9) (1879) 4 Q.B.D. 614, at pp. 623, 624.
(10) (1903) 2 K.B. 432.
(11) (1906) 1 K.B. 32.
(12) (1912) 13 C.L.R. 577.
(13) (1926) 37 C.L.R. 432, at p. 443.

R. v. *Clarke*; *Ex parte Crippen* (1); *R.* v. *Daily Mirror*; *Ex parte Smith* (2); *R.* v. *Evening Standard*; *Ex parte Director of Public Prosecutions* (3); *R.* v. *Daily Mail*; *Ex parte Farnsworth* (4); *R.* v. *Gunn* (5); *Ex parte Bishop of Norwich* (6); *Attorney-General* v. *Soundey* (7); *Lyons* v. *Bates* (8); *R.* v. *McKinnon* (9); *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 23; (1935) 48 *Harvard Law Review* 885, at p. 909.] The history of the matter indicates that this jurisdiction is inherent in the King's Bench Division, and that it is to protect the administration of justice throughout the realm. It is not a non sequitur to say that a power to correct involves a power to protect. The contempt charged here is one amounting to an interference with the course of justice. The fact that there are two ways of protecting the administration of justice (by indictment and by the summary method) has been referred to by the appellants. The procedure by indictment has been said to be obsolete: *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 3n; (1935) 48 *Harvard Law Review* 885, at p. 909. A number of reasons is given in other cases why the summary method is to be preferred: *Skipworth's Case* (10); *R.* v. *Davies* (11); *R.* v. *Parke* (12). *R.* v. *Dunbabin*; *Ex parte Williams* (13) contains a statement of the necessary ingredients of the offence of contempt. The objective fact of a tendency to deflect the court is the test. *R.* v. *Davies*; *Ex parte Delbert-Evans* (14) supports the view that a mere possibility of the matter coming before a jury attracts the jurisdiction, and the mere fact that a magistrate or a judge alone might try the case is no excuse. The effect that such publications might have on witnesses has not been referred to. This matter is dealt with in *Halsbury's Laws of England*, 2nd ed., vol. 7, pp. 7, 8; *R.* v. *Blumenfeld* (15); *Bell* v. *Stewart* (16). As to the question of intention, reliance is placed on the remarks of *Fullagar* J. in *Davis* v. *Baillie* (17), and on *Bell* v. *Stewart* (18). The question of intention as a separate constituent element does not arise, because the defendants had knowledge of the risk involved in publishing, they had knowledge of the charges, and they deliberately took the risk. There is a clear contempt unless the public interest requires the publication. [He referred to *Ex parte Bread Manufacturers Ltd.*; *Re Truth*

(1) (1910) 103 L.T. 636.
(2) (1927) 1 K.B. 845.
(3) (1924) 40 T.L.R. 833.
(4) (1921) 2 K.B. 733.
(5) (1954) Cr. L. Rev. 53.
(6) (1932) 2 K.B. 402.
(7) (1938) 33 Tas. L.R. 143.
(8) (1911) Q.W.N. 13.
(9) (1909) 30 N.Z.L.R. 884.
(10) (1873) L.R. 9 Q.B. 230, at p. 233.
(11) (1906) 1 K.B. 32, at pp. 41, 42.
(12) (1903) 2 K.B. 432, at p. 442.
(13) (1935) 53 C.L.R. 434, at p. 442.
(14) (1945) K.B. 435.
(15) (1912) 28 T.L.R. 308, at p. 311.
(16) (1920) 28 C.L.R. 419, at p. 434.
(17) (1946) V.L.R. 486.
(18) (1920) 28 C.L.R. 419, at p. 432.

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& Sportsman Ltd. (1); *Ex parte Gaskell & Chambers Ltd.* (2); *Phillips* v. *Hess* (3); *Re Labouchere* (4); *Sunday Times Newspaper Co. Ltd.* v. *Sun Newspaper Ltd.* (5); *Ex parte Myerson* (6); *R.* v. *Daily Mail*; *Ex parte Factor* (7).]. It is conceded that there may be a special case where the doctrine might be applied in a criminal matter, but it would be rare. It cannot reasonably be said that the doctrine should be invoked here. The objective of the appellants could have been sought by other means.

Sir *Garfield Barwick* Q.C., in reply.

L. W. Street, in reply.

Cur. adv. vult.

Mar. 18.

The following written judgments were delivered:—

DIXON C.J., FULLAGAR, KITTO, TAYLOR JJ. This is an appeal from an order of the Supreme Court of New South Wales (Full Court) making absolute a rule nisi directed to the three appellants to show cause why they should not be punished for contempt of court. The appellant company is the proprietor of the Sydney Morning Herald newspaper, the appellant Pringle is the editor of that newspaper, and the appellant Reynolds is a solicitor practising in Sydney. The contempt charged consisted in the publication in the Herald of certain matter relating to the arrest of one Alan Pierpoint Rigby and containing allegations of violent and unprovoked assaults upon him on 18th February 1954 by certain members of the police force of New South Wales. Three charges were preferred by the police against Rigby, and these were pending at the time of the publication of the matter in question. That publication was held by the Full Court to constitute a contempt of court because it tended to interfere with the course of justice in relation to those pending proceedings. A fine of £250 was imposed upon the company, a fine of £50 upon Pringle, and a fine of the same amount upon Reynolds, who supplied some of the matter complained of to the newspaper.

Before examining the facts and circumstances in more detail, it will be convenient to consider a question of law of considerable importance, which was discussed before the Full Court and before this Court. It may possibly be going too far to say that it is always

(1) (1937) 37 S.R. (N.S.W.) 242, at pp. 249, 250; 54 W.N. 98, at p. 100.
(2) (1936) 2 K.B. 595.
(3) (1902) 18 T.L.R. 400.
(4) (1901) 18 T.L.R. 208.
(5) (1919) 19 S.R. (N.S.W.) 145, at p. 151; 36 W.N. 70.
(6) (1922) 39 W.N. (N.S.W.) 260.
(7) (1928) 44 T.L.R. 303.

of the essence of a contempt of the type alleged in this case that the matter published should have a tendency to prejudice or embarrass the conduct of proceedings actually pending in a court at the time of publication: see *R.* v. *Parke* (1) and *R.* v. *Daily Mirror*; *Ex parte Smith* (2). It has been seen, however, that in the present case proceedings by the police against Rigby were actually pending at the time of publication, and it is in relation to these that the question of contempt must be considered. In fact there was also pending at that time an information for assault laid by Rigby against one of the constables concerned. This fact, however, was not known in the Herald office, and we think that the Supreme Court rightly put this proceeding out of consideration. Now, the three charges against Rigby were pending not in the Supreme Court of New South Wales but in a court of petty sessions. And it was argued for the appellants, on the one hand, that, if there was a contempt here at all, there was no contempt of any court except the court of petty sessions, and, on the other hand, that the Supreme Court had no jurisdiction to deal summarily with a contempt of any court other than itself. The Full Court decided against this contention. In effect, their Honours accepted the second of the two propositions put, but rejected the first. The respondent contended that the jurisdiction of the Court of King's Bench to punish summarily for contempt (a jurisdiction inherited by the Supreme Court of New South Wales) extended to contempts of any court, or at least to contempts of any court which was subject to control by the King's Bench by means of any of the prerogative writs.

The three charges laid against Rigby were (1) that he behaved in an offensive manner in a public place, (2) that he resisted a constable in the execution of his duty, and (3) that he assaulted a constable in the execution of his duty. The first of these charges was laid under s. 8A (a) of the *Vagrancy Act* 1902. The offences created by that section are offences punishable summarily in a court of petty sessions, and it would appear that a charge of such an offence could not under any circumstances come before the Supreme Court on indictment. If the charge under the *Vagrancy Act* had been the only charge pending, *Owen* J. certainly, and perhaps the other members of the Full Court, would have held that that court had no jurisdiction to deal summarily with the appellants as for contempt. But the position with regard to the other two charges against Rigby was somewhat different. The

(1) (1903) 2 K.B. 432, at p. 437. (2) (1927) 1 K.B. 845, at p. 851.

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second charge was laid under s. 59 of the *Police Offences Act* 1901-1951. Again the charge actually laid is of an offence punishable summarily. But the same charge could have been laid as for an indictable offence, under s. 58 of the *Crimes Act* 1900. The third charge against Rigby was laid under s. 494 of the *Crimes Act* 1900. Here too the offence charged is an offence punishable summarily, but here again the same charge could have been laid, as for an indictable offence, under s. 58 of the *Crimes Act* 1900. Moreover the justices before whom this third charge came might, under s. 497 of the Act, instead of dealing with the case themselves, commit the defendant for trial on indictment in the Supreme Court or in quarter sessions. In these circumstances the Full Court held that it had power to entertain summary proceedings for contempt in relation to the second and third of the charges against Rigby. *Owen* J. expressly rejected the broader contention of the present respondent, but he said: "If the cause is one which *may* reach the superior court for trial, a contempt committed along the way is capable of being treated as a contempt of the superior court and therefore as being within its summary jurisdiction" (1). *Street* C.J. (with whom *Clancy* J. agreed on this aspect of the case) declined to express a concluded opinion on the broader submission of the respondent, but rested the jurisdiction of the court in the particular case on the basis adopted by *Owen* J.

We are of opinion that the Supreme Court rightly held that it had the jurisdiction in question, but we think, with respect, that the learned judges founded that jurisdiction on a basis which may be said to be at once too wide and too narrow. It seems to us too wide because it assumes that, if by any possibility, however remote, the relevant proceedings may find their way into the Supreme Court, then the Supreme Court has the jurisdiction in question. It is but a small step further to say that it is enough if some day some proceeding, capable of being affected by the matter published, might be commenced by somebody in the Supreme Court. That would be going much too far. The view adopted is, on the other hand, in our opinion, too narrow, because it denies (or assumes to be wrong) the broad view, which we hold to be correct, that the Supreme Court has power to deal not only with contempts of itself but with contempts of any inferior court. This latter view appears to be supported by modern authority, and also by historical considerations.

So far as authority is concerned, it is convenient to begin by referring to *R.* v. *Parke* (2). In that case it was argued for the

(1) (1954) 54 S.R. (N.S.W.) 163, at p. 173; 71 W.N. 113, at p. 118.

(2) (1903) 2 K.B. 432.

respondent that the High Court of Justice could not " deal by way of attachment for contempt with interferences with the due course of justice in any court other than itself " (1). *Wills* J. (speaking for himself, Lord *Alverstone* C.J. and *Channell* J.) said :—" It may be conceded that the jurisdiction to commit for contempt of court is confined to contempt of the court exercising the jurisdiction. Upon the wider and more general question, whether this Court will treat in this fashion inroads upon the independence of inferior courts, we propose to say a few words towards the close of this judgment. As far as the present case is concerned it does not seem to us to arise " (1). The judgment then proceeds to dispose of the case on the ground that the relevant proceeding was a prosecution for the indictable offence of forgery, which, although it had not at the material time gone beyond the court of petty sessions, must, if it were tried at all, be tried in a branch of the High Court of Justice. (Substantially the same view was taken in this Court in *Packer* v. *Peacock* (2).) The court then goes on to deal with the " wider and more general question ". No concluded opinion upon it is expressed, but the relevant earlier cases are cited and discussed, and it is clear that the inclination of their Lordships' opinion was towards an affirmative answer to that question (see (3)).

The difficulty which has not unnaturally been felt about this case seems to arise from the first sentence in the introductory passage quoted above—" It may be conceded that the jurisdiction to commit for contempt of court is confined to contempt of the court exercising the jurisdiction " (1). If this sentence is read—and this is the most obvious reading—as expressing an actual opinion that the jurisdiction is so limited, then it is, of course, authority for saying that the jurisdiction is so limited. But it ought not, in our opinion, to be so read. If it were finally accepted that the jurisdiction is so limited, then it is plain that the " wider and more general question ", to which so much careful attention is given, could not possibly arise. The truth seems to be that what the court is really saying is this—" Even if it be conceded that the jurisdiction is confined to contempt of the court exercising the jurisdiction, yet the jurisdiction exists in this case. We shall, however, consider later whether it is correct to say that the jurisdiction is so limited ". If the sentence is so read, any difficulty attaching to the case disappears, although no concluded opinion is expressed as to the jurisdiction to deal summarily with contempts of inferior courts, and what is said on that subject is *obiter*.

(1) (1903) 2 K.B., at p. 436.
(2) (1912) 13 C.L.R. 577.
(3) (1903) 2 K.B. 432, esp. at pp. 443, 444.

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It appears to us clear that the question, which was discussed at some length but left unanswered in *R.* v. *Parke* (1), received a definite affirmative answer in *R.* v. *Davies* (2). Again the judgment of the court (Lord *Alverstone* C.J., and *Wills* and *Darling* JJ.) was delivered by *Wills* J. Again he begins by saying that the case could be decided in favour of jurisdiction on what is substantially the same ground as that of the decision in *R.* v. *Parke* (1). But this time it is quite impossible to regard what is said on the " wider and more general question " as in the nature of *obiter dictum*. What is said is : " But, inasmuch as a further question of great and growing importance, namely the jurisdiction of this Court to treat attacks of this kind upon the independence and usefulness of inferior tribunals as offences to be dealt with *brevi manu* by this Court in its summary jurisdiction, has been argued, we think it desirable to deliver our judgment upon this point also, and to treat the case as if a committal had actually taken place to quarter sessions " (3). The question is stated in clear terms, and the answer given to it is put as a ground of the judgment. Nor can the answer made be in doubt when one reads what follows. The headnote appears to state the effect of the decision correctly when it says : " The King's Bench Division has power to punish by attachment contempts of inferior courts " (2). In *R.* v. *McKinnon* (4), *Dennis-ton* J. observes that before *R.* v. *Parke* (1) doubt existed as to whether, in the case of contempts of inferior courts, there was any remedy except the slow and cumbrous process of indictment, and he says (rightly, we think) that *R.* v. *Davies* (2) established " the broad doctrine that the King's Bench had power to punish such contempts by summary process " (5). The same " broad doctrine " has been applied in *R.* v. *Daily Mail* ; *Ex parte Farnsworth* (6) (contempt of a court martial) ; *Ex parte Bishop of Norwich* (7) (contempt of an ecclesiastical court) ; *Attorney-General* v. *Soundy* (8) (contempt of a licensing court) ; *R.* v. *Edwards* (9) (contempt of a county court) and *Ex parte Collins* ; *Re Hlentzos* (10) (contempt of a district court). The last-mentioned case is a decision of the Full Court of New South Wales : the jurisdiction in question is asserted in clear terms.

The cases mentioned above are (with the exception of the last two) cited by *Owen* J. in his judgment in the present case. His

(1) (1903) 2 K.B. 432.
(2) (1906) 1 K.B. 32.
(3) (1906) 1 K.B., at p. 37.
(4) (1909) 12 N.Z. Gaz. L.R. 423.
(5) (1909) 12 N.Z. Gaz. L.R., at p. 424.
(6) (1921) 2 K.B. 733.
(7) (1932) 2 K.B. 402.
(8) (1938) 33 Tas. L.R. 143.
(9) (1933) 49 T.L.R. 383.
(10) (1935) 52 W.N. (N.S.W.) 65.

Honour nevertheless expressed the opinion that " the jurisdiction of a superior court to punish for contempt in a summary way exists only where the contempt is a contempt of that superior court " (1). His Honour thought that in the cases cited the courts had " without any apparent close examination of the point assumed that, wherever a prerogative writ will lie to an inferior tribunal, there is power in the superior court to punish summarily a contempt of that tribunal " (2). It is to be noted that in *Packer* v. *Peacock* (3), *Griffith* C.J. said :—" Yet, with all respect, the reasoning, especially in the case of *R.* v. *Davies* (4), is not easy to follow. The connection between the general jurisdiction of the Court of King's Bench to correct inferior courts and a general jurisdiction to protect them is not obvious, and had never before been asserted " (5). But the learned Chief Justice added : " We should, however, hesitate long before declining to follow these authorities " (6).

With all respect, the position reached in *R.* v. *Davies* (4) was reached only after a close and careful examination of the question and of the somewhat inconclusive authorities which might be thought to bear upon it. Nor, as we think, is there anything unreal in the connection asserted in *R.* v. *Davies* (4) between a jurisdiction to issue prohibition or certiorari to inferior courts and a jurisdiction to punish for contempts of inferior courts. If, indeed, it is put, as *Griffith* C.J. put it, as a connection between a power to correct and a duty to protect, then it is true that the connection is not obvious. But, although the jurisdiction is " protective " in a sense, it has been said again and again that the court punishes contempts not in order to protect courts or judges or juries but in order to safeguard and uphold the rights of suitors and ensure that justice be done. So regarded, the power to punish for contempt of inferior courts and the power to issue *mandamus* or *certioriari* to inferior courts are seen as in truth but different aspects of the same function—the traditional general supervisory function of the King's Bench, the function of seeing that justice was administered and not impeded in lower tribunals.

The history of the jurisdiction to punish summarily for contempt is considered in two learned articles in the *Law Quarterly Review* by Sir *John Fox* ((1908) 24 L.Q.R. 184, 266 and (1909) 25 L.Q.R. 238, at p. 354) and by Sir *William Holdsworth* in his *History of English Law*, 4th ed. (1935), vol. III, pp. 391-394. It is necessary, as Sir *John Fox* says, to begin by distinguishing between different

(1) (1954) 54 S.R. (N.S.W.), at p. 176 ; 71 W.N., at p. 121.
(2) (1954) 54 S.R. (N.S.W.), at p. 175 ; 71 W.N., at p. 120.
(3) (1912) 13 C.L.R. 577.
(4) (1906) 1 K.B. 32.
(5) (1912) 13 C.L.R., at pp. 585, 586.
(6) (1912) 13 C.L.R., at p. 586.

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kinds of contempt of court. A party disobedient to the order or process of a court is often said to be " in contempt ". In these cases each court has its own appropriate means of enforcement, and such " contempts " are not criminal. Criminal contempt consists in contumelious behaviour to a court, and is divided into two broad classes—contempt in the face of the court and contempt out of court. All criminal contempts are indictable offences at common law. Contempts in the face of the court have, however, from time immemorial been punishable summarily (i.e. without conviction by a jury) by the court before which the contempt is committed. This, according to *Selden*, could be justified by the view that, the offence being committed in the face of the court, " the very view of the court was a conviction in law". But, with regard to contempts out of court, it would seem that all through the mediaeval period, and up to at least the middle of the 17th century, a person guilty of criminal contempt out of court could not, unless he chose to confess his guilt, be punished except upon conviction by a jury. To this extent Sir *John Fox* (whose view is accepted by Sir *William Holdsworth*) rejects the well-known passage in the judgment of *Wilmot* J. in *R.* v. *Almon* (1), in the course of which he says that the power of the Courts in Westminster Hall to punish summarily for contempt out of court is " coeval with their first foundation and institution ". The truth seems to be that that power was regarded from an early date as residing in the Council, which dealt summarily with contempts of *any* court, that it was later exercised freely by the Star Chamber, and that, after the abolition of the Star Chamber by the Act of 1641, it was assumed by the King's Bench. Sir *John Fox* finds what he regards as the earliest authentic reported example in the King's Bench as late as 1720. *Holdsworth* in his *History of English Law*, 4th ed. (1935), vol. III, pp. 393, 394, explains the position concisely in a passage, the whole of which is important, but the first part of which only need be quoted. That learned author says :— " The Council, and later the Star Chamber, had long possessed a jurisdiction over contempts committed against *any* court ; and the common law courts had from an early period sometimes referred such cases to them. After the abolition of the Star Chamber and the jurisdiction of the Council in England in 1641 the King's Bench assumed this jurisdiction. It was then able the more easily to do so because it could be represented as a supplement to, and a corollary of, its powers to correct ' misdemeanours extra-judicial ' committed by or occurring in all inferior courts ; and as a consequence of the fact that it had inherited from the Star Chamber the

(1) (1765) Wilm. 243, at p. 254 [97 E.R. 94, at p. 99].

position of *custos morum* of all the subjects of the realm. And these are the bases on which this jurisdiction is now rested". And he cites *R.* v. *Davies* (1). This passage shows that the jurisdiction in question, derived from the Council, was a jurisdiction to deal summarily with contempts committed against *any* court, and it brings out the reality of the connection between supervision by means of the prerogative writs and supervision by means of punishment for contempt: cf. *R.* v. *Davies* (2).

The case of *Re Syme*; *Ex parte Worthington* (3) was decided long before *R.* v. *Davies* (1). The decision was, in our opinion, wrong, and it should be regarded as overruled. The judgment of *Holroyd* J. cites two English decisions—*Cook* v. *Cook* (4) and *Re Application for Attachment* (5). The first of these cases was not a case of criminal contempt. The second is among the cases considered in *R.* v. *Parke* (6).

For the above reasons we are of opinion that the Supreme Court of New South Wales has power to deal summarily with contempts of inferior courts of New South Wales, and for this reason that court had jurisdiction to entertain the application made to it, and to make the order under appeal. It is now necessary to consider the appeal on its merits. But, before examining the matter published, it is desirable to refer briefly to what may be called the background of the publication.

For some two years before the publication of the matter now in question the conduct of some members of the police force of New South Wales had on many occasions been the subject of reports and highly critical comment not only in the defendant company's newspaper but in other newspapers published in Sydney. In the course of evidence taken before a Royal Commission, appointed to inquire into the liquor trade, allegations of a very serious nature were made involving a number of members of the force, and, in the light of these and of the report of the Commission, which was published later, the Herald published a number of articles demanding that an open inquiry should be made into the whole administration of the police force. In addition to what had come to light through the Royal Commission the newspaper had, in and shortly before January 1954, received accounts of police misconduct which, in the opinion of those responsible for its policy, were not without substance. The most serious charges made against police officers were of corruption, but from time to time allegations of violence

(1) (1906) 1 K.B. 32.
(2) (1906) 1 K.B., at p. 43.
(3) (1902) 28 V.L.R. 552.
(4) (1885) 2 T.L.R. 10.
(5) (1886) 2 T.L.R. 351.
(6) (1903) 2 K.B., at p. 439.

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and brutality were made. About the middle of January 1954 the Government called for a report from the Commissioner of Police, Mr. Delaney, and the commissioner's report was published on 29th January. Thereafter the Herald, in leading and other articles, pressed further for a public inquiry into the administration of the force. Whether there was any truth in any of the allegations made is, of course, irrelevant to any question which this Court has to consider, but the whole situation was obviously disquieting, and the whole subject was plainly a matter of great public interest and of great public importance.

On or about 23rd February 1954 a statement by Rigby, not made by way of statutory declaration, containing allegations of violent assaults upon him on 18th February, was received in the office of the Herald, but the question of publishing it does not seem even to have been considered at this stage. On 8th March 1954 a statutory declaration by a man named Studley-Ruxton was received in the office of the Herald. This contained allegations of extremely brutal treatment by several members of the force after Studley-Ruxton had been arrested. It was decided that, for the time being at any rate, these allegations should not be published. However, the same statutory declaration had on the same day been forwarded also to another Sydney newspaper, the Daily Telegraph, and on the following day, 9th March, it was published in full in that newspaper. The Government on 10th March announced the appointment of a judge of the Supreme Court as a Royal Commission to conduct a public inquiry into Studley-Ruxton's allegations. These events seemed to the management of the Herald to raise the question whether Rigby's statement, which had been in their hands for about a fortnight, should not now also be published. It was known that a charge or charges had been laid by the police against Rigby, and the possibility that publication might be held to be a contempt of court was not overlooked. Counsel were consulted, and the advice, given orally, was to the effect that publication would not amount to a contempt of court, and that, even if it were held to be a contempt, it would not be regarded as a serious contempt. It was decided that, if Rigby were prepared to support his statement by a statutory declaration, publication would be made. Rigby made a statutory declaration, and this was published in the Herald on the following morning, 11th March.

The text of the statutory declaration was preceded in the issue of 11th March by certain introductory matter under the heading "Police Violence Alleged. Another Statement sent to Premier, Delaney". This introductory matter was in the following terms :—

" Yesterday the Premier, Mr. Cahill, appointed Mr. Justice Dovey to inquire into allegations by Mr. David Studley-Ruxton that he was assaulted by seven police officers at Darlinghurst Police Station on February 25th. Today the ' Herald ' publishes a statutory declaration by Mr. Alan Pierpoint Rigby, alleging that he was assaulted by several police officers at Phillip Street Police Station on February 18. The ' Herald ' has been in possession of a statement by Mr. Rigby since February 23, but has not published it as proceedings against him are at present pending before a police court. For the same reason, the ' Herald ' did not publish the statement by Mr. Studley-Ruxton which it received on March 8. Now that the Premier has ordered a judicial inquiry into the allegations made by Mr. Studley-Ruxton, Mr. Rigby's solicitors, Rex Reynolds Baker and Company, have sent copies of his statutory declaration to the Premier and to the Police Commissioner, Mr. C. J. Delaney. In these circumstances, the ' Herald ' considers itself obliged to publish the declaration. While clearly the truth of these allegations can be decided only by judicial process, the ' Herald ' believes them to be sufficiently grave to require investigation by the same method and at the same time as the allegations made by Mr. Studley-Ruxton."

Only one paragraph of Rigby's declaration need be set out. That is par. 2, which runs as follows :—" On Thursday, 18th February, 1954, at about 5 p.m. I was standing near a barrier at the intersection of Macquarie Place and Bridge Street waiting to see Her Majesty the Queen and the Duke of Edinburgh pass along Bridge Street. I had my hand on the top of the barrier when a constable of police, whose name I now know but whom I shall in this declaration call Constable ' A ', brought his hand down on my hand, which was on the barrier, and at the same time said to me in a loud tone of voice, ' Get your hands off there '. I withdrew my hand and said, ' All right, but you needn't hit me like that. You have no right to lay hands on me ' ". For the rest, the declaration asserts that Rigby was taken into custody by Constable " A " and another constable, escorted to the Phillip Street police station, and there subjected to a series of brutal assaults. The substance of pars. 3, 4 and 5 is that he was marched to the police station with his arm twisted up behind his back in such a way as to cause him unnecessary pain. What is described in these paragraphs, though open to criticism, is not of a very serious character. The grave misconduct is said to have taken place after the arrival at the station. The declaration concludes :—" From the time I was first spoken to by Constable ' A ' until the time I was released I did not resist the

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police in any way, nor did I give them any cause to assault me as they did ".

There was also published in the issue of the Herald of 11th March a copy of a letter written by Rigby's solicitors to the Commissioner of Police and enclosing a copy of the statutory declaration. The second paragraph of the letter ran as follows :—" In view of a similar case, to which publicity has already been given in the Press, and in view of the announcement that a judge of the Supreme Court has been appointed to inquire into this first mentioned case, we consider it our duty to bring our client's case to your notice, and to that end we enclose herewith a copy of his statutory declaration. We also consider it our duty to give the facts of our client's case the widest possible publicity, and copies of the statutory declaration have been forwarded to the Press. We seek your co-operation in having our client's case thoroughly investigated, and in having it made the subject of an inquiry by the same Supreme Court judge who is inquiring into, we understand, the similar case to which publicity has already been given ". There were other references in the newspaper to the matter, and to allegations which had been made against the police generally, but these have, in our opinion, no relevance to any question of contempt.

In the issue of the Herald of 12th March 1954 there were further references both to the case of Rigby and to the case of Studley-Ruxton, but the only matter of any importance for present purposes is that the newspaper published the text of a letter which had been sent by Rigby's solicitors to the Premier of New South Wales. After referring to the nature of Rigby's allegations, the letter proceeded :—" We understand that you have directed an inquiry into allegations by a Mr. Studley-Ruxton to the effect that he was assaulted by a number of police officers, and that this inquiry is to be presided over by a Supreme Court Judge. We earnestly request that you will see fit to direct that our client's allegations against the police be inquired into by the same Judge. In making this request, we would point out that our client is a man of standing in the community, he has been in business as a commercial artist for the past 27 years, is a man of the highest integrity, and is well known in the commercial world. That he could be without any reason assaulted by police officers and falsely charged is a matter of the utmost gravity, and we feel it can only be effectively dealt with by a full and open inquiry in the manner above suggested ". The rest of the material in the issue of 12th March consisted mainly of criticism of the Premier and the Attorney-General for their

refusal to enlarge the terms of the public inquiry to cover the allegations made by Rigby.

In the Supreme Court somewhat different views seem to have been taken by *Street* C.J. and *Owen* J. respectively. All the learned judges appear to have considered only the statutory declaration of Rigby, and not to have regarded any of the other matter published as material. But *Owen* J. seems to have regarded the whole of the declaration as being " in effect a statement by an accused person of the evidence which he would give at his trial . . . a detailed statement of facts, which, if true, show that the declarant had committed no offence " (1). So regarding the declaration as a whole, his Honour held its publication to be a punishable contempt. The learned Chief Justice took the view that publication of the declaration, so far as it related to events which happened after arrival at the police station, could not be held to be contempt of court. Those events, he thought, could have no possible relevance in any material pending proceeding. His Honour was nevertheless of opinion that publication of the earlier paragraphs of the declaration, which purported to set out the circumstances of the actual taking into custody of Rigby, constituted a contempt. This, he said, " amounts to the publication of the evidence likely to be given at the subsequent trial ", and had therefore " a tendency to prejudice the fair trial of the issues involved in these proceedings " (2).

We agree with what is implicit in both judgments, viz. that the publication in question can only be treated as a contempt by virtue of some bearing on the question of the guilt or innocence of Rigby, and we agree with the Chief Justice that allegations of cruelty or other misconduct on the part of the police cannot, as such, have any bearing on that question. Such allegations could only become admissible in evidence if something in the nature of a confession were tendered in evidence, and it were sought by the defence to exclude it on the ground that it was not voluntary. There is no suggestion here that the ill-treatment alleged had for its object the obtaining of a confession or " statement ", nor does it appear that any such confession or " statement " was ever sought or made. The question which emerges thus seems to us to be whether any of the material published can properly be regarded as having such a relation to the charges pending against Rigby that it tended to prejudice or interfere with the due and fair determination of his guilt or innocence.

(1) (1954) 54 S.R. (N.S.W.), at p. 177; 71 W.N., at p. 121.

(2) (1954) 54 S.R. (N.S.W.), at p. 167; 71 W.N., at p. 114.

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We would begin by saying that a mere tendency to create a general prejudice against the police is, in our opinion, plainly insufficient. Before examining the question further, it is desirable to make certain general observations.

We have expressed our opinion that the scope of the summary jurisdiction to punish for contempt is wide, and extends to the punishment of contempts of any court, and we have referred to its history. Its practical justification lies in the fact that in general "the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy" (per *Wills* J. in *R.* v. *Davies* (1), citing *R.* v *Almon* (2)). Because it is founded on the elementary necessities of justice, there must be no hesitation to exercise it, even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice. We are in complete agreement with *Owen* J. when he says, in effect, that it would be a disgraceful thing if "trial by newspaper" were allowed to supersede, or to influence, the ordinary process of the courts (3). Perhaps there has been in the past too little vigilance on the part of the Crown for the vindication of this principle. On the other hand, because of its exceptional nature, this summary jurisdiction has always been regarded as one which is to be exercised with great caution, and, in this particular class of case, to be exercised only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case. A penalty will not be imposed in its exercise "unless the thing done is of such a nature as to require the arbitrary and summary interference of the court in order to enable justice to be duly and properly administered without any interruption or interference"—per *Cotton* L.J. in *Hunt* v. *Clarke* (4), quoted by Lord *Russell* C.J. in *Reg.* v. *Payne* (5). Sometimes the court may think that, technically speaking, a contempt has been committed, but that, because the tendency to embarrass is slight, or because of special circumstances, it ought to refuse to exercise its summary jurisdiction. There may be occasions when it will be material to remember that there may be attempts to abuse the jurisdiction. There have been occasions where summary proceedings for contempt have been commenced, or threatened, not with the real object of ensuring the impartial

(1) (1906) 1 K.B., at p. 41.
(2) (1765) Wilm., at p. 256 [97 E.R. at p. 100].
(3) (1954) 54 S.R. (N.S.W.), at p. 177; 71 W.N., at p. 122.
(4) (1889) 58 L.J. (Q.B.) 490, at p. 493.
(5) (1896) 1 Q.B. 577, at p. 581.

administration of justice, but solely for the purpose of stopping public comment on, or even public inquiry into, a matter of public importance. A court possessing the summary jurisdiction will not allow itself to be made the instrument for effecting such a purpose.

In the present case, a consideration of all the matter published, and of all the circumstances attending the publication, has led us to the conclusion that the occasion was not such as to justify the exercise of the summary jurisdiction. The case was arguable, but we think that the rule nisi should have been discharged.

The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to circumstances. In the present case we think that it is of more importance than usual. For here not only is it clear that nobody in the Herald office had the slightest intention of committing a contempt, or the slightest intention or desire of doing or saying anything which might affect in any way the conduct or outcome of any legal proceeding. It is also clear that to those responsible for what was published in the Herald the guilt or innocence of Rigby on any charge pending against him was a matter of complete indifference. From their point of view it did not matter one iota whether Rigby had committed, or been charged with, a grave offence or a petty offence or no offence at all. What concerned them, and all that concerned then, was that a statement had been made, subject to a sanction equivalent to that attaching to an oath, that a man had been grossly maltreated by police constables after being taken into custody. If the allegations made were true—and any opinion as to their truth was expressly disclaimed—their seriousness could not be affected by any question of the guilt or innocence of Rigby on any charge. Nor is it to be overlooked, in considering the purpose of the publication, that other complaints against the police had been made and had been published in the press, that the Premier had publicly invited the citation of specific instances, and that the Government had just appointed a Royal Commission to investigate specific allegations in another case. In the generality of cases of this class, where a penalty has been imposed, pending legal proceedings have provided either the actual subject matter or the immediate occasion of the publication. In *Packer* v. *Peacock* (1), for example, the sole occasion of the publication was a pending charge of murder against Peacock, and the only interest of the

(1) (1912) 13 C.L.R. 577.

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matter published lay in its bearing on his guilt or innocence. In *Davis* v. *Baillie* (1) there was a direct suggestion of the guilt of Davis, who had absconded from bail, on charges of breaking and entering, and his prior convictions were stated. On the other hand in *Ex parte Bread Manufacturers Ltd.*; *Re Truth & Sportsman Ltd.* (2) where the article complained of formed part of a series of articles which began before the relevant litigation was commenced, and which dealt generally with a matter of public interest, the Full Court of New South Wales refused to punish as for contempt, *Jordan* C.J. saying that any tendency which the articles might have to influence the pending litigation was " purely fortuitous " (3): cf. *Phillips* v. *Hess* (4). In the present case, the police charges against Rigby did not provide the occasion of the publication, and had nothing to do with the purpose of the publication. If what was published did have any bearing on those charges, that bearing was, to use Sir *Frederick Jordan's* word, fortuitous.

These considerations are perhaps enough of themselves to support the conclusion that the case was not one for the exercise of the summary jurisdiction in respect of contempts. But indeed, even if the matter published is scanned from a purely objective point of view, we do not think that it is actually possible to find in it that real and definite tendency to prejudice or embarrass pending proceedings, which is of the essence of a contempt of the kind alleged. The matter in question must be read as a whole. It is extensive, and in each of the two issues of 11th and 12th March comprises several columns. Only what have seemed to us to be the directly relevant parts have been set out above. The matter must also be read in the light of the allegations which had been publicly made against certain members of the police force over a considerable period, and especially in January and February 1954, and of the circumstances existing at the time of publication. The text of the statutory declaration is preceded by an introductory statement, which is set out above. The proceedings against Rigby are expressly mentioned, not in such a manner as to contain the slightest suggestion of Rigby's guilt or innocence but as providing the reason why Rigby's statement had not been published earlier. The writer goes on to say that, now that the Premier has ordered a judicial inquiry into the similar allegations made by Studley-Ruxton, Rigby's solicitors have sent copies of his declaration to the Premier and the Commissioner of Police, and that in these

(1) (1946) V.L.R. 486.
(2) (1937) 37 S.R. (N.S.W.) 242; 54 W.N. 98.
(3) (1937) 37 S.R. (N.S.W.), at p. 251; 54 W.N., at p. 100.
(4) (1902) 18 T.L.R. 400.

circumstances the Herald " considers itself obliged " to publish the declaration. The Herald takes no responsibility for the truth of Rigby's allegations, but " believes them to be sufficiently grave to warrant investigation " along with those made by Studley-Ruxton. The text of the declaration, which follows, and especially par. 2, which we have set out above, may be said to suggest by implication that *no* offence of any kind had been committed by him, and the last paragraph, which also is set out above, contains the words, " I did not resist the police in any way ". But there is no express reference to any charge laid against Rigby, and neither in the introductory matter nor in the declaration itself is anything said or suggested with regard to the nature of any charge which may have been laid. The truth is, we think, that, so far as anything in the issue of 11th March is concerned, there is nothing in it which can properly be regarded as having any real bearing on any pending legal proceeding. The publication does, of course, tend to evoke general distrust and suspicion of the police in relation to any criminal proceeding launched by them, but, as we have said, that is plainly not enough.

The same is, in our opinion, true of the matter published on 12th March, but there is a part of it which does come near to offending, and which requires special mention. The issue of that date contains the letter from Rigby's solicitors to the Premier, with which was forwarded the statutory declaration. This letter states that Rigby was taken into custody " without cause ", and it contains the paragraph which has been set out above. This paragraph asserts that Rigby is " a man of standing in the community " and " a man of the highest integrity ", and it says : " that he could be without any reason assaulted by police officers and falsely charged is a matter of the utmost gravity ". This letter, it is to be observed, was the work of Rigby's solicitors, who, unlike the proprietor and editor of the newspaper, *were* concerned with the guilt or innocence of Rigby on any charge laid against him, and it may be said to contain a suggestion not merely that Rigby is innocent of any offence but that charges have been laid against him which are known by the informant or informants to be unfounded : cf. *Daw* v. *Eley* (1).

It may well be thought that this letter, or at least the last sentence of it, ought not to have been published in the newspaper. But, when it comes to a question of contempt, the words to which exception might be taken must be read in their context. The whole purport of the letter is an appeal to the Premier to have Rigby's

(1) (1868) L.R. 7 Eq. 49, at p. 61.

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allegations of assault investigated at the same time by the tribunal which had been appointed to investigate the allegations of Studley-Ruxton. It is in support of this appeal that the Premier is told that Rigby is a respectable and responsible person, whose statements merit serious consideration. Then the words " That he *could be* without any reason assaulted and falsely charged is a matter of the utmost gravity " do not amount to an assertion that Rigby was falsely charged, but really mean that the possibility of Rigby's allegations being true raises a question of the utmost gravity (as indeed it did), and they are followed by the concluding words of the letter—" and we feel it can only be effectively dealt with by a full and open inquiry in the manner above suggested ". But not only must the last sentence of the letter be read in its context in the letter. The whole letter must be read in its context in the newspaper of 12th March. Again the matter published consists of several columns, and again the whole purport of what is published is that the terms of the inquiry to be held should be enlarged to include Rigby's allegations. The adoption of this course is strongly urged, the reasons given by the Government for refusing to adopt it are stated and strongly criticised, the views of political leaders on the refusal are given and supported or refuted, and so on. In its own context, and in this wider context, a single sentence of the solicitors' letter loses much of the significance which it might have had, if it had been published in isolation.

Looking at the whole of the matter published on the two days, we cannot find in it any real tendency to interfere with or embarrass the due conduct of any proceedings against Rigby. *Owen* J. himself said :—" I agree that it is in the highest degree improbable that the publication would affect the mind of any stipendiary magistrate who might try the informations summarily " (1). But he added :— " I think that it might well have a prejudicial effect should indictments be preferred and a trial by jury take place " (2). It would seem in the highest degree improbable at the time of publication that the charges would ever go before a jury. But in any case the matter published has no substantial bearing on those charges. The whole substance and gravamen of it all is that allegations of violence and brutality have been made against members of the police force, that they are to be taken very seriously, that the question whether they are true or false is a matter of great public importance, and that they should be made the subject of official public inquiry. No attempt is made, no real tendency is shown, to pre-judge any

(1) (1954) 54 S.R. (N.S.W.), at p. 177 ; 71 W.N., at p. 121.

(2) (1954) 54 S.R. (N.S.W.), at p. 177 ; 71 W.N., at pp. 121, 122.

police prosecution. There is in no sense an assumption of the defence of Rigby on any charge. It is nowhere expressly stated that he has been charged with anything. Anyone who chooses to infer from one or two brief passages that some charge or other has been made will be able to find nothing of substance to suggest to him that Rigby is either guilty or not guilty of the unknown offence. Clearly a contempt may be committed although there is no specific reference to any pending proceeding, but here the existence of pending proceedings seems to us to be a mere accidental circumstance which cannot make criminal a publication in no way concerned with those proceedings but made altogether *alio intuitu*.

The appeal should, in our opinion, be allowed with costs. The order under appeal should be discharged, and in lieu thereof it should be ordered that the rule nisi be discharged with costs.

McTIERNAN J. I agree that these appeals should be allowed. The publication of the matters complained of was capable of being regarded as a technical contempt, but when the whole context of the article complained of, and the circumstances in which it was published are taken into consideration, I think that nothing which was published had a clear and distinct tendency towards swaying and influencing a magistrate, by whom the pending proceedings would be determined.

I agree that the Supreme Court would have jurisdiction to punish for contempt amounting to an interference with the course of justice in those proceedings.

Appeals allowed with costs. Order of the Supreme Court dated 28th April 1954 discharged. In lieu thereof order that the rule nisi dated 15th March 1954 be discharged with costs.

Solicitors for the appellants, John Fairfax & Sons Pty. Ltd., and J. M. D. Pringle, *Stephen, Jacques & Stephen.*

Solicitors for the appellant, R. Reynolds, *H. Roy Booth & Boorman.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor of New South Wales.

G. D. N.