

officer should be entitled to receive when those departments were transferred.

For all these reasons it seems to us that the construction suggested by Mr. Cussen is excluded by the considerations usually called in aid in construing an ambiguous section of an Act. The plain meaning is that, as soon as the enquiry has been made what is the salary to which an officer is entitled on 27th December, 1900, the section is exhausted. The plaintiff says that he was entitled to a salary of £100 a year at that time, and he has received it. He has not made out any cause of action in respect of any addition to that salary.

Other questions have been raised with which it is unnecessary for us to deal.

*Questions answered in favour of defendants.*

Solicitors, for petitioner, *Rigby & Fielding*, Melbourne.  
Solicitor, for respondent, *Powers*, Commonwealth Crown Solicitor.

[HIGH COURT OF AUSTRALIA.]

BACKHOUSE . . . . . APPELLANT;  
DEFENDANT,  
AND  
MODERANA . . . . . RESPONDENT;  
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF  
WESTERN AUSTRALIA.

*Practice—Irregular service of initiatory process—Appeal—Prohibition—Special leave to appeal—Rule upon which the High Court will act in granting leave to appeal.*

Irregularity in the service of initiatory process does not oust the jurisdiction of the Court. Such a defect is a ground for appeal, and not for prohibition. *Barker v. Palmer*, 8 Q.B.D., 9, approved.

H. C. OF A.  
1904.  
MILLER  
v.  
THE COMMON-  
WEALTH.

H. C. OF A  
1904.  
PERTH,  
October 11.  
Griffith, C.J.,  
Barton and  
O'Connor, JJ.



H. C. OF A.  
1904.

BACKHOUSE  
v.  
MODERANA.

The principles on which the High Court will grant special leave to appeal from the Supreme Court of a State as laid down in *Dalgarno v. Hannah* (*ante* p. 1), applied.

MOTION for special leave to appeal.

This was a motion by the defendant, Backhouse, for special leave to appeal to the High Court of Australia from an order of the Supreme Court of Western Australia, dated the fourth of October, 1904, discharging a rule *nisi* for a prohibition calling upon the mining warden at Mount Magnet and one Moderana to show cause why a writ of prohibition should not issue restraining the respondents from further proceeding on a judgment or order of the Warden's Court, dated the 8th July, 1904. The action was one in which the plaintiff sued the defendant and one Canning to recover the sum of £148 3s. for work done, goods supplied, and the hire of horse let to hire by the plaintiff to the defendants in connexion with the working of Gold Mining Lease 463M. Judgment was obtained by the plaintiff in default of appearance by the defendants for the full amount claimed, and a rule *nisi* for a prohibition was obtained by Backhouse on the grounds:—

1. That the warden had no jurisdiction to entertain the matter;
2. That the applicant was not served with any process in the matter; and
3. That the proceedings were bad on their face.

*Forster*, for the defendant in support of the motion. Ten clear days had not elapsed between the issue and the return day of the summons as required by the Goldfields Regulations. The Full Court held on the authority of *Barker v. Palmer*, 8 Q.B.D., 9, that a prohibition would not lie where a question of time merely was involved. Prohibitions have been granted, however, in such cases, *e.g.*, *In re Pearson*, 17 N.S.W.L.R., 245.

[GRIFFITH, C.J.—Can you show that this is a matter of public importance?]

The defendant has no interest in the quartz claims, but worked the same merely under a tribute agreement with one Bartlett, a shareholder. Nor was the defendant a registered proprietor of any mining tenement within the Murchison goldfields, and therefore the contract entered into by him is not within the meaning



of sec. 232 of the *Mining Act* 1904. The jurisdiction of the Warden's Court is matter of public importance.

H. C. OF A.  
1904.

BACKHOUSE  
v.  
MODERANA.

GRIFFITH, C.J. This is an application for special leave to appeal from the judgment of the Full Court of Western Australia discharging a rule *nisi* for a writ of prohibition. The case was brought in the Warden's Court, and was a claim for £148 for various services described as horse hire, so many shifts, removing a boiler, supply of mining timber, and carting ore to a railway station. The party moving, in his affidavit, says that he was carrying on business mining on a quartz claim as tributor, and not as registered owner, and that these goods were supplied to him for the purpose of carrying on these mining operations. Judgment was given for the plaintiff, and a prohibition was asked for upon two grounds, firstly, that the warden had no jurisdiction to entertain a claim of that nature, and secondly that the service of the summons upon the applicant was informal and not in accordance with the provisions of the law. The Full Court was against the applicant on both grounds. So far as regards the objection that the service of the summons was irregular—that is, that there was no effectual service at all—the argument is raised that a defect in the service prevents the Court from exercising jurisdiction. The Full Court held otherwise, and it was so held by the Queen's Bench in England, who were of opinion that such a defect was a ground for appeal and not for prohibition. This Court can see no reason to doubt the correctness of that decision. It is clear, in the present case, that an appeal lay if the applicant was aggrieved by having had no notice, or by having judgment given in his absence. In such a case it is quite clear that a party can apply for a new trial. Such a right is given him by the express regulations of the Warden's Court; and even without such regulations I do not doubt that a Court of record, which has inadvertently given judgment against a man in his absence, has inherent jurisdiction to set right any such mistake. As to the point of the jurisdiction of the Warden's Court, the jurisdiction of that Court extends to all contracts, questions or disputes of any kind relating to a mining tenement or to mining. The term "mining" is defined to mean "all modes of prospecting and mining



H. C. OF A.  
1904.

BACKHOUSE  
v.  
MODERANA.

for and obtaining gold or minerals." The work, the subject of this action, appears to have been done, in part, under a contract to supply means for getting the gold from the ground, and as to another part under a contract to supply means for conveying the ore to a place where the gold might be extracted from it. The best that can be said is that it may be doubtful whether these particular contracts were contracts relating to mining. As to what the jurisdiction of the Warden's Court is, that, no doubt, is an important question, but whether that question arises in this case or not depends itself on a question of fact. We laid down in the case of *Dalgarno v. Hannah*, ante p. 1, that we would not grant special leave to appeal to this Court except in cases of public interest, or where an important point of law was in question. The only category under which it is suggested that this case falls is that it involves an important question of law. The suggested question of importance is the extent of the jurisdiction of the Warden's Court, but whether that question arises at all in this case is doubtful. In the case of *Dalgarno v. Hannah*, ante p. 12, we said, "It is, however, a matter for our discretion to say whether so important a question should be decided in the present case. And considering the nature of the case, which is, we think, on the border-line, we think our discretion would be most fitly exercised by refusing leave to appeal." In an application for special leave to appeal made to the Privy Council this year in the case of *McLaughlin v. The Daily Telegraph Newspaper Co. Ltd.*, ante p. 479, their Lordships repeated the rule in *Prince v. Gagnon*, which they said they would follow. The present case is unattended with doubt except on a question of fact; and it has never been the practice of the Judicial Committee of the Privy Council to grant special leave to appeal where the case involves merely a doubtful question of fact.

BARTON, J., and O'CONNOR, J., concurred.

*Application refused.*

Solicitor for the appellant, *W. T. Forster*.