[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

FLETCHER AND ANOTHER;

Ex parte KISCH.

H. C. of A. 1935.

SYDNEY, *Jan.* 29, 30, 31; *Feb.* 1, 6.

Evatt J.

Contempt of Court—Decision of High Court—Publication in newspaper of matter relating thereto—Criticism of decision—Duty of publishers—Punitive jurisdiction of Court—Principles observed—Contempt of State inferior Court—General jurisdiction of High Court.

Upon an application made to the High Court that the editor and the proprietor of a certain newspaper be punished for contempt of that Court in publishing certain articles and letters in the newspaper purporting to criticize a decision of the High Court,

Evatt J. *held* that the legal principles applicable in such a case are:—

(*a*) The High Court has ample jurisdiction to punish summarily those responsible for publications calculated to obstruct or interfere with the administration of justice, whether such publications take the form of comment referring to proceedings pending in the Court, or that of unjustified attacks upon the members of the Court in their public capacity.

(*b*) In the case of attacks upon the Court or its members, the summary remedy of fine or imprisonment is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice, and where the attacks are unwarrantable.

(*c*) It is the duty of the Court to protect the public against every attempt to overawe or intimidate the Court by insult or defamation, or to deter actual and prospective litigants from complete reliance upon the Court's administration of justice.

(*d*) The facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice.

(*e*) Even although the criticism exceeds the bounds of fair comment so that other remedies of a civil or criminal nature are or may be available, the Court will not apply the summary remedy unless upon the principles stated above.

(*f*) In all cases of contempt the Court has power to act not only summarily but *ex mero motu*.

(*g*) Summary proceedings for contempt are criminal in character: therefore the respondents are entitled to invoke the principle that guilt should be proved beyond reasonable doubt.

Some of the letters were published after it had been announced that fresh proceedings in a Court of Petty Sessions were to be taken against the applicant.

Held that the High Court possesses no general jurisdiction in relation to contempts constituted by publications tending to prejudice proceedings before inferior Courts of a State, even though such inferior Courts are about to exercise, or are exercising, Federal jurisdiction.

MOTION FOR COMMITTAL.

Between 21st December 1934 and 8th January 1935, certain letters and articles were published in the *Sydney Morning Herald*, a newspaper published daily except on Sundays, most of which letters and articles purported to criticize the decision of the High Court in *R.* v. *Wilson*; *Ex parte Kisch* (1), announced on 19th December 1934, to the effect that Scottish Gaelic could not be regarded as a European language within the scope and intention of sec. 3 (*a*) of the *Immigration Restriction Act* 1901. Oral judgments were delivered which set out the reasons for the decision, and a full statement of those reasons was available to the reporters of the various newspapers. On 20th December a report of the decision was published in the *Sydney Morning Herald*, but a brief and inadequate summary of the judgment of the Court was given.

An application was made to the High Court by Egon Erwin Kisch that C. Brunsdon Fletcher and John Fairfax & Sons Ltd., the editor and proprietor respectively of the *Sydney Morning Herald*, be punished for contempt of that Court, on the grounds that (*a*) the letters published on 7th and 8th January 1935 were calculated to interfere with the fair trial in the Court of Petty Sessions of a new information laid against the applicant, and (*b*) that all the articles and letters published between 21st December and 8th January constituted so serious an attack on the Court and its members that the respondents should be punished.

(1) *Ante*, p. 234.

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The motion now came on for hearing before *Evatt* J.

It appeared from the evidence that the letters of 7th and 8th January were published after the announcement of the new proceedings against Kisch.

In an affidavit sworn by a solicitor's clerk on 8th January, the deponent stated that from the time of the delivery on 19th December of the judgment referred to above until the date of the affidavit, a series of attacks upon the competency of the High Court, and the means and methods adopted by the Court in arriving at its decision, had been made in the *Sydney Morning Herald*. The deponent stated that the series of attacks constituted a systematic campaign by the respondents to create dissatisfaction with the Court with respect to its competency and justice in order to prejudice Kisch in any further proceedings under the *Immigration Act*, and that Kisch had been so prejudiced. In a further affidavit, sworn by the same deponent on 23rd January, he stated that in fresh proceedings Kisch was convicted on 21st January by a magistrate of being on 3rd January 1935, a prohibited immigrant found within the Commonwealth, in that he was a person who immigrated into the Commonwealth and had been declared by the Minister to be in his opinion from information received from the Government of the United Kingdom through official channels undesirable as an inhabitant of, or visitor to the Commonwealth.

The respondent Fletcher stated in an affidavit that he had been for more than sixteen years the editor of the *Sydney Morning Herald*, with which he had been associated in journalism for nearly thirty-two years; that immediately after the High Court's judgment on 19th December he received a vast number of letters on the matter, in which the writers of the greater part of the letters complained of the meaning which they attributed to the judgment in respect of the Gaelic language; that such letters were received practically every day, as many as thirty arrived on one day, and as the amount of space at his disposal for all correspondence was limited generally to one column per day, he, as editor, had to select therefrom those letters which in his judgment were representative of the opinions of the various writers; that his only desire in publishing the correspondence was, in accordance with the policy of the newspaper,

to place the columns of the newspaper at the disposal of correspondents, as he deemed it his duty, on a matter which from the number of letters received was, in his opinion, of very great importance to a large section of the community; that the letters were published by him without comment or criticism; that it was not the intention of the respondents in publishing the matters complained of to produce an impression in the minds of the public and its readers in any way adverse to the High Court; that the article by "Columbinus" was written and contributed voluntarily, and not in any way at the request of the respondents; that that article was paid for in accordance with the invariable practice of the newspaper; that it was impossible in this matter to publish in full the judgments of all the Judges, but the usual practice was followed of publishing a summary which fairly expressed the decision of the Court; that on the same day as that on which that summary was published five other decisions of the High Court were also published in the newspaper in the form of summaries; that an article received from a named King's Counsel was too lengthy for publication at the time of its receipt; that he fairly and without prejudice and without any other desire than properly to present the views of correspondents, selected such letters as fairly carried out that desire; that the selection was made by him to the best of his ability without reference to anything but a desire fairly to ventilate both sides of the matter. On behalf of himself and the other respondent he denied the charges made in the affidavit by the solicitor's clerk on 8th January.

Fletcher was cross-examined on his affidavit.

Other material facts appear in the judgment hereunder.

Piddington K.C. (with him *Farrer*), for the applicant, referred to *R.* v. *Nicholls* (1); *R.* v. *Editor of the New Statesman*; *Ex parte Director of Public Prosecutions* (2); *Attorney-General of the Irish Free State* v. *O'Kelly* (3); *R.* v. *Gray* (4); *In re Read and Huggonson* (5); *Porter* v. *The King*; *Ex parte Yee* (6); *Anderson* v. *Fairfax* (7); *Re the Echo and Sydney Morning Herald Newspapers* (8); *R.* v. *Daily Mirror*; *Ex parte Smith* (9); *R.* v. *Freeman's Journal* (10).

(1) (1911) 12 C.L.R. 280.
(2) (1928) 44 T.L.R. 301.
(3) (1928) I.R. 308, at p. 315.
(4) (1900) 2 Q.B. 36, at p. 40.
(5) (1742) 2 Atk. 469; 26 E.R. 683.
(6) (1926) 37 C.L.R. 432, at p. 443.
(7) (1883) 4 L.R. (N.S.W.) 183.
(8) (1883) 4 L.R. (N.S.W.) 237.
(9) (1927) 1 K.B. 845, at p. 851.
(10) (1902) 2 I.R. 82, at p. 90.

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[EVATT J. referred to *McLeod* v. *St. Aubyn* (1).]

Curtis K.C. (with him *Wesche*), for the respondents, referred to *Attorney-General* v. *Bailey* (2); *Bell* v. *Stewart* (3); *Ex parte Scott Fell*; *Re Smith's Newspapers Ltd.* (4); *R.* v. *Payne* (5); *Attorney-General* v. *Kissane* (6); *R.* v. *Nicholls* (7); *Porter* v. *The King*; *Ex parte Yee* (8).

Cur. adv. vult.

Feb. 6. Prior to the delivery of judgment an apology, which *Evatt* J. directed to be filed and recorded, was read to the Court by *Curtis* K.C., as follows:—"Whatever may be your Honor's judgment in this matter and whatever is the legal effect of the publication of some of the letters and articles complained of, both my clients have instructed me unreservedly to express their deep regret for some of the statements contained therein, which on examination are found to be inaccurate, intemperate and, unfortunately, offensive.

At the same time my clients wish to assure this Honorable High Court that, in allowing their columns to be used for this correspondence, they had no intention at any time in any way of reflecting directly or indirectly on the prestige or integrity of this appellate body, which has and always will have my clients' highest respect in common with that of the whole of the public of this Commonwealth."

EVATT J. then delivered the following written judgment:—

This is an application to punish the editor and proprietor of the *Sydney Morning Herald* newspaper for contempt of the High Court in publishing certain matters in that newspaper between December 21st, 1934 and January 8th, 1935. Most of the published articles or letters purported to criticize a decision of this Court (*R.* v. *Wilson*; *Ex parte Kisch* (9)) announced on December 19th last to the effect that Scottish Gaelic could not be regarded as a European language within the scope and intention of the relevant section of the *Immigration Act*.

(1) (1899) A.C. 549, at p. 561.
(2) (1917) 17 S.R. (N.S.W.) 170.
(3) (1920) 28 C.L.R. 419, at p. 428.
(4) (1923) 24 S.R. (N.S.W.) 33, at p. 36.
(5) (1896) 1 Q.B. 577.
(6) (1893) 32 L.R. Ir. 220, at p. 239.
(7) (1911) 12 C.L.R. 280.
(8) (1926) 37 C.L.R., at p. 443.
(9) *Ante*, p. 234.

On November 28th, 1934 the applicant was convicted by a magistrate, and on the same day an appeal to Sydney Quarter Sessions was launched. During the proceedings before the Police Court a Rev. M. M. Macdonald had been tendered by the prosecution as a witness to give evidence of certain facts as to Scottish Gaelic. For reasons which do not appear from the Police Court depositions, but which no doubt were justified, the magistrate declined to accept this tender of his evidence. Thereupon Macdonald composed an article on Scottish Gaelic and sent it to the respondent Fletcher with whom he appears to be personally acquainted. At the time, the appeal to the Quarter Sessions was pending, and Fletcher, who received the article on December 6th, put it on one side with a view to its possible use after the appeal had been determined. On December 14th a separate application brought the conviction before this Court for review, and on December 19th the Full Court, by a majority decision of four Justices to one, quashed the conviction. Oral judgments were delivered which set out the reasons for the decision, and a full statement of these reasons was available to the reporters of the various newspapers.

The leading judgment, that of *Rich* J., pointed out that if the provision in the *Immigration Act* had been addressed to philologists, the expression " European language " could be taken to include every systematic form of utterance for the communication of ideas, but that the provision was dealing with the practical subject of immigration and ostensibly provides a test against illiteracy and ignorance of European speech. So regarded, the phrase meant " a standard form of speech recognized as the received and ordinary means of communication among the inhabitants in an European community for all the purposes of the social body " (1). And the evidence showed clearly that Scottish Gaelic in spite of its long history and actual survival was not such a language. *Dixon* J. considered that the phrase in the Act indicated a form of speech " which in some politically organized European community is regarded as the common means of communication for all purposes, either throughout the whole body or throughout a complete society, if the political organization is composed of more than one community of

(1) *Ante*, p. 241.

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people" (1). He dealt with the facts and emphasized that the Courts should not treat the matter philologically but practically. In my own judgment (2) pains were taken to set out the statistics which showed so marked a decline in the use of Scottish Gaelic as to prove that the only language now spoken in Scotland which fairly answered the statutory requirement was the English language itself.

On December 20th the newspaper published by the defendants reported the decision, but an inadequate and unfair summary of the judgment of the Court was given. On the main newspage several quotations from the judgment of *Rich* J. were given, but these failed to convey the meaning or effect of his judgment read as a whole. The heading of the item—"Gaelic not a European language"—was very misleading. It was common ground that Scottish Gaelic still is a mode of speech in use in part of Europe, and the only question in dispute upon the appeal was the scope and intention of the phrase "European language" in its context, a dispute committed to the Court only because the Executive Government has never prescribed the languages which may be employed. Further, the dictation test had been announced to the applicant as a test "in Scottish Gaelic," so that the reference by some of the correspondents to the Irish language was quite beside the point, and obviously made in ignorance both of the reasons for the Court's decision and also of the facts proved in evidence.

On the day following (December 21st) the Rev. Macdonald's article was published by the respondent Fletcher. The statement of Macdonald that "colossal ignorance" of Scottish affairs seemed to prevail in Australia "even in high places" had been written prior to December 6th, so that "colossal ignorance" could not have been intended by him to be imputed to members of this Court which did not obtain seisin of the case until December 14th. Mr. Macdonald's intention was to impute ignorance to another person who did not agree with him, presumably the learned King's Counsel in the Police Court proceedings who had objected to his evidence. Unfortunately Fletcher's use of the article at the time chosen by him made it inevitable that many readers would apply Macdonald's words to the members of the Court. Moreover, Fletcher did not

(1) *Ante*, pp. 244, 245. (2) *Ante*, pp. 246, 247.

consult Macdonald as to the use of the article after the High Court decision. It should be added that there is little reason to suppose that Macdonald would have objected to publication, for in due course he accepted payment from the respondent for his article, which occupied nearly a column on the leader page of the paper—a space about three times as long as that which had been accorded to the report of the decision of this Court !

The next matter to which reference is required is an article published under the pen name of " Columbinus " on December 27th. The writer strained to affect a scholar's detachment from all the merely legal questions involved in the case, but it seems not improbable that an element of malice lurks behind the façade of heavy sarcasm and hackneyed story. But the Court is constrained to give the respondents the benefit of every reasonable doubt upon all questions of fact which are involved, and it is unable to infer with sufficient certainty that a more damaging imputation upon the Judges than ignorance of the facts as to Scottish Gaelic was attributed to this article by the newspaper readers. This contributor also accepted payment for his article. Although his identity was disclosed to the Court, the parties agreed that it was unnecessary that it should be revealed in proceedings to which he is not a party.

The next publication which calls for comment is the report of a speech purporting to have been delivered by the Rev. Macdonald on January 1st, and published in the newspaper on January 2nd. He was reported as saying that the decision of the Court " was as bewildering as it was unexpected " and one " in which every Scot must disagree." Then he added " When we think of the means and methods adopted by the High Court to determine the point in question we are not at all surprised at the verdict." Counsel suggested that in speaking these words Macdonald meant to complain of the fact that his testimony had been rejected by the Court of Petty Sessions, and that the Full High Court should have called him as a witness on the appeal. But every lawyer knows and every layman could easily find out, that in the exercise of such appellate jurisdiction, it is not possible for this Court to call witnesses or make use of fresh evidence. In spite of this, Macdonald, without any fair disclosure of his special position as a rejected witness,

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endeavoured to excite indignation against the Court, and the respondents allowed him to make the attempt. The result was that the public might possibly have interpreted his speech as implying that there was some departure from recognized law and practice in the method of procedure adopted by the Court, an implication that would have been entirely false and unwarranted.

On January 4th and 5th the respondents published two letters which sought to answer the criticism made against the Court. New proceedings against the applicant reached the stage of service of the summons on January 7th. On the same day a previous contributor was given the opportunity of replying to the two letters which had defended the Court's decision. The publication of this letter of January 7th under a *nom de plume* was very misleading, suggesting, as it did, that it was not written by any of those who had previously taken part in the discussion, and the fact being that it was written by a person who had become prominently identified with it in his own person.

The last letter complained of was published on January 8th, also from a previous contributor. This was couched in insulting terms and is quite indefensible in manner and tone.

The grounds of the application are :—(1) That the letters published on January 7th and 8th were calculated to interfere with the fair trial in the Court of Petty Sessions of the new information laid against the applicant. (2) That all the articles and letters published between December 21st and January 8th constituted so serious an attack on the Court and its members that the respondents should be punished.

The first ground for the application was not so strongly pressed as the second. It appears from the evidence that the respondents published the letters of 7th and 8th after the announcement of the new proceedings against the present applicant. I hold that the High Court has not jurisdiction to deal with this ground of the present application. Although this Court is vested with jurisdiction in relation to contempts of the High Court, it possesses no general jurisdiction in relation to contempts constituted by publications tending to prejudice the proceedings before inferior Courts of a State, even although such inferior Courts are about to exercise or are exercising Federal jurisdiction. Such inferior Courts are still

"Courts of a State," and in relation to contempts of the character indicated, the Supreme Court of the State and, in the absence of express Federal legislation, the Supreme Court alone, possesses the appropriate jurisdiction.

In relation to the second and main ground of the present case, the legal position may be thus stated :—

(1) The High Court has ample jurisdiction to punish summarily those responsible for publications calculated to obstruct or interfere with the administration of justice, whether such publications take the form of comment referring to proceedings pending in the Court or that of unjustified attacks upon the members of the Court in their public capacity (*Porter* v. *The King*; *Ex parte Yee* (1), per *Isaacs* J.).

The origin of the present law and procedure is explained by Sir *John Fox* in his *History of Contempt of Court* (1927). The present English law in relation to newspapers is closely analyzed by Professor *A. L. Goodhart* in the *Harvard Law Review*, vol. 48, p. 885. The latter refers, at p. 900, to Lord *Morris's* "strange remark" in *McLeod* v. *St. Aubyn* (2), that committals for contempt by scandalizing have become obsolete in England.

(2) In the case of attacks upon the Court or its members, the summary remedy of fine or imprisonment is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable (*Bell* v. *Stewart* (3), per *Isaacs* and *Rich* JJ.).

(3) All the recent decisions show that it is the duty of the Court to protect the public against every attempt to overawe or intimidate the Court by insult or defamation, or to deter actual and prospective litigants from complete reliance upon the Court's administration of justice (*In re Sarbadhicary* (4); *R.* v. *Gray* (5); *Attorney-General of the Irish Free State* v. *O'Kelly* (6); and *R.* v. *Editor of the New Statesman*; *Ex parte Director of Public Prosecutions* (7); *R.* v. *Colsey* (8)).

(4) Fair criticism of the decisions of the Court is not only lawful, but regarded as being for the public good; but the facts forming

(1) (1926) 37 C.L.R., at p. 443.
(2) (1889) A.C. 549.
(3) (1920) 28 C.L.R., at p. 429.
(4) (1906) 23 T.L.R. 180, at p. 182.
(5) (1900) 2 Q.B., at p. 40.
(6) (1928) I.R., at p. 315.
(7) (1928) 44 T.L.R. 301.
(8) The Times, 9th May 1931, at p. 4.

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the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice (*R.* v. *Nicholls* (1)).

(5) Even although the criticism exceeds the bounds of fair comment so that other remedies of a civil or criminal nature are or may be available, the Court will not apply the summary remedy unless upon the principles stated above.

(6) In all cases of contempt, the Court has power to act not only summarily but *ex mero motu* (*Re the Echo and Sydney Morning Herald Newspapers* (2)). This power is essential in the case of the High Court before which the Governments of the Commonwealth and States are frequent litigants.

In *Skipworth's Case* (3) the Attorney-General proceeded against the respondent at the request of the Court, and "as the representative of the profession" (per *Cockburn* L.C., *Kenealy's Trial of Tichborne*, introductory vol., p. 240. Further, the general rule of British criminal jurisprudence is that "a private person has just as much right to prosecute in the name of the Crown as the Crown itself" (*Holdsworth, History of English Law*, vol. III., p. 62; *Stephen, History of Criminal Law*, vol. I., pp. 493, 495).

(7) Summary proceedings for contempt are criminal in character, and the respondents are therefore entitled to invoke the principle that guilt should be proved beyond reasonable doubt.

All that remains is for the Court to apply the above principles in the present case.

The facts which have been already set out show clearly that the respondents as publishers and three of their contributors, viz.:— Rev. M. M. Macdonald, "Columbinus," "Aonaghus Dumhnullach," exceeded the limits of fair criticism. The respondents failed to publish to their readers a fair or adequate summary of the reasons of the Court, and thus enabled the writers to use unjustified expressions. Not a single critic stated or recognized the fact that in giving its decision this Court was bound by the evidence. This would have been apparent to every lawyer, and it is difficult to believe that it was unknown to all of the contributors and the respondent Fletcher. Although the contributors have not been joined in the

(1) (1911) 12 C.L.R., at p. 286.
(2) (1883) 4 L.R. (N.S.W.) 237.
(3) (1873) L.R. 9 Q.B. 230.

present proceedings, the respondents have to accept responsibility for their writings which do not constitute " reasonable argument or expostulation " (*R.* v. *Gray* (1)).

In the circumstances it was not surprising that learned counsel was compelled to admit that the contributions were " unwarranted," " offensive," " inaccurate " and " intemperate." He also admitted that they could not be justified, and could only be excused as the " outbursts " of " three disgruntled Scotsmen." He would not concede that the articles were " improper," but it is quite clear that " unwarranted," " inaccurate," " offensive " and " intemperate " " outbursts " in criticism of the Court or its judgments are most " improper."

However, in applying the legal principles set out above, the Court's decision is that a punitive order should not be made against the present respondents. It is in their favour that they published two letters at least which stated the position with fairness and accuracy. Nor did the respondents themselves express agreement with their other contributors. Remembering that this is a criminal cause, the Court is unable to find as a fact that the letters and articles published did not fairly represent the total correspondence received. And the articles and letters complained of, though admittedly intemperate and unwarranted, bore on their face sufficient evidence of such qualities as to destroy their effectiveness. But the respondents were at fault in departing from the duty of fair editing, and, in dismissing the application, I exercise my discretion by refusing to make any order as to the costs of the respondents.

Application dismissed without costs, such dismissal to be without prejudice to any proceedings that may be brought in the Supreme Court of New South Wales in relation to the publication of the letters of January 7th and 8th, 1935.

Solicitors for the applicant, *C. Jollie Smith & Co.*

Solicitors for the respondents, *Stephen, Jaques & Stephen.*

J. B.

(1) (1900) 2 Q.B. 36.