[HIGH COURT OF AUSTRALIA.]

O'FLAHERTY . . . . . APPELLANT;
INFORMANT,

AND

McBRIDE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A SPECIAL MAGISTRATE OF SOUTH AUSTRALIA.

H. C. OF A. 1920.

ADELAIDE, *Sept.* 23, 27.

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

Evidence—Privilege—Disclosure contrary to public policy—Production in Court of official communications—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 9 (4).

Sec. 9 (4) of the *Income Tax Assessment Act* 1915-1918 provides that "an officer shall not be required to produce in any Court any return, assessment, or notice of assessment, or to divulge or communicate to any Court any matter or thing coming under his notice in the performance of his duties under this Act, except as may be necessary for the purpose of carrying into effect the provisions of this Act."

Held, that the section does not weaken the rule of common law that evidence of affairs of State is excluded when its admission would be against public policy.

Held, therefore, that where on a prosecution for making a false return under the Act, the head of the Income Tax Department objected on the ground of public policy to the production of reports made to him by officers of the Department, an order to produce one of the reports, the production of which was called for by the defendant, was improperly made, and a dismissal of the prosecution consequent upon the refusal to comply with the order was also erroneous.

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APPEAL by way of case stated.

An information was heard by a Special Magistrate of South Australia whereby Michael John O'Flaherty charged that Gerald Bede McBride did make a return of income derived by Bradbury & Co. Ltd. from all sources in Australia during the twelve months from 1st October 1917 to 30th September 1918 which was false in a certain particular, namely, that the surplus net profit derived by Bradbury & Co. Ltd. from personal exertion was in the return stated to be £16,469 17s. 1d. whereas in fact it was more than that sum. The Magistrate, having dismissed the information, on the application of the informant stated a case for the determination of the High Court. The case stated shortly that at the hearing Stanley McKeller White, Deputy Federal Commissioner of Income Tax for South Australia, who had control of the Federal Income Tax Department in South Australia, objected to the production of any reports relating to income tax matters and investigations between officers of the Department; that the appellant during his cross-examination was asked, in reference to a certain conversation, to refresh his memory by looking at a report made by him to the Chief Clerk or Deputy Commissioner, and refused to do so; that counsel for the defendant thereupon called for the production of the report, and, its production having been refused, the Special Magistrate thereupon ruled that the informant should produce it; that counsel for the defendant thereupon applied for a dismissal of the information, and that the Magistrate thereupon dismissed the information with £23 2s. costs.

The questions asked by the case were:—

(*a*) Was I right in refusing to direct that the witness under cross-examination should be compelled to refresh his memory?

(*b*) Was I right in ruling that the report should be produced?

(*c*) Was I right in dismissing the case? And what should be done in the premises?

Cleland K.C. (with him *Ward*), for the appellant. The refusal to produce the document in question was authorized by sec. 9 (4) of the *Income Tax Assessment Act*. The exception in sub-sec. 4 leaves it

to the responsible head of the Department to produce a document if in his opinion it is necessary for the purpose of carrying into effect the provisions of the Act. If the refusal to produce was not justified by sec. 9 (4), it was justified at common law (*Beatson* v. *Skene* (1)). That case decides that the Judge cannot compel production of evidence the production of which is contrary to public policy, and also that the head of the Department was the proper person to decide whether its production is contrary to public policy. *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* (2) is distinguishable, for here the nature of the document was fully disclosed. [Counsel referred to *Williams* v. *Star Newspaper Co.* (3).]

[KNOX C.J. referred to *Hennessy* v. *Wright* (4) ; *Hughes* v. *Vargas* (5).

[ISAACS J. referred to *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (6) ; *Marks* v. *Beyfus* (7).

[RICH J. referred to *West* v. *West* (8) ; *Home* v. *Bentinck* (9) ; *Wilkinson* v. *Wilkinson* (10).]

If the document ought to have been produced, the Special Magistrate was wrong in dismissing the case. He might have dealt with the witness who refused to produce it for a contempt. At most, he could have adjourned the case *sine die*.

Thomson, for the respondent. Even if the Magistrate was wrong in ordering production of the document, he was right in dismissing the information. The prosecution might have asked to have a case stated before the decision was given or might have produced the document under protest. An order irregularly obtained must be obeyed until properly set aside (*Woodward* v. *Earl Lincoln* (11) ; *Fennings* v. *Humphery* (12) ; *Chuck* v. *Cremer* (13)). The Magistrate had no jurisdiction to commit for contempt. See *Summary Jurisdiction Act* 1850, sec. 6 ; *Stone's Justices Manual*, 50th ed., pp.

(1) 5 H. & N., 838.
(2) 16 C.L.R., 178.
(3) 24 T.L.R., 297.
(4) 57 L.J. Q.B., 594.
(5) 9 R., 661.
(6) (1916) 1 K.B., 822.
(7) 25 Q.B.D., 494, at p. 500.
(8) 27 T.L.R., 476.
(9) 2 Brod. & B., 130.
(10) 1 S.R. (N.S.W.) (Eq.), 285.
(11) 3 Swans., 626.
(12) 4 Beav., 1.
(13) 2 Ph., 113.

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40, 923. The Magistrate had jurisdiction to order production of this document. The case is within the exception to sec. 9 (4) of the *Income Tax Assessment Act*. A prosecution for an offence against the Act is a carrying into effect of the provisions of the Act. The Magistrate had a right to look at the document to determine for himself whether the claim for privilege was sustained (*Hennessy* v. *Wright* (1)). There was jurisdiction under sec. 5 of the *Criminal Procedure Amendment Act* 1866-1867 to order production of the document. [Counsel also referred to *McLeod* v. *Phillips* (2); *In re Joseph Hargreaves Ltd.* (3); *Lee* v. *Birrell* (4); *Republic of Liberia* v. *Roye* (5).]

[KNOX C.J. referred to *Chatterton* v. *Secretary of State for India in Council* (6).]

Cleland K.C., in reply.

Cur. adv. vult.

Sept. 27.

The written judgment of the COURT, which was delivered by RICH J., was as follows :—

This matter comes before us in the form of a special case stated under sec. 40 of the *Justices Procedure Amendment Act* 1883-1884 (S.A.).

It appears that an information had been preferred by the appellant against the respondent under sec. 58 (1) (*c*) of the *Income Tax Assessment Act* 1915-1918, for making a return of income derived by Bradbury & Co. Ltd. (of which the respondent was a director) which was false in a certain particular, viz., " the surplus net profit derived by the said Bradbury & Co. Ltd. from personal exertion was in the said return stated to be £16,469 17s. 1d. whereas in fact it was more than £16,469 17s. 1d." The prosecution was instituted by the appellant as an officer of the Income Tax Department. It appeared in the course of the case that the appellant, on behalf of the Department, had interviewed the Wheat Commissioner of South Australia

(1) 21 Q.B.D., 509, at p. 515.
(2) 5 S.R. (N.S.W.), 503.
(3) (1900) 1 Ch., 347, at p. 353.
(4) 3 Camp., 337.
(5) 1 App. Cas., 139, at p. 143.
(6) (1895) 2 Q.B., 189.

with reference to the Company, and had, after investigation, made a report to the Chief Clerk of the Income Tax Department. Stanley McKeller White, Deputy Commissioner of Taxation for South Australia and having control of the Department there, gave evidence objecting to the production of any reports relating to income tax matters and investigations between officers of the Department, and also objected to the admission of any verbal statements between such officers on the ground that such production or admission would be prejudicial to the best interests of the Commonwealth and against public policy. In cross-examination the appellant was asked whether he had discussed certain items in connection with the Company's business with the Wheat Commissioner. He also stated that on the official file there was a report by him to the Taxation Department or one of the superior officers purporting to report his interview with the Wheat Commissioner. In cross-examination the witness, not being able to remember certain matters asked of him, was requested to refresh his memory by looking at the report. On advice of his counsel he objected to do so. Thereupon counsel for the respondent called for the report. The Magistrate ruled that the witness must produce the document. Counsel for the appellant refused to produce it. Thereupon respondent's counsel applied for a dismissal of the case. The Magistrate says in the case stated :—" Having ruled that the report should be produced and directed the witness to produce it, and the appellant on the advice of his counsel having refused to produce it, I thereupon dismissed the information, and in doing so stated as follows:— 'Apart from the question of validity of the objection or of my ruling, the fact is that I have ruled that certain evidence called for by the defendant should be produced by the witness in the box, who is also the informant, which evidence he has refused to produce. Until this evidence is produced, what effect it may have on the case it is impossible for me to say. The counsel for the informant having stated that it will not be produced, I have come to the conclusion that the case must be dismissed, and I dismiss accordingly with costs £23 2s.' " Par. 6 of the case stated is as follows [His Honor then read the questions set out above].

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Question (*a*) was not pressed, and the answer clearly is Yes.

As to question (*b*) the provisions of the *Income Tax Assessment Act* contained in sec. 9 (4) are of great importance. That sub-section is as follows: "An officer shall not be required to produce in any Court any return, assessment, or notice of assessment, or to divulge or communicate to any Court any matter or thing coming under his notice in the performance of his duties under this Act, except as may be necessary for the purpose of carrying into effect the provisions of this Act." There is no doubt, and it was in fact admitted, that the report which was ordered to be produced was within the sub-section, unless excluded by the final words, "except" &c. The effect of that sub-section is negative. Whatever obligation might have existed by law in the circumstances of the case apart from that sub-section, a new statutory exclusion was enacted, and that statutory exclusion applied to the production of the report in question unless it was "necessary for the purpose of carrying into effect the provisions of this Act." In order, therefore, to justify an order for production, the Court must see that the production is "necessary" for the stated purpose. There is nothing in the facts stated to show that the report was "necessary" for that purpose. The most that can be said for it is that if it were looked at it might on inspection appear to be "necessary," but the statutory provision quoted does not weaken, and is not intended to weaken, the rule of common law that evidence of affairs of State is excluded when its admission would be against public policy. That rule in the present case operates to exclude the admission of the report—and, of course, all secondary evidence of its contents—and consequently operates so as to leave the Court unable to say whether its production is or is not "necessary" for the purposes mentioned in sub-sec. 4 of sec. 9 of the Act. The principal authorities governing this branch of the case are *Home* v. *Bentinck* (1); *Hughes* v. *Vargas* (2); *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (3). It follows that the answer to question (*b*) should be in the negative.

Question (*c*) in this case depends entirely on the answer to the

(1) 2 Brod. & B., 130. (2) 9 R., 661; 9 T.L.R., 471, 551.
(3) (1916) 1 K.B., 822.

previous question. That question being answered in the negative, the dismissal was clearly erroneous.

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Questions answered: (*a*) *Yes*; (*b*) *No*; (*c*) *No. Case remitted to Special Magistrate to do what is right consistently with this order. Respondent to pay costs of appeal.*

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Ward, Powers & Jeffries.*

Solicitors for the respondent, *Varley, Evan & Thomson.*

B. L.

Appl *Lucas v Yorke* 58 ALJR 20

Dist *Thunderdome Racetiming & Scoring v Donan Industries Pty Ltd* (1992) 36 FCR 297

[HIGH COURT OF AUSTRALIA.]

ROFF COURTNEY KING . . . . . APPELLANT;
RESPONDENT,

AND

THE COMMERCIAL BANK OF AUSTRALIA LIMITED . . . . . RESPONDENT.
PETITIONER,

Practice—High Court—Appeal from Supreme Court of State—Security for costs—Reduction of security—Grounds for reduction—High Court Procedure Act 1903-1915 (*No.* 7 *of* 1903—*No.* 5 *of* 1915), *secs.* 35, 36.

In exercising the discretion given by sec. 36 of the *High Court Procedure Act* to the High Court to reduce the amount of security for the costs of an appeal from the Supreme Court of a State, the Court may take into consideration the nature of the case, that is, whether it affects the status of the appellant or affects him pecuniarily, the fact that there has been unsuccessful and protracted litigation between the appellant and the respondent, and that the appellant, if impecunious, may sue *in formâ pauperis.*

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MELBOURNE, *Oct.* 18, 20.

Rich J. IN CHAMBERS.