[HIGH COURT OF AUSTRALIA.]

THE KING, ON THE PROSECUTION OF HOWARD FREEMAN . . . . PLAINTIFF;

AND

ARNDEL . . . . . DEFENDANT.

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MELBOURNE, *March* 7, 8, 17.

Griffith C.J., Barton and O'Connor JJ.

Post and Telegraph Act 1901 (*No.* 12 *of* 1901), *sec.* 57—*Power to refuse to register or deliver letters—Fraudulent or immoral business—Order of Postmaster-General—Duty to carry or deliver letters—Mandamus—Certiorari—Discretion—Judicial act.*

The Postmaster-General, in determining whether he has reasonable grounds to suppose that any person is engaged in receiving money in connection with any of the matters mentioned in sec. 57 of the *Post and Telegraph Act* 1901, is not exercising a judicial or a merely ministerial function, but is exercising a discretion, and must form his own independent judgment. Having formed an opinion and made an order under that section, mandamus will not lie to compel him to revise his decision, or to compel him or any subordinate officer to disobey the order.

Nor will certiorari lie to quash such an order. For under the Act it is not intended that the Postmaster-General should be a judicial officer when exercising his powers under sec. 57, nor is it required that he should hear the party to be affected by an order made under that section.

Semble, there is no legal duty imposed on the Postmaster-General to carry or deliver postal articles.

RULE *nisi* for mandamus.

On the application of Howard Freeman, a rule *nisi* was granted by *O'Connor* J. calling upon A. J. Arndel, Acting Deputy Postmaster-General at Sydney, to show cause why a writ of mandamus should not be issued commanding him to transmit through the Post Office all mail matter addressed to Messrs. Freeman & Wallace or to any persons on their behalf.

The affidavits in support of the application alleged the following facts:—Howard Freeman was a member of the firm of Freeman

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& Wallace which carried on business in Melbourne under the style of "The Freeman & Wallace Electro-Medical and Surgical Institute," and a similar business under the same firm name in Sydney.

On 30th January, 1906, the Postmaster-General, purporting to act under the *Post and Telegraph Act* 1901, made and caused to be published in the Commonwealth *Gazette* of 3rd February, 1906, the following order:—

"Postmaster-General's Department.

"Order of the Postmaster-General, under sec. 57, *Post and Telegraph Act* 1901.

"In pursuance of the powers conferred upon me by the *Post and Telegraph Act* 1901, I hereby order and direct that, on and after this date, any postal article received at a Post Office in the Commonwealth, addressed to—

"Messrs. Freeman & Wallace,

"or—

"The Freeman & Wallace Electro-Medical Surgical Institute,

"either by their own name, or the fictitious or assumed name of Mr. F. Howard, 225 and 227 Elizabeth Street, Sydney, or to any agent or representative of theirs, shall not be registered, transmitted, or delivered to such persons.

"The above order and direction is made, because I have reasonable grounds to suppose the persons above-mentioned to be engaged in the Commonwealth in receiving money in connection with a fraudulent and immoral business within the meaning of sec. 57 of the *Post and Telegraph Act* 1901.

"Dated this 30th day of January 1906.

"Austin Chapman.

"Postmaster-General of the Commonwealth of Australia."

The nature of the business was described by an accountant employed by the firm as follows:—"The business of the said firm consists of treating persons for various diseases either after personal interviews with such persons at the consulting rooms of the firm . . . or after receiving correspondence from persons seeking medical and electrical advice and treatment. There are in the employ of the firm two duly qualified medical practitioners Dr.

Richard Wallace and Dr. Elizabeth White who attend at the consulting rooms of the said firm in Sydney during fixed consulting hours, and in the employ of the said firm in Melbourne there are two duly qualified medical practitioners, namely Dr. S. Lane Wallace and Dr. C. Reinhold Baker who also attend there during fixed consulting hours. The patients who attend at the consulting rooms in Sydney and Melbourne are under the immediate supervision of the duly qualified medical practitioners employed by the firm, and it is only the said medical practitioners who order medicine for such patients. All medicines ordered for the patients are dispensed by chemists duly registered in New South Wales or Victoria. The electrical branch of the business, consisting of electric baths, electric batteries and massage, is also under the control and direction of the said medical practitioners. In addition to the above-mentioned medical practitioners, the said firm calls in Dr. Charles McCarthy of Elizabeth Street, Sydney, to consult with the said Dr. Richard Wallace in complicated cases. In the case of patients who communicate with the said firm by correspondence seeking advice and treatment, forms are sent to such patients containing questions to be answered by them setting forth their symptoms, and, in addition, such patients are required to give the fullest antecedent history of their cases. On the receipt of the said answers and information they are referred to the medical practitioners employed by the firm who order medicines for such patients, such medicines being dispensed by duly registered chemists as aforesaid and forwarded to the patients with letters of advice as to their use and as to the treatment of their respective cases. The said letters are written by the clerical staff employed by the firm from information supplied by the medical practitioners aforesaid."

Howard Freeman said:—"The business referred to has been carried on under my direct supervision for the last eleven years at 225 and 227 Elizabeth Street Sydney aforesaid, and I say that, neither at the time of the publication of the order before referred to, nor at any previous time, has such business been carried on in a fraudulent or in an immoral manner, nor can the statement so published that the proprietor or proprietors of the said business were receiving money in connection with a fraudulent and

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immoral business apply in any way to such business, and no reasonable ground for such a statement ever existed."

The Postmaster-General, Mr. Austin Chapman, swore an affidavit in reply which, so far as is material, was as follows:—

"4. I made the said order on the ground stated therein, in the exercise of my discretion, having—after having caused full inquiries to be made, and after consulting the law advisers of the Commonwealth—formed the opinion that I had a reasonable ground for supposing that the person or persons carrying on business under the titles mentioned in the said order were engaged in the Commonwealth in receiving money in connection with a fraudulent and immoral business.

"5. The papers, reports, and correspondence, from which I formed the opinion that I had reasonable ground to suppose the persons mentioned in the said order to be engaged in the Commonwealth in receiving money in connection with a fraudulent and immoral business within the meaning of sec. 57 of the *Post and Telegraph Act* 1901, are very numerous (the file containing more than 150 sheets), and are in my possession as Postmaster-General of the Commonwealth.

"6. The portion of the file of papers, reports, and correspondence referred to in the last paragraph of this my affidavit, which was then in the possession of the Department of the Postmaster-General, was, as I am informed by the secretary to the Postmaster-General's Department, and believe, submitted to the Honourable the Attorney-General, for the time being of the Commonwealth, Mr. Deakin, and, on or about the 12th day of July, 1903, his opinion (a copy of which is attached hereto marked 'A') was received by the secretary to the Postmaster-General's Department.

"7. The whole file of papers, reports, and correspondence referred to in paragraph 5 of this my affidavit, was submitted to the Crown Solicitor for the Commonwealth—further reports having been in the meantime obtained—and his opinion (a copy of which is attached hereto marked 'B') was duly received by the Secretary to the Postmaster-General's Department from the Secretary to the Attorney-General's Department on the 12th day of January last.

"After carefully perusing the whole of the said papers and

opinions, I formed the opinion that I had, and I am still of opinion that I have, reasonable grounds for supposing that the person or persons carrying on business under the titles mentioned in the said order, were engaged in the Commonwealth in receiving money in connection with a fraudulent and immoral business, and I have not cancelled the said order."

Exhibit "A" to the above affidavit was as follows:—

"The Postmaster-General asks to be further advised upon this matter, in view of further correspondence with Detective White, now submitted (see my opinions of 1st September 1902, 26th November 1902, 19th March 1903). In my opinion, the papers now afford ample ground to suppose that Freeman & Wallace are engaged in a fraudulent and immoral business within the meaning of sec. 57 of the *Post and Telegraph Act* 1901, and would justify the Postmaster-General in making an order under that section, directing that any postal article received at a Post Office addressed to them or either of them, by their own or a fictitious or assumed name, or to any agent or representative of theirs, or to their address, should not be registered, transmitted or delivered to them.

"8th July 1903. (Signed) Alfred Deakin."

Exhibit "B" was as follows:—

"I am of opinion, on the papers submitted, that the action advised by the Honorable the Attorney-General (8/7/03)—as above—can be taken, as there is sufficient evidence in the correspondence and papers on the file to afford the Postmaster-General reasonable grounds for the belief that Freeman & Wallace are engaged in a fraudulent and immoral business within the meaning of sec. 57 of the *Post and Telegraph Act* 1901.

"9th January 1906. (Signed) Chas. Powers, Crown Solicitor."

By consent of the parties the application for a mandamus was dealt with as if a request had been made to A. J. Arndel to register a letter, addressed to Messrs. Freeman & Wallace, and he had refused that request.

Cussen and *Starke*, for the prosecutor in support. There is a duty on the Postmaster-General to deliver letters which have been posted, and that duty is assumed right through the *Post and*

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Telegraph Act 1901. See secs. 4, 7, 9, 20, 113, Schedule 2. That duty is recognized in the United States. See *American School of Magnetic Healing* v. *McAnnulty* (1). In order to justify the Postmaster-General in making an order under sec. 57 of the *Post and Telegraph Act* 1901 there must in fact be reasonable grounds on which to form an opinion that the business is immoral or fraudulent. The only evidence here is that the business is neither immoral or fraudulent. The Court will not assume fraud unless it is proved. It cannot be reasonable to make an order under the section without hearing what the person to be affected by it has to say. The word "reasonable" *primâ facie* involves an appeal to the ordinary tribunals which decide facts. The Court will not assume the truth of false allegations, and, if on the true facts it can be shown that the Postmaster-General ought to have arrived at the conclusion that there were no reasonable grounds for the opinion he formed, the order is bad. If the Postmaster-General relies on true facts, the question is, do those facts afford grounds which a reasonable man might consider to be reasonable grounds for the opinion? It is for the other side to show that the word "reasonable" has some other meaning. As to the question of reasonableness see *Flower* v. *Allan* (2). Sec. 158 of the *Post and Telegraph Act* 1901, provides that no action shall lie in respect of non-delivery of letters &c., but that section does not apply to mandamus. The Postmaster-General in deciding whether he will make an order under sec. 57 is exercising a *quasi*-judicial function, and his action is examinable by the Court. There are no words similar to those used in sec. 160 of the *Customs Act* 1901, under which the Minister's decision is clearly intended not to be examinable.

If the making of this order were not a judicial act, it is clear that the onus would be on the Postmaster-General to justify the order in an action for trespass. It would not be sufficient to prove the order, but he would have to prove facts which justify the order. But the act is judicial, because the Postmaster-General must have evidence before him, and because the civil rights of a particular individual are thereby determined: *New Lambton Land & Coal Co. Ltd.* v. *London Bank of Australia Ltd.* (3); *Smith*

(1) 187 U.S., 94.

(2) 2 H. & C., 688, at p. 694.

(3) 1 C.L.R., 524.

v. *Reg.* (1); *R.* v. *Hamilton* (2); *Cooper* v. *Wandsworth District Board of Works* (3); *Hopkins* v. *Smethwick Local Board of Health* (4). Mandamus or certiorari will therefore lie. [They also referred to *Quick and Garran's Constitution of the Australian Commonwealth*, p. 720; *In re Melbourne Democratic Club* (5); *Kendall* v. *United States* (6); *Raleigh* v. *Goschen* (7).]

Mitchell K.C. and *Davis*, for the defendant, *contrâ*. The action of the Postmaster-General under sec. 57 of the *Post and Telegraph Act* 1901 was not intended to be examinable in a Court of law. The word "suppose" is not one which would be used if a quasi-judicial proceeding were contemplated. There is no express duty put upon the Postmaster-General to convey letters, and there is no common law right to have them conveyed. The duty and the right, if they exist, must be spelt out of the whole Act. If that is so, the duty is subject to sec. 57. The words of sec. 158 are wide enough to cover mandamus. The Postmaster-General is a Minister of the Crown and mandamus will not lie in respect of his action under sec. 57: *United States* v. *Hitchcock* (8). He is not a *persona designata*. See also *Roberts* v. *Ahern* (9). As to Arndel, the order of the Postmaster-General is a complete answer, and for the prosecutor to succeed he must get the order rescinded. That cannot be done by mandamus, but must be by some proceedings in the nature of *certiorari*. In whatever form the proceedings are brought, the answer is that the order of the Postmaster-General is not intended to be examinable. [They also referred to *R.* v. *Maude* (10); *Rex* v. *Poor Law Commissioners* (11); *High Court Rules*, Or. XLI., r. 7; *Reg.* v. *The Lords of the Treasury* (12); *R.* v. *The Commissioners of Inland Revenue* (13); *Ex parte Sir C. J. Napier* (14); *Rex* v. *Commissioners of Customs* (15); *Goldring* v. *Collector of Customs* (16); *Reg.* v. *Secretary of State for War* (17); *Kinloch* v. *Secretary of State for India in Council* (18);

(1) 3 App. Cas., 614, at p. 623.
(2) 7 V.L.R. (L.), 194, at p. 199.
(3) 14 C.B. (N.S.), 180, at p. 189.
(4) 24 Q.B.D., 712.
(5) 27 V.L.R., 88; 22 A.L.T., 233.
(6) 12 Peters, 524.
(7) (1898) 1 Ch., 73.
(8) 190 U.S., 316.
(9) 1 C.L.R., 406.
(10) 14 V.L.R., 227; 10 A.L.T., 15.
(11) 6 A. & E., 54.
(12) L.R. 7 Q.B., 387, at p. 397.
(13) 12 Q.B.D., 461, at p. 471.
(14) 18 Q.B., 692.
(15) 5 A. & E., 380.
(16) 9 A.L.R. (C.N.), 37.
(17) (1891) 2 Q.B., 326.
(18) 15 Ch. D., 1; 7 App. Cas., 619.

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United States, ex relatione Dunlap v. *Black* (1); *Ex parte Penney* (2); *In re Coalport China Co.* (3); *New Lambton Land and Coal Co. Ltd.* v. *London Bank of Australia Ltd.* (4); *Thompson* v. *Farrer* (5); *Hicks* v. *Faulkner* (6); *In re Briton Medical and General Life Assurance Association* (7); *In re Young and Harston's Contract* (8).]

Cussen in reply. In order to entitle him to a mandamus, the prosecutor must show that there is a duty of a public nature to be performed by an officer in respect of which he, the prosecutor, has an interest, and also that there is no legal order authorizing that officer to refuse to perform that duty. If there is no duty to the public to deliver letters, that is an end of the application for mandamus, but not of that for certiorari. That there is such a duty is shown by *Kendall* v. *United States* (9), and that duty is one cast upon each individual officer in the postal service. There are two reasons why the order of the Postmaster-General should be treated as a nullity, first, on the principles laid down in *Raleigh* v. *Goschen* (10), and *Kendall* v. *United States* (9), and secondly, because this was a judicial proceeding and the prosecutor was not heard. See *Linford* v. *Fitzroy* (11). Sec. 58 of the *Post and Telegraph Act* 1901 does not apply to a prerogative writ, but only contemplates the kinds of action that can be brought against the King.

[He also referred to *Armytage* v. *Wilkinson* (12); *Capel* v. *Child* (13); *Flower* v. *Local Board of Low Leyton* (14); *Bateman* v. *Poplar Board of Works* (15); *Holme* v. *Guy* (16); *Short and Mellor's Crown Practice*, pp. 17, 19; *Chapman, Morsons & Co.* v. *Guardians of the Auckland Union* (17).]

Cur. adv. vult.

March 13. GRIFFITH C.J. This is a rule *nisi* calling upon the Acting Deputy Postmaster-General at Sydney to show cause why a

(1) 128 U.S., 48.
(2) L.R. 8 Ch., 446.
(3) (1895) 2 Ch., 404.
(4) 1 C.L.R., 524, at p. 540.
(5) 9 Q.B.D., 372, at p. 381.
(6) 8 Q.B.D., 167, at p. 173.
(7) 32 Ch. D., 503.
(8) 31 Ch. D., 168, at p. 174.
(9) 12 Peters, 524.
(10) (1898) 1 Ch., 73.
(11) 13 Q.B., 240, at p. 247.
(12) 3 App. Cas., 355, at p. 366.
(13) 2 Cr. & J., 558.
(14) 5 Ch. D., 347.
(15) 33 Ch. D., 360, at p. 387.
(16) 5 Ch. D., 901.
(17) 23 Q.B.D., 294, at p. 303.

mandamus should not be issued commanding him to transmit through the Post Office all mail matter addressed to the applicants or to any person on their behalf. Sec. 57 of the *Post and Telegraph Act* 1901 provides that:—

"(1) If the Postmaster-General has reasonable ground to suppose any person to be engaged either in the Commonwealth or elsewhere in receiving money or any valuable thing—

(*e*) in connexion with a fraudulent obscene indecent or immoral business or undertaking;

he may by order under his hand published in the *Gazette* direct that any postal article received at a post office addressed to such person either by his own or fictitious or assumed name or to any agent or representative of his or to an address without a name shall not be registered or transmitted or delivered to such person.

"(2) The order shall specify such name or address and shall upon publication be of full force and effect until cancelled by the Postmaster-General."

Sec. 58 provides that, when such an order has been made, any postal article addressed to the person named in such order if received at a post office shall not be delivered to such person, but shall be returned to the General Post Office and then opened and returned to the sender, or, if it comes from outside the Commonwealth, shall be returned to the country whence it came. That is the law applicable to the present case. The respondent shows on affidavit in answer to the application for a mandamus, that such an order was made by the Postmaster-General and is still in force—when I say such an order, I mean an order purporting to be made under sec. 57 on the ground that he had reasonable ground to suppose that the applicants were engaged in a fraudulent and immoral business. If the conditions prescribed by sec. 57 existed, the Postmaster-General clearly had jurisdiction and authority to make the order. The applicants say that they carry on their medical business by post. The section assumes that the business is so carried on. That statement of the applicants does not carry the matter any further. The applicants also deny that their business is either fraudulent or immoral. Mr. Chapman, who was at the time the order was made, and is now, Postmaster-General, makes an affidavit in which he states that before the

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order was made he considered a great quantity of information supplied to him by detectives and others, and came to the conclusion that the business being carried on by the applicants was fraudulent and immoral.

That is how the matter stands upon the evidence.

In answer to the rule it is pointed out, in the first place, that the respondent is a subordinate officer who is bound to obey the law, and that, so long as the order stands, the Postmaster-General under some circumstances having authority to make it, a subordinate officer is bound to obey the Statute, which says that the order shall upon publication be of full force and effect until cancelled by the Postmaster-General, and he is bound further, so far as matters are in his control, instead of registering, transmitting or delivering letters referred to in the order, to obey the behests of sec. 58. That is, of course, a complete answer so far as the rule is addressed to the Acting Deputy Postmaster-General, because there cannot be a mandamus to a subordinate officer commanding him to do a thing which he is forbidden by law to do.

But counsel representing the respondent, who substantially stands for the Commonwealth Government, intimated that they did not desire to take a technical objection of that sort, and were willing to treat the matter as if the mandamus were sought against the Postmaster-General, and I propose to deal with the matter on that basis. The first objection that occurs, considering the matter from that point of view, is that the order, so long as it stands, is binding on the Postmaster-General as well as on every subordinate officer of the department. So that, if a mandamus were granted at all, it could not be in the form in which it is asked. In substance what is desired is to compel the Postmaster-General to rescind his order. I will assume for a moment that the granting of such a mandamus would be a proper exercise of the powers of the Court, if no other difficulty were in the way, and I will proceed to consider a much more important question, viz., how far this Court has jurisdiction to order the Postmaster-General to perform the duties of his office.

Mandamus is a prerogative writ, issued nominally in the name of the Crown, but really on the relation of an individual, to compel an officer to do an act which the applicant is entitled to have

done, and without the doing of which he cannot enforce or enjoy some right which he possesses. If the act sought to be compelled to be done is a discretionary act, mandamus does not go further than to command the exercise of the discretion, and can never go to command its exercise in a particular manner. How far, then, does a mandamus lie against an executive officer of the Government? There is no precedent that we know of, except one in America, in which such a mandamus has been granted. A few attempts have been made in England, and only one was successful in *The King* v. *The Lords Commissioners of the Treasury* (1) in 1835, but it is now considered that mandamus was there granted by mistake.

In *The Queen* v. *The Lords Commissioners of the Treasury* (2) in 1872, another application was made for a mandamus against the Lords Commissioners of the Treasury. In that case *Blackburn* J. laid down some rules applicable to the question as to how far mandamus will lie against officers of the executive government. He says (3):—"The question remains whether there is any statutory obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money: because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation, particularly where the application is made on behalf of persons who have a direct interest in the matter, viz., the treasurer of the county on behalf of the county which ought by the Statute to have been indemnified for the costs which they have been obliged to pay. But it is here, I think, that the case fails. The general principle, not merely applicable to mandamus but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a mandamus were applied for against the secretary of a railway company to do something, it would not be granted, merely because the railway company his masters had an obligation to perform the duty, and it makes no difference that the master, or the principal, or the sovereign is only suable by petition

(1) 4 A. & E., 286. (2) L.R. 7 Q.B., 387.
(3) L.R. 7 Q.B., 387, at p. 397.

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of right, or perhaps not at all. There is the familiar case of the surveyor of highways who is the servant of the inhabitants of the parish; the inhabitants of the parish cannot be sued, because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants, though he is the person who acts for them. The same principle applies to mandamus, if the duty is by Statute, though perhaps 'duty' is hardly the word to employ with regard to Her Majesty; where the intention of the legislature shows that Her Majesty should be advised to do a thing, and where the obligation, if I may use the word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by mandamus merely because the Sovereign happens to be the principal.

"There are many cases applicable to this, beginning with the Post Office cases in Lord *Holt's* time, where Lord *Holt* differed from the rest of the Court, and it was held that the Postmaster-General was not suable as a carrier for non-delivery of letters, because it was in effect the Crown; the Crown could not be sued in such a matter; and similarly where through the clumsiness of a man steering a ship of war, they negligently ran down a merchantman, it was held the owners could not sue the Queen, nor the captain of the man-of-war.

"That being so, the question comes to be this, whether it can be shown (common law out of the question) that in any way a duty is cast upon the Lords of the Treasury towards third persons, not merely a duty to the Queen to advise, but a duty to third persons to issue this minute which it is the object of the mandamus to make them issue."

A distinction may be taken in this case that the duty of the Postmaster-General in relation to an order under sec. 57 is not to act under the direction of the Governor-General in Council, but is to act himself on his own motion. But it can make no difference that he is really acting as agent of the Crown unless he has also a direct duty to the third person which he may be called upon to perform. That was pointed out in *The Queen* v. *Secretary of State for War* (1), by Lord *Esher* M.R., who said:—"I entirely

(1) (1891) 2 Q.B., 326, at p. 338.

agree with the Divisional Court that a mandamus will not lie in this case against the Secretary of State for War, on the ground that there is no legal duty towards the applicant, to do what the applicant asks us to direct him to do, imposed upon him either at common law or by statute. Assuming that the Crown were under any obligation to make this allowance to the claimant, a mandamus would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not: he has no legal duty as such agent towards any individual. But the case goes further than that. There is no obligation upon the Crown to make this allowance recognized by the law. Therefore, what we are asked to do is really to direct a servant of the Crown, who is only responsible to the Crown, to do that which the Crown itself, his principal, is under no legal obligation to do. The appeal must fail on the ground, first, that a mandamus would not lie against the Crown, and secondly, that it will not lie against the Secretary of State, because in his capacity as such he is only responsible to the Crown, and has no legal duty imposed upon him towards the subject. The principle has been laid down over and over again in many cases."

The question, then, to be considered is whether the Postmaster-General owes any duty to the applicant in effect to withdraw this order.

The matter has been fully considered in the United States. I refer first to *Decatur* v. *Paulding* (1), which was an application for a mandamus to the Secretary of the Navy to perform a duty. In an earlier case, *Kendall* v. *The United States* (2), it had been held that a Federal Court had jurisdiction to issue a mandamus to an officer of the Federal Government commanding him to do a ministerial act.

The first question was whether an act of the Secretary of the Navy was a mere ministerial act. Chief Justice *Taney* in delivering judgment said (3):—"The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act

(1) 14 Peters, 497. (2) 12 Peters, 524. (3) 14 Peters, 497, at p. 515.

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of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion . . . The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion, or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

That in my judgment is a perfectly accurate statement of the English law on the subject, and contains the principles to be applied in determining the present case. In a later case in 1888, *The United States* v. *Black* (1), the cases of *Kendall* v. *The United States* (2), in which a mandamus was granted against the Postmaster-General, and *Decatur* v. *Paulding* (3) were referred to, and portion of the passage I have read from the latter case was quoted. The Statute under consideration in *Kendall* v. *The United States* (2) directed the solicitor of the Treasury to settle and adjust the claims of certain contractors for carrying mails, and to make them such allowances as upon full examination of the evidence might seem to be equitable and right, and the Postmaster-General was directed to credit those contractors with whatever sums the solicitor of the Treasury might decide to be due to those contractors. The Court held that no discretionary power was given to the Postmaster-General, and that the duty enjoined upon him was merely ministerial. In the *United States* v. *Black* (4), Mr. Justice *Bradley* in delivering the judgment of the Court, after referring to the two cases I have mentioned, said :—" The principle of law deducible from these two cases is not difficult to enounce. The Court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the Court having no appellate power for that purpose ; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a

(1) 128 U.S., 40.
(2) 12 Peters, 524.
(3) 14 Peters, 497.
(4) 128 U.S., 40, at p. 48.

service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

If, as I think, that passage correctly represents the law of the Commonwealth, there is no difficulty in applying it to the present case, regarding it as an application for a mandamus. The Court is asked in substance to require the Postmaster-General to revise the conclusion at which he arrived, and to come to the conclusion that he has no reasonable ground to suppose that the applicants were engaged in a fraudulent or immoral business. But it is clear that the duty of the Postmaster-General is not a mere ministerial duty, but that it is a duty involving the exercise of a discretion, and upon which he must form his own independent judgment. He may come to a conclusion one way or the other, and this Court cannot revise his judgment in a case where he is called upon to exercise a discretion. It is therefore clear that the Court cannot by mandamus interfere to order the Postmaster-General to cancel this order, nor, as long as this order stands, can the Court compel anybody to act in disobedience to it.

It was, however, suggested in the course of the argument that possibly the order is one that can be reviewed by *certiorari*. If so, there would be no difficulty in moulding this rule so as to give relief in that form. *Certiorari* only lies to a judicial or quasi-judicial authority, except in some cases where it is specially given by Statute. If the Postmaster-General in making an order under sec. 57 is to be regarded as a judicial authority, probably *certiorari* would lie to bring up the proceedings to be quashed. But then on what grounds could the proceedings be quashed? On *certiorari* you cannot inquire into the correctness of the conclusions of fact that the tribunal drew from the evidence before it. You can take objection that the order was not within the competence of the tribunal under any circumstances. If the circumstances are such that the order might have been correctly made you cannot get *certiorari*.

One other ground for *certiorari* is that an order was made to the prejudice of a party who was not heard. That view very much pressed me at first, viz.: that this was a quasi-judicial proceeding and that the applicants were not heard. But in another sense this was not a quasi-judicial but an executive act. This

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order was made by one of the executive officers of the Government, called in the Constitution "the Queen's Ministers of State for the Commonwealth."

The order was made by that officer in that capacity. The act is only quasi-judicial in this sense, that it is required to be made upon evidence. The condition of making the order is that the Postmaster-General has reasonable ground to suppose that the person, in respect of whom it is made, is doing one of the specified things. That involves the consideration of evidence or information given to the Postmaster-General, and if the proceeding is regarded as an ordinary judicial proceeding, it would be sufficient to say that the other party was not heard. But that inference, if it can ever be applied to an executive act, and I doubt whether it can, may be excluded by the plain provisions of the Statute imposing the duty. In the present case it is clear to my mind from the words of the section, that the duty is intended to be exercised there and then on what is considered to be an emergency. The section does not suggest that the Postmaster-General is to call upon other persons to show cause before making the order. The conditions are that it must be proved to his satisfaction that a person is engaged in receiving money in connexion with gambling, lotteries, fortune telling, or "in connexion with a fraudulent obscene indecent or immoral business or undertaking." In order that the Postmaster-General may act, it is necessary to have some information placed before him, but it would be entirely contrary to the rules of public policy if he were to disclose that evidence to the person sought to be affected by it. He might go so far as to tell that person that there was a charge made against him, and to call on him to show cause; possibly that might be so as a counsel of perfection, but I do not think it is required by the Statute. I think it appears sufficiently from the Statute that it was not intended that the Postmaster-General should be regarded as a judicial officer, or that he should call upon the other party before making an order. I think therefore that an order of this kind is not examinable by *certiorari*.

I have given my reasons for thinking the Postmaster-General cannot be called upon by mandamus to revise his conclusion. If there is any remedy for a person who cannot get his letters through

the post it must be sought elsewhere. Supposing that sec. 57 were not in the Act, it is extremely doubtful whether there would be a right to compel the Postmaster-General to deliver letters, because *primâ facie* the answer would be that the person affected could bring an action for the detention of the letters. If he could not, so much the worse for him; if an action for detinue would lie, he could not get a mandamus to compel the delivery of the letters.

I therefore say that if the applicants have any remedy it must be sought either by an application to the Postmaster-General to revise his decision, showing him that he has been misinformed, that their business is not fraudulent or immoral, but is respectable and honest, or else, if they can succeed in doing so, by bringing an action against the party who is detaining the letters. I must not be supposed to offer any encouragement to the bringing of such an action. In my opinion this application fails in whatever aspect it is regarded.

BARTON J. I need not traverse again the facts which have been sufficiently stated by the learned Chief Justice. The application has been treated as if it were against the Postmaster-General, and I will so treat it in order to discuss it in its broadest aspect. The main question is whether the order complained of is judicial in character, or merely ministerial, or whether it comes within the wide field of administrative duties. A case much relied on by the applicants was *Smith* v. *The Queen* (1). There the question arose under the *Crown Lands Alienation Act* 1868 of Queensland whether the Commissioner, in determining that a lessee of Crown lands had forfeited the lease, was acting in a judicial capacity. If the proceeding before the Commissioner was judicial, it is clear that the person whose rights might be affected was entitled to be heard. He was summoned but was not heard in the proper sense, because he was not summoned until part of the evidence had been taken, and he was denied knowledge of what that evidence was. In discussing the sections of the Act there in question, the Lords of the Privy Council said (2):—"If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the

(1) 3 App. Cas., 614.

(2) 3 App. Cas., 614, at p. 623.

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provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance. Their Lordships are of opinion that the inquiry to be made by the Commissioners under sec. 51, sub-sec. 5, is in the nature of a judicial inquiry."

Now I do not think that this is a case at all like *Smith* v. *The Queen* (1). Nothing can be adduced from the framework or substance of the *Post and Telegraph Act* 1901, which entitles us to consider that this particular sec. 57 is one which prescribes a judicial inquiry. Other sections of the Act have been cited, and amongst them secs. 29 and 43 which I will mention directly. There is not a shred of context in the Act which shows that the Minister of State, *primâ facie* an officer with administrative functions (see Constitution, sec. 64), is conducting a judicial inquiry when he is informing his mind for the purpose of deciding whether he has reasonable cause to suppose that a business largely conducted through his department is fraudulent or immoral. It is, of course, an every-day business of responsible Ministers of the Crown to satisfy themselves from the numerous sources of information open to them whether they are justified in exercising powers which gravely concern the business and other affairs of citizens. But they do not by that means become exercisers of judicial functions. Now, there is a great difference of expression between sec. 57 and secs. 29 and 43, because provisions are appended to the last-named sections which are entirely absent from sec. 57, nor is there anything in that section substituted for them, or which can take their place.

Sec. 29 deals with the registration of newspapers and gives certain powers to the Postmaster-General to prevent the sending by post of alleged newspapers, unless the provisions of the section have been complied with. The section goes on:—(5) "No action shall be brought against the Postmaster-General or any officer of the department for anything done or purporting to be done under the provisions of this section but any person aggrieved by anything done or purporting to be done by the Postmaster-General or a Deputy Postmaster-General under this section may appeal to a

(1) 3 App. Cas., 614.

Justice of the High Court or to a Judge of a Supreme Court of a State by summons or petition in a summary way. The Justice or Judge may decide whether the action taken under this section was justified in law or in fact and may make such order as to restoration to the register or otherwise as to him may seem just," &c. There is therefore a remedy granted by a judicial proceeding in the event of a wrongful exercise of the power given by that section. In sec. 43 we find a provision enabling the Postmaster-General or any Deputy Postmaster-General to cause any postal article having anything profane, blasphemous, obscene, offensive or libellous, written or drawn on the outside thereof, or any obscene enclosure in any postal article, to be destroyed. There again there is provision for a judicial proceeding. It is this:—"No action shall be brought against the Postmaster-General or any officer of the Department for anything done under the provisions of this section but any person aggrieved by anything done by the Postmaster-General or a Deputy Postmaster-General under this section may appeal to a Justice of the High Court or to a Judge of a Supreme Court of a State by summons or petition in a summary way." The powers are strong and perhaps arbitrary, but are safeguarded by resort to a judicial tribunal. When we come to sec. 57 there is no such provision. We do find however that the order of the Postmaster-General is to be of full force and effect until cancelled by him. So that, while we have provisions in one class of sections giving strong powers providing for recourse to the Courts of law, we have no similar provision in sec. 57.

Thus while we find these provisions in secs. 29 and 43, on the other hand, sec. 57 (2) tends to show, by comparison, indeed by contrast, that the order of the Postmaster-General is to stand until he himself shall cancel it. There is not, nor could there consistently be, any similar provision in the other sections mentioned, and the marked difference in the casting of the section now under discussion, and that of the two others, materially strengthens the argument for the respondent, that the proper inference is that the function of the Postmaster-General, acting under sec. 57 (1), is, upon the terms employed, not that of judicial decision, and that such an order as the present is not examinable here. If a judicial proceeding is required in order to warrant

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an order, then it must of course be conceded that the person whose business is in question must be heard before the order can be made. But first the judicial character of the proceeding must be established, and it is not established merely because we see that the power given by the section may be exercised most harmfully unless it is applied with great discretion. The legislature expects discretion from the Crown's Ministers in all their transactions. In a vast scheme of affairs, so far-reaching as the Post Office, dealing every day with enormous sums of money, as well as guarding the reputations and the secrets of millions of people, requiring often promptitude of decision as the first essential of effective action, the legislature, in laying down rules for its management, may often think it wise to sacrifice something of deliberateness to the necessities of the ever-pressing volume of business. And they have probably thought so here. At any rate, we have no reason to suppose that they have departed in this instance from the general policy of such acts. The public business could not go on if the current transactions of great departments of State were liable to a thousand interruptions at the hands of the Courts. Before one of such interruptions can be judicially sanctioned, we ought to be able to see that Parliament has not been content to assure itself of the generally just and fair conduct of Ministers by the ordinary means so ready to its hands —the assertion, as often as need be, of their responsibility to itself. And in the present case I cannot see that Parliament has used language which supports the contention that judicial interference was contemplated. There is, however, a very strong reason to think that Parliament had nothing of the kind in contemplation. Publicity is an invariable incident, and to-day an essential, of judicial proceedings. But the transactions dealt with in sec. 57 (1) (*e*), are largely of a kind which, so long as the persons corresponding with firms of "medical specialists" observe the law, no Parliament would readily expose to publicity. Indeed, the mere prospect of any such result, which most of those concerned would regard as calamitous, would render it well nigh impossible for the Department to obtain information on which it could act, and so the apparent power would become a triviality, and nefarious practices, fortified by a redoubled secrecy, would become impregn-

able. This argument, of course, contains no reflection on the present applicants. On the manner in which their business is in truth conducted, they are somewhat reticent, while the Department, in standing on its claim of immunity from judicial interference, has declined to set forth the information on which it acted. I have come to the conclusion that the act is not judicial. On the other hand, I cannot think it is merely "ministerial." It was urged that if the duty were to determine on facts, it must be judicial; that if it appeared that the Minister must receive information before he could act, and which he must necessarily weigh, then, in face of that strong "element," as it was called, the thing done must be taken to be judicial in the absence of anything appearing to the contrary.

This would be perfectly true if the *discrimen* were merely between the judicial and the ministerial: if everything that did not belong to the one class belonged to the other. But here we find an attempt to eliminate a third factor, wider perhaps in its operation than either of the two mentioned. The field of administrative operations covers immeasurably the greatest area of the work of government. In that field there must be the constant collection of facts, and the vigilant exercise of judgment and discretion. Great, no doubt, is the number of acts, formerly administrative, but now ministerial because performed almost automatically at the behest of Parliament, or prescribed by regulation under Statute. But the administrative part of the work of government must still be the largest as long as prompt and discreet action on facts first to be ascertained is the first duty of the public servant, whether permanent in office or responsible to Parliament. If the act now challenged is within this larger area, then it is not judicial and it is not ministerial. If judicial, it might be dealt with by mandamus, but only so far as the judicial duty was repudiated or refused. If ministerial, mandamus would apply to it, but only so far as the act to the performance of which the applicant is entitled must be performed as a public duty, and without option or discretion. But no one would say that there is no discretion in the Postmaster-General as to whether he shall receive and deliver letters, or exercise the powers of sec. 57, and the discretion is none the less existent, even

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if in the exercise of the power he may commit an error of judgment. It cannot be seriously argued that the duty is purely ministerial. I have already given reasons for concluding that it is not judicial. If those reasons are correct, it must then be administrative. And a purely administrative duty is not to be enforced by mandamus, which, in such circumstances, would be an exercise of power by the Courts tending to sap ostensibly the power of the Crown, but really to undermine the principle of the responsibility of Ministers, and to subject their acts, and the working of the great Departments of State to endless encroachment on the part of the judiciary. Such a process would end in confusion and disaster. The principles governing this case, then, are not those found in *Smith* v. *The Queen* (1). They are rather to be sought in cases like *The Queen* v. *The Lords Commissioners of the Treasury* (2), where Lord *Cockburn* C.J., speaking of the jurisdiction to issue a writ of mandamus, says:—"We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." The principle, as it exists in the American Republic, is elucidated in the leading case of *Decatur* v. *Paulding* (3), where *Taney* C.J., laid down the limits of the jurisdiction and duty of the Courts in words which, as the learned Chief Justice has quoted them, I will not repeat. That exposition is so clear that I shall not cite any further authority in the same line. My opinion, then, is that we have no jurisdiction to grant the mandamus asked. I need not say that I am not, any more than is the Chief Justice, able to see how, in any event, we could have granted the applicant a writ, while the order complained of remained in force, *i.e.*, uncancelled by the Postmaster-General. For, while it remained in existence, it would completely protect all officers who acted under it against mandamus. Nor can I

(1) 3 App. Cas., 614.
(2) L.R. 7 Q.B., 387, at p. 394.
(3) 14 Peters, 497, at p. 515.

comprehend how that order could be got rid of by *certiorari* or other process of law, unless it were judicial, which we are agreed it is not, unless it were clearly an assumption to exercise an authority which had not been conferred. In the view I take it is unnecessary to express an opinion on the question raised in argument, whether sec. 158 of the *Postal Act* operates to prohibit an application for a mandamus.

In the result I agree that the rule must be discharged.

O'CONNOR J. This matter came before me in Chambers on an application for a rule *nisi*. It appeared to me on the materials I then had before me that two questions raised were very arguable. The first question was whether the order made by the Postmaster-General under sec. 57 was examinable in any form at the suit of the person injured. The second was whether there was sufficient evidence that the Postmaster-General had exercised his power of making the order upon reasonable grounds for supposing that the business dealt with was fraudulent or immoral. If it were now necessary to decide the latter question, I should certainly not be willing to adjudicate upon the materials we have before us. We have on the part of the applicants the vaguest outline of what their business is, and, we have on the part of the Postmaster-General a mere suggestion of the grounds upon which he acted.

But it becomes unnecessary to consider the question of fact because of the view we take of the much more important question whether in this case a mandamus will lie at all, either against a subordinate officer of the Post Office, or against the Postmaster-General himself.

A mandamus is asked for to direct the Acting Deputy Postmaster-General to transmit through the Post Office all mail matter addressed to the applicants or any person on their behalf.

It will be convenient to consider this question leaving out of consideration the power exercised by the Postmaster-General under sec. 57. The first inquiry on any application for a mandamus against a public officer is this:—What is the duty, if any, by the public officer to the applicant? The foundation of mandamus is the legal obligation by the officer to discharge some public duty to the applicant. If there is no public duty to be

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discharged either by the Assistant Deputy Postmaster-General or by the Postmaster-General himself, or no legal obligation to discharge that duty towards the applicant, then there is no foundation for a mandamus. It is a well known principle of law referred to already by the learned Chief Justice that mandamus will not lie against the Crown or against a servant of the Crown under ordinary circumstances. If a Statute has imposed some special duty upon a servant of the Crown, then, although he is a servant of the Crown, if he is a *persona designata* to perform the duty, its performance may be enforced against him by any person interested, exactly as if he were not a servant of the Crown. But unless a person who is a servant of the Crown owes some duty either by common law or by Statute to the applicant, mandamus will not lie.

The Post Office is one of the great Departments of State, and the Government undertakes to carry out the duties relating to postal services by that Department just as it does the collection of revenue by the Treasury and the Customs Department, the construction of public works by the Public Works Department, the care of public lands by the Lands Department, and other duties of the Executive Government by other departments. But there is no obligation towards any individual member of the public as to any of these duties on the part of any officer of the Government, unless it is imposed by Statute. The duty of each officer is to the Government, and not to individual members of the public. Looking at the *Post and Telegraph Act* 1901 we find that the Postmaster-General is the Minister of State for the Commonwealth, charged with the administration of the Act. There is no section of the Act which directly or indirectly imposes upon the Postmaster-General or upon any of his officers the duty to deliver or transmit letters under any circumstances. On the contrary, it appears that this Department is to be carried on, as every other Government Department is carried on, in accordance with the discretion and under the direct control of the Governor-General in Council. For instance, under sec. 97 (*a*) there is power to make regulations for the "management of post offices and telegraph offices and the receipt despatch carriage and delivery of postal articles and telegrams and for the conduct and guidance

of all postmasters and other officers and servants of the Department." Looking through the Act it appears to me there would be nothing to prevent the Governor-General in Council, in the exercise of the power given him by that section from making regulations largely restricting the class of correspondence that might be freely transmitted through the Post Office. Even if sec. 57 did not exist, there is no section of the Act which would make it *ultra vires* in the Governor-General in Council to make regulations dealing specially with correspondence of this kind. In addition to that it will be noticed that the powers of the Government with regard to the matters I have mentioned are to be exercised in accordance with the discretion not of the Postmaster-General, but of the Governor-General in Council. I need not further particularize. It is merely necessary to say that, taking the whole purview of the Act, it appears to be one of those Acts which, for the benefit of the public, empowers the Government by its officers to perform certain duties, but with no obligation on the part of the officers towards any member of the public. In these circumstances it is impossible to say that there is any duty owing by the Postmaster-General or by any officer of the Post Office to the applicants to receive transmit or deliver their correspondence which the Court could enforce by mandamus.

Coming now to sec. 57, that section is at once an answer to the present application. As long as the order under sec. 57 stands, that is to say, until it is cancelled by the Postmaster-General, every officer of the Department is bound to obey it, and the Acting Deputy Postmaster-General is therefore bound to obey it. The mandamus asked for would be a command to him to disobey the order. Not only is the Acting Deputy Postmaster-General bound by the order, but the Postmaster-General himself and his successors are bound, and everyone else who deals with the Post Office is bound, as long as that order remains uncancelled, to obey its directions.

I agree with the opinion of the learned Chief Justice that the remedy of mandamus to compel the Postmaster-General to alter his order is quite inapplicable. It would be impossible to conceive of a mandamus being applied to such a purpose. The only question on that point is whether an order under sec. 57 is

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or is not examinable under some such proceeding as *certiorari*. As long as the order stands mandamus cannot be obtained. If, however, *certiorari* would lie, this Court would not consider itself bound by the form of the application, but in order to do justice, would alter the form so as to make it appropriate. *Certiorari* will only lie to bring up an order of a Court or one made in a judicial or *quasi*-judicial proceeding, or the order of some body where decisions are by Statute made examinable by *certiorari*. The Postmaster-General does not act as a Court, and an examination of sec. 57 satisfies me that this is neither a judicial nor a *quasi*-judicial proceeding. One of the marks of a judicial proceeding is, an obligation to hear evidence. There was no obligation on the Postmaster in this case to hear evidence. The powers under the section may have to be exercised promptly: they may have to be exercised without inquiry, or after inquiry from the most secret sources. The whole object of the section might be defeated if it were necessary to hold an inquiry before putting its provisions into operation. For that reason the power is given to the Postmaster-General, when he has reasonable ground to suppose a person to be engaged in certain operations, to make the order. That "reasonable ground" may arise from his own knowledge, or from departmental reports, as well as from full proof. If you restrict the grounds upon which the Postmaster-General may act to grounds that come before him in some judicial or *quasi*-judicial proceeding, you practically destroy the usefulness of the section. The section appears to me to bear evidence on its face that Parliament did not intend its operation to be so restricted. The order is by sec. 57 (2) in force until cancelled by the Postmaster-General. There is no order that we have power to make under *certiorari* to cancel the order under the circumstances.

It is said—and upon this ground the argument for the applicants was principally based—that mandamus will lie because the order is a nullity, there being no ground at all for the exercise of the power given to the Postmaster-General. There is no foundation for such an argument. To say that it is to be treated under the circumstances as non-existent does not seem to me to be possible.

For these reasons I am of opinion that the order made by the

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Postmaster-General is not examinable in any form. On these two broad grounds therefore the application must be refused: First, because no duty exists on the part of the Postmaster-General towards the applicants to deliver or carry their letters. In the second place, the order made under sec. 57, so long as it stands, is a complete answer to the application, and there is no way by *certiorari* or otherwise in which the order can be brought before the Court. I therefore agree that the rule *nisi* should be discharged.

Rule discharged with costs.

Solicitors, for prosecutor, *Gillott, Bates & Moir*, Melbourne.

Solicitor, for defendant, *Charles Powers*, Crown Solicitor for the Commonwealth.

B. L.

Aff
Wilfley Ore Concentrator Syndicate v Guthridge (1906) 4 CLR 202

Appl
Olin Corporation v Super Cartridge Co Pty Ltd (1977) 180 CLR 236

Foll
Olin Corporation v Super Cartridge Co Pty Ltd (1977) 1A IPR 197

[HIGH COURT OF AUSTRALIA.]

N. GUTHRIDGE LIMITED . . . . APPELLANTS;
DEFENDANTS,

AND

THE WILFLEY ORE CONCENTRATOR SYNDICATE LIMITED . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Patent—Infringement—Prior Publication.

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MELBOURNE, *March* 19, 20, 21, 22, 26.

Griffith C.J., Barton and O'Connor JJ.

The validity of a patent for improvement in ore concentrators was challenged on the ground of prior publication, founded upon a description in an engineering journal of the invention the subject matter of the patent.

It was alleged by the patentees that the description so published was unintelligible.

Held, that the question was whether the description was sufficient to convey to men of science and employers of labour information which would enable them, without any exercise of inventive ingenuity, to understand the