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GORMAN v. WILLS.

Appeal dismissed. Order of the Supreme Court varied by ordering that the costs of the first trial be costs in the action.

Solicitors, for the appellants, *Dibbs & Parker.*

Solicitors, for the respondents, *Lewis, Levy & Fulton.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

ALEXANDER . . . . . APPELLANT; DEFENDANT,

AND

DONOHOE . . . . . RESPONDENT. COMPLAINANT.

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SYDNEY, *Dec.* 12, 17, 21.

Griffith C.J., Barton and Isaacs JJ.

Immigration Restriction Act 1901 (*No.* 17 *of* 1901), *sec.* 9—*Immigration Restriction Amendment Act* 1905 (*No.* 17 *of* 1905), *sec.* 12—*Master of vessel from which prohibited immigrant enters Commonwealth—Formal defect in conviction—Fine imposed without alternative of imprisonment—Appeal—Statutory prohibition—Amendment—Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 37.

The master of a ship from which a prohibited immigrant had entered the Commonwealth was convicted in a police Court, by a magistrate exercising federal jurisdiction, of an offence under sec. 9 of the *Immigration Restriction Act* 1901, and ordered to pay a fine of £100 and costs.

On an application to the High Court for a prohibition:

Held, that the magistrate had the same power as regards costs as if he had been exercising his ordinary jurisdiction, and that, even if the conviction was defective in that it did not impose a term of imprisonment in default of payment of the fine, the High Court had power under sec. 37 of the *Judiciary Act* to amend it by adding the alternative.

The grounds of the prohibition being statutory, the High Court dealt with it as an appeal, and made an order dismissing the appeal with costs.

PROHIBITION.

The appellant was master of the ship *Port Logan*. While the ship was in the port of Newcastle one of the crew, who was, in

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the opinion of the Commonwealth officer, a prohibited immigrant, left the ship and entered the Commonwealth. The appellant was prosecuted before a magistrate under sec. 9 of the *Immigration Restriction Act* 1901, as amended by sec. 12 of the Act of 1905, and convicted, and was ordered to pay a fine of £100 and five guineas costs.

17th December. *Tighe*, on behalf of the defendant, moved the High Court for a rule *nisi* for a prohibition. The first ground taken was that the decision of the magistrate was against evidence, inasmuch as the officer had formed his opinion on insufficient material, and before a muster of the ship's crew. [Counsel referred to *Reg.* v. *Bishop of London* (1).] The Court, following *Preston* v. *Donohoe* (2), refused to grant a rule on that ground. Another ground taken was that the ship's articles were not produced, and the proper certified copies were not put in evidence, as required by the *Merchant Shipping Act*. [Counsel referred to *Taylor on Evidence*, 10th ed., p. 304; *Alivon* v. *Furnival* (3).] On this ground also the Court refused to grant a rule. A rule *nisi* was granted on the ground that the conviction was bad; (1) because it included an order to pay costs, and the magistrate had no jurisdiction to make such an order; (2) because there is no provision in the Act for enforcing the fine; and (3) because there was no award of imprisonment in default of payment of the fine.

December 21st. The case now came before the High Court on motion to make the rule absolute for a prohibition.

Tighe, for the appellant. The magistrate has no jurisdiction to award costs when exercising federal jurisdiction.

[GRIFFITH C.J.—All the State Courts are invested with federal jurisdiction. Surely in every case where a party is entitled to have recourse to a State Court under a federal Act, costs may be awarded him in the same way as if the Court were exercising its ordinary jurisdiction.]

As to the other grounds, there is no provision in the Immigration Restriction Acts for enforcing a fine of more than £50, and

(1) 24 Q.B.D., 213.
(2) 3 C.L.R., 1089.
(3) 1 C.M. & R., 277; 3 L.J., Ex. (N.S.), 241.

consequently the State law must apply. The provisions of the *Justices Act*, No. 27 of 1902, as to procedure for summary conviction must be followed: *Punishment of Offences Act* 1901, secs. 2, 3. That and the common law regulate the practice in Courts of summary jurisdiction. [He referred also to *Judiciary Act* 1903, secs. 79, 80.] The provisions of sec. 10 of the *Immigration Restriction Act* 1901 do not exclude the remedy under the *Justices Act* 1902. By sec. 82 of the latter Act the justices must adjudge that in default of payment of a fine the offender shall be imprisoned for such period as to such justices shall seem fit. The conviction is therefore bad.

GRIFFITH C.J.—Has not this Court power under sec. 37 of the *Judiciary Act* to amend by awarding imprisonment in the alternative?]

The justices have a discretion which they only can exercise, and at a particular time. This Court cannot say now what term of imprisonment the justices would or ought to impose. The Supreme Court has powers of amendment under sec. 115 of the *Justices Act* 1902, but it has no power to amend such a defect as this, where discretion is involved: *Ex parte Sin Kye* (1).

[GRIFFITH C.J.—Under sec. 37 of the *Judiciary Act* power is given in more comprehensive words than those used in conferring the power of amendment under the *Justices Act*. This Court may exercise its discretion if the Court below fails to do so. We could read the depositions and fix the term of imprisonment. There may be a difficulty in exercising the power, but the Court should not refuse to exercise it for that reason.]

Where a statutory Court is given power by the Statute to make an order, and it is provided that the order must be in a certain form, it is bad unless made in that form.

[GRIFFITH C.J.—That is so where the provision is for the benefit of the person affected by the order. But is there any authority for quashing a conviction on this ground?]

Blacket, for the respondent, referred to sec. 132 of the *Justices Act* 1902 as expressly negativing such a contention, and was not further called upon.

(1) 15 N.S.W. W.N., 205.

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Dec. 21.

The judgment of the Court was delivered by

GRIFFITH C.J. The objection taken in this case is somewhat singular. It is that the order by which the appellant was ordered to pay a fine of £100 did not go on to specify for how long he should be imprisoned in the event of his failure to pay the fine. The Immigration Restriction Acts, under which the conviction was had, provide no method for the recovery of the penalty, and the Crown is content to rest upon the order to pay. Possibly, to be strictly regular, the conviction should be amended by imposing a term of imprisonment in the alternative. There is no doubt that this Court has power to do that, because in sec. 37 of the *Judiciary Act* 1903 it is provided that:—"The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance," so that in this case the Court may make the order that ought to have been made in the first instance. But, as neither party desires that, it is not necessary for us to do anything more than dismiss the appeal.

This matter was instituted by a rule *nisi* for a prohibition. But it was a statutory prohibition, which is always treated as an appeal. It is really a particular way of instituting an appeal; and being here, we treat it as an appeal.

Appeal dismissed with costs.

Solicitors, for appellant, *Sparke & Millard.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

C. A. W.