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necessarily be done as a fraudulent preference, which is a conclusion quite beyond the New Zealand authorities as I read them.

With reference to the argument that the debtor here was moved by the hope of pulling through, I would refer to the case of *In re Vingoe; Ex parte Viney* (1), which shows that a hope of pulling through does not necessarily negative an intention to prefer. It may be coupled with a desire to make the creditor safe in any case, and then a payment to him is a fraudulent preference.

Appeal dismissed with costs.

Solicitors, for the appellants, *W. H. Wilson & Hemming.*
Solicitors, for the respondent, *Thynne & Macartney.*

N. G. P.

[HIGH COURT OF AUSTRALIA.]

JEREMIAH KELLY . . . . . APPELLANT;
COMPLAINANT,

AND

SYDNEY WIGZELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Oct.* 10.

Griffith C.J., Barton and Isaacs JJ.

Brisbane Traffic Act 1905 (*Qd.*), (5 *Edw. VII. No.* 18), *sec.* 6—*Traffic Regulations*—"*Permitting*" *passengers in excess of prescribed number to travel on tramcar*—*Duty of tramway conductor*—*Variance between information and evidence as to place*—*Justices Act* 1886 (*Qd.*), (50 *Vict. No.* 17), *sec.* 48.

In a prosecution for an offence against a by-law which prohibits a conductor from permitting any person in excess of the maximum number prescribed to travel on a tramcar, the fact that there are more than the

(1) 1 Manson, 416.

prescribed number actually travelling in a tramcar is sufficient evidence of such permission on the part of the conductor.

An information ought not to be dismissed on the ground of a merely technical variance between the information and the evidence with regard to the name of the place in which an offence is proved to have been committed.

Decision of the Full Court: *Kelly* v. *Wigzell*, 1907 Q.W.N., 1, reversed.

The Brisbane Tramway Company in 1906 ran tramcars in the streets of Brisbane and South Brisbane. One of their cars, running from South Brisbane towards Brisbane, drew up in Melbourne Street on the south bank of the river, entered Victoria Place (a short approach continuing Melbourne Street to the bridge), and was there boarded by police officers, who counted the passengers while going across the bridge, and found that several in excess of the regulation number fixed by the Traffic Regulations of 6th April 1906 (framed under the provisions of the *Brisbane Traffic Act* 1905,) were travelling in the car. The conductor was prosecuted for a breach of the Regulations, sec. XVIII. (5), which provides that "no conductor shall . . . permit any person in excess of the maximum number prescribed in clause 2," (which was 50 for that type of car), "to travel in or upon any tramcar." The information charged the offence as having been committed in Melbourne Street, South Brisbane. The magistrate dismissed the complaint on the ground that there was no evidence that any offence had been committed in Melbourne Street, as the passengers were not counted until after the car had left that place. This decision was affirmed by the Supreme Court (1), who added as an additional ground that the evidence did not establish any "permission" on the part of the conductor.

The complainant appealed by special leave to the High Court.

Power (with him *Macleod*), for the appellant. "Permitting to travel" is fully established by the evidence; the conductor is the person in charge of the car, and knows when passengers get on the car, and has full power to exclude any in excess of the prescribed number from getting on.

(1) 1907 Q.W.N., 1.

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The evidence that an offence was committed being clear, it is immaterial that the information is at variance, if at all, with the evidence in its statement of the place where the offence occurred: *Justices Act* 1886, sec. 48. As a matter of fact, Melbourne Street and Victoria Place are the same street in a direct line; the place where the offence occurred is known by both names. In any case the magistrate was bound to grant an amendment of such a detail; and this Court may do so now: *Gabriel* v. *Rickards* (1); *Keliher* v. *Bleakley* (2).

Feez (with him *Shand* and *Lukin*), for the respondent. The special leave should be rescinded; this is a trivial matter involving no substantial or important question: *Dalgarno* v. *Hannah* (3); *Connolly* v. *Meagher* (4). The Traffic Regulations have also been radically amended, so as to make the present regulation of no importance. If the new by-law—which enacts that if any person or persons in excess of the maximum number prescribed "are" upon any tramcar, the conductor shall be guilty of a breach of the preceding regulation (*i.e.* sec. XVIII. (5))—is invalid, the whole question is clear; the only question therefore substantially in dispute is whether the new by-law is not invalid by reason of the Traffic Commissioners thus setting up, *ultra vires*, a new rule of evidence, and also making a conductor guilty of an offence even though forced upon him by other persons against his resistance. The only evidence relating to the *locus* of the offence was that the passengers were counted on the bridge. No amendment was asked for in the magistrate's Court, and it should not be granted now: *R.* v. *Justices of South Brisbane*; *Ex parte Thornton* (5); *R.* v. *Justices of Clifton*; *Ex parte McGovern* (6).

[GRIFFITH C.J.—Sec. 48 says that the amendment "shall" be made, and the Court will therefore regard the amendment as made.]

There was no evidence of "permission" by the conductor; it was not shown that he had any knowledge of the excess of passengers; he would only be guilty if he omitted to take action

(1) 10 Q.L.J., 143.
(2) 1902 St. R. Qd., 61.
(3) 1 C.L.R., 1.
(4) 3 C.L.R., 682.
(5) 1902 St. R. Qd., 152.
(6) 1902 St. R. Qd., 177.

when he knew of that excess. By-laws cannot alter the rules of evidence: *Somerset* v. *Wade* (1); *Sherras* v. *De Rutzen* (2). The prosecution must show either guilty knowledge or else that the conductor did not upon reasonable grounds believe that the car was not overcrowded. Passengers jump up on a car from all sides, and at all times, when the conductor has no means of knowing of the excessive number, or of excluding the last comers from boarding the car. Considering the harshness of the by-law, and the fact that the respondent has defended the case in the public interest, costs should be allowed to the respondent against the Crown.

Power in reply. An unsuccessful respondent, who has fought the case through three Courts on untenable points, should not be awarded costs.

GRIFFITH C.J. The defendant, a tramway conductor, was prosecuted for the breach of a regulation made under the *Brisbane Traffic Act* 1905, which provides that:—"No conductor shall permit any person in excess of the maximum prescribed in clause 2 to travel in or upon any tramcar." The number prescribed for the tramcar in question was 50. There was evidence that there were 65 persons travelling in the tramcar, and the defendant was the conductor of it. It is said that that was not sufficient evidence that the defendant permitted them to travel in the car. I confess I have had some difficulty in grasping the argument. When the law prescribes that the person in charge of a vehicle shall not permit more than a certain prescribed number to enter that vehicle, surely it imposes on him the duty to count them to see that not more than that number enter; otherwise the law would be absolutely futile. The fact, therefore, that there are more persons than the law permits in the car is evidence, not only that they entered the car, but that the person in charge of it allowed them to enter it. There was, therefore, sufficient evidence of permission. Another point was made incidentally that the place in which the car was alleged to have been travelling was described as Melbourne

(1) (1894) 1 Q.B., 574. (2) (1895) 1 Q.B., 918.

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Street, South Brisbane, whereas its true name is Victoria Place. According to the case stated, it bears both names. It is the end of Melbourne Street, where that street joins Victoria Bridge, and it is sometimes called Victoria Place. If there were anything in the point at all, it would be cured by sec. 48 of the *Justices Act*, which declares that objections to variances of that sort shall not be allowed. I think, therefore, that on the evidence defendant was manifestly guilty and ought to have been convicted. The Supreme Court took the contrary view, and this is an appeal by special leave from their decision. This Court gave leave to appeal, regarding the matter as one of general importance, since if such evidence is not sufficient to convict a conductor for a breach of the regulations, the regulations would be futile. The learned Chief Justice said:—"A conductor cannot eject a person having the right to travel from his car." Probably not. "He cannot eject any passenger unless he does so lawfully." I quite agree. He goes on:—"And therefore the respondent could only have turned those persons off this car who had entered it at a time when it already contained the maximum number." I agree again, but because he had the right to turn them off, and it was his duty to turn them off, and he failed to do so, he must take the consequences. The appeal must be allowed, and the case remitted to the Police Magistrate to convict.

BARTON J. I am of the same opinion. I think there was ample evidence to justify a conviction, and that evidence was wholly unanswered. On the question of permission, the regulation on which the prosecution was instituted is positive in its terms, it forbids the conductor to permit any person to enter the tramcar after the number prescribed by clause 2 have entered. The conductor enters upon his duties under the provisions of the Act under which this prosecution was instituted, and he must be taken to have known the regulation, or paragraph of the regulation, immediately preceding that under which the charge was laid. By it he is forbidden to allow any person to enter his car if the maximum number of persons—in this case fifty—are already upon it. It is therefore hard to see how he could fail to know that there were more than the maximum number on his

car. The presence of more than the maximum number is *primâ facie* evidence that he knew there were more than the maximum number, and there was no answer given to that evidence. For those reasons I am of opinion that the appeal should be allowed.

ISAACS J. I agree.

Power. As to the costs of the motion to rescind? That was a separate motion and we were brought to answer it.

ISAACS J. Was there no notice that the two motions would be heard together?

Power. No. The motion to rescind was heard first on the first day of the sittings, and the case was low down in the list.

GRIFFITH C.J. There can be only one taxation of course. Have the costs been paid?

Power. No. The costs were taxed, but not paid.

GRIFFITH C.J. The respondent must pay the costs of the appeal and the motion to rescind, but of course there will be only one taxation.

Appeal allowed. Order appealed from discharged, appeal from justices allowed with costs, case remitted to the Police Magistrate, with direction to convict. Respondent to pay the costs of the appeal and of the motion to rescind leave.

Solicitor, for appellant, *Hellicar* (Crown Solicitor for Queensland).

Solicitors, for respondent, *Thynne & Macartney.*

N. G. P.