[HIGH COURT OF AUSTRALIA.]

EVANS . . . . . APPELLANT;

AND

DONALDSON AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 2, 3, 9.

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

Certiorari—Justices in Petty Sessions—Order removing public officer—Order made without proper inquiry—Justices Act 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *sec.* 146 —*Weights and Measures Act* (*N.S.W.*) (16 *Vict. No.* 34), *sec.* 7, *Consolidated No.* 19 *of* 1898)—*Inspector of weights and measures—Public officer—Tenure of office—Removal by Justices—Constitution Act* 1902 (*N.S.W.*) (*No.* 32 *of* 1902), *sec.* 47—*Audit Act* 1902 (*N.S.W.*) (*No.* 26 *of* 1902), *sec.* 22.

By the *Weights and Measures Act* (N.S.W.), 16 Vict. No. 34, (Consolidated in 1898, Act No. 19), the Justices in Petty Sessions were directed (sec. 7) to appoint in their respective districts inspectors of weights and measures, who were to be entitled to fees according to the scale in the Schedule. There was no provision in the Act for the removal of an inspector from his office.

Held, (following *M'Mahon* v. *Lennard*, 6 H.L.C., 970; *Darley* v. *The Queen*, 12 Cl. & F., 520; and *The Queen* v. *Guardians of St. Martin-in-the-Fields*, 17 Q.B., 149; 20 L.J.Q.B., 423); that the office of inspector under the Act was a freehold public office tenable during life or good behaviour.

Held, further, that an inspector was not liable to dismissal at the pleasure of the Governor in Council as the holder of a public office under the Government within the meaning of sec. 47 of the New South Wales *Constitution Act* 1902, but could only be removed from office by the justices in Petty Sessions by whom he had been appointed, and not at their pleasure, but for good cause, and after being called upon to show cause against his removal.

Ex parte Everingham, 9 S.C.R. (N.S.W.) 250, and *Ex parte Duggan*, 4 N.S.W. L.R. 332, approved.

The provisions of sec. 22 of the *Audit Act* 1902 declaring persons who are charged by law with the duty of collecting fees or who actually collect public

moneys, and persons employed in any branch of the public service who receive fees under any statutory or other authority, to be accounting officers, and the fees collected to be public moneys, do not apply to inspectors appointed under the *Weights and Measures Act*, and, even if they applied to them, would not affect the tenure of their office.

Certiorari will lie to bring up an order made by justices in Petty Sessions in the exercise of their power of removal. It is not taken away by sec. 146 of the *Jusices Act* 1902; that section does not apply to orders made by justices in the exercise of jurisdiction independent of the Act.

The appellant was inspector of weights and measures under the Act 16 Vict. No. 34. During his term of office a Royal Commission inquired into the administration of his department, and recommended its complete re-organization. The appellant was called upon to show cause before the justices in Petty Sessions why he should not be removed from office in view of certain charges made against him during the course of the inquiry before the Royal Commission. He appeared before the justices and offered evidence in defence, but the justices, acting upon instructions from the Government that the appellant should be dismissed, and upon the findings and recommendation of the Royal Commission which they declined to review, without making any real inquiry into the merits, ordered the removal of the appellant from his office.

Held, on the evidence, that the order of removal was substantially a dismissal by the Government, not an order made by the justices in the exercise of their discretion, and that, as the appellant was entitled to a judicial consideration of the whole matter by the justices, a writ of *certiorari* should be granted to bring up and quash the order.

The appellant when first appointed received in addition to his fees a salary from the Government, and later received a larger salary and paid all fees into the Treasury up to the date of his removal from office.

Held, that the acceptance of a salary did not affect the tenure of his office, or render him liable to dismissal by the Government as a public servant under the Acts relating to the Public Service.

Decision of the Supreme Court: *Ex parte Evans*, (1908) 8 S.R. (N.S.W.), 309, reversed.

APPEAL from a decision of the Supreme Court of New South Wales on an application for a writ of *certiorari*.

The appellant was in 1883 appointed by justices in Petty Sessions under the Act, 16 Vict. No 34, sec. 7 (now sec. 8 of the *Consolidated Act* No. 19 of 1898), inspector of weights and measures for certain police districts in the metropolitan area. He held the office until 30th April 1908, when the respondent

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Mr. Donaldson, a Stipendiary Magistrate of the Metropolitan District, sitting alone as a Court of Petty Sessions, made an order declaring that the appellant was removed from his office. The circumstances leading up to the making of that order sufficiently appear in the judgments hereunder. The appellant obtained a rule *nisi* calling upon the respondents, who were the Stipendiary Magistrates for the Metropolitan District, to show cause why a writ of prohibition or certiorari should not be granted in respect of the order of removal, upon the grounds, *inter alia*, that the proceedings of the justices were contrary to natural justice, that they had removed the appellant upon charges of misconduct without any evidence of such misconduct and contrary to the evidence, and had expressed from the Bench in open Court a determination to remove the appellant, whether any evidence was brought before them or not, and whatever the evidence before them might prove to be, and refused, in effect, to hear the appellant's evidence, and that the purported removal of the appellant was made under instructions from the Attorney-General's Department and the Crown and by reason thereof, and was not a proper or lawful exercise of the power of removal vested in the justices in Petty Sessions. The rule *nisi* was subsequently discharged by the Supreme Court with costs: *Ex parte Evans* (1), and from that decision the present appeal was brought by special leave.

Armstrong (*Perry* with him), for the appellant. The appellant was not a public officer under the Government within the meaning of sec. 47 of the *Constitution Act* 1902. He was an independent public officer, having a freehold tenure of his office. He held his office for life or during good behaviour. His duties were of a public nature and independent of the Government. [He referred to *M'Mahon* v. *Lennard* (2); *The Queen* v. *Guardians of St. Martin-in-the-Fields* (3); *Darley* v. *The Queen* (4); *Ex parte Everingham* (5); *Isles' Case* (6); *Re Constables of Hipperholme* (7)]. The appointment can only be

(1) (1908) 8 S.R. (N.S.W.), 309.
(2) 6 H.L.C., 970.
(3) 17 Q.B., 149.
(4) 12 Cl. & F., 520.
(5) 9 S.C.R. (N.S.W.), 250.
(6) 2 Keb., 820.
(7) 5 D. & L., 79.

made by the justices in Petty Sessions under the Act, and the removal must be by the same authority: *Ex parte Duggan* (1). The Crown has no power to dismiss such an officer. The whole power over the officer is entrusted by the Crown to the justices. The inspector is not within the Acts dealing with the Public Service, and the *Audit Act* 1902, sec. 22, does not apply to him. The office is not a minor appointment under the *Constitution Act* 1902. [He referred to *Krefft* v. *Hill* (2)]. The appellant, having a freehold tenure of his office, could not be dismissed except for good cause, such as old age, incompetence, misconduct, &c., and he was entitled to show cause against his dismissal. The justices were bound to inquire into the merits, they were not entitled to act on caprice or on instruction from any other authority. It was unconstitutional and illegal for the Government to interfere: 2 Edw. III. c. 8; *Ex parte Duncan* (3). The fact that he received a salary from the Government in substitution for fees did not affect the tenure of his office, or bring him under the authority of the Public Service Board. The justices were bound to exercise a judicial and independent discretion after due inquiry into the charges made and the answers put forward by the appellant. But they made no proper inquiry. They acted on instructions from the Government, not on their own judgment. The result of the inquiry was, on the admission of the magistrates themselves, a foregone conclusion. Charges of misconduct were made against the appellant which were never really inquired into. The appellant is greatly prejudiced because the appearance is that he was dismissed for the misconduct alleged, whereas in fact he was dismissed because the Government had decided to re-organize the Department of Weights and Measures. The order was, therefore, without foundation, and should be quashed, if *certiorari* will lie. On the authorities the order of the justices in a case of this sort, though not a judicial act in the strict sense, is judicial in the sense that it is not merely ministerial or arbitrary. It involves a determination of a judicial nature, and comes within the class of acts in respect of which *certiorari* will lie. The writ will lie wherever there is an exercise of

(1) 4 N.S.W. L.R., 332.
(2) 13 S.C.R. (N.S.W.), 280.
(3) (1904) 4 S.R. (N.S.W.), 217.

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jurisdiction of a statutory kind: *Reg.* v. *Nicholson* (1). There is no distinction in this respect between an order appointing and an order removing an officer. An order of licensing justices, though not strictly judicial, may be brought up by *certiorari*: *Rex* v. *Woodhouse* (*Leeds Justices*) (2); so may an order by justices in Quarter Sessions for the governance of their officers: *Reg.* v. *Coles* (3); or an order by justices relating to paths in a cemetery: *Reg.* v. *Arkwright* (4). The act of the justices here was a denial of justice and should be quashed. [He referred to *Reg.* v. *Justices of St. Albans* (5)].

Blacket (*Sanders* with him), for the respondents. The cases dealing with tenure of office are excluded by express statutory provision. The *Weights and Measures Act* 1898 gives no express power to remove, though sec. 9 (*c*) refers to removal, but by the *Interpretation Act* No. 4 of 1897, sec. 30, the power to appoint carries with it the power to remove or suspend. The appellant was therefore removable by the justices. This was a minor appointment, originally in the power of the Crown, but entrusted by the Crown to the justices, and unless there is some express statutory provision to the contrary, the Crown, or the authority appointed by the Crown to act on its behalf may remove at pleasure. In *Darley* v. *The Queen* (6) and *M'Mahon* v. *Lennard* (7) the officer was not the servant of the Crown, but of the person who appointed him. Here the service is not that of the justices but of the Crown. The general rule therefore applies. Sec. 47 of the Constitution applies to officers whether paid by salary or not. The fact that he was paid by fees is not inconsistent with his being a servant of the Crown. It is assumed in *Ex parte Duggan* (8) that the appointment was under one part or the other of sec. 47 of the Constitution, and that implies that the office was under the Crown. But by sec. 27 of the *Audit Act* 1902 the fees were to be paid into the Treasury. From that time the appellant was a salaried officer of the Crown, paid out of the consolidated revenue. Having accepted the position of a public

(1) (1899) 2 Q.B., 455, at p. 473.
(2) (1906) 2 K.B., 501.
(3) 8 Q.B., 75.
(4) 12 Q.B., 960.
(5) 22 L.J. M.C., 142.
(6) 12 Cl. & F., 520.
(7) 6 H.L.C., 970.
(8) 4 N.S.W. L.R., 332.

servant under the Department, and having enjoyed the privileges attaching to such service, he cannot now repudiate that position and claim to be independent of the Crown. Whether that is so or not, there is no limit on the power of the justices to dismiss. He held office at their pleasure, and had no tenure of his office. If sec. 30 of the *Interpretation Act* does not apply, the appellant could not be removed at all.

[GRIFFITH C.J.—I think that at common law the power to remove would be vested in the appointing authority apart from Statute. Somebody must have the power to remove.

O'CONNOR J.—If he must be discharged by justices that can only be effected in a certain manner. If they act otherwise surely he is entitled to have the order removed to be inquired into.]

The appointment is a ministerial act, and so is the removal. Neither *certiorari* nor prohibition will lie in respect of it: *Reg.* v. *Watermen's Co.* (1); *Rex* v. *Drummond*; *Ex parte Saunders* (2); *Henry* v. *Newcastle Trinity House Board* (3). *Rex* v. *Woodhouse* (*Leeds Justices*) (4) was a case where the justices were bound to exercise a judicial discretion between parties. That is very different from the appointment or removal of an officer. Even if *certiorari* would lie in such a case in England, it is taken away here by the *Justices Act* (No. 27 of 1902), sec. 146. The only ground on which a writ might possibly issue is total absence of jurisdiction. But for mere irregularity the order of the justices cannot be questioned. They clearly had jurisdiction to deal with the matter. The only complaint is that they did not proceed in a regular manner, or that they acted upon evidence which they should not have treated as conclusive, or which was inadmissible. Those are not grounds which go to the jurisdiction: *Short and Mellor, Practice of Crown Office*, 2nd ed., p. 14; *Ex parte Hopwood* (5); *Ex parte Blewitt* (6). The findings of the Commission were evidence upon which the justices were entitled to act. They were at any rate sufficient to justify the order of removal. This Court cannot inquire whether the

(1) (1897) 1 Q.B., 659.
(2) 88 L.T., 833.
(3) 8 El. & Bl., 723.
(4) (1906) 2 K.B., 501.
(5) 19 L.J.M.C., 197.
(6) 14 L.T. N.S., 598.

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reasons for the order were adequate. [He referred to *Hill* v. *Clifford*; *Clifford* v. *Timms*; *Clifford* v. *Phillips* (1); *In re Crick* (2).]

[GRIFFITH C.J. referred to *Osgood* v. *Nelson* (3).]

The justices need not even have called upon the appellant to show cause: *Ryder* v. *Foley* (4).

Armstrong, in reply.

Cur. adv. vult.

August 9.

GRIFFITH C.J. This was an application by the appellant to the Supreme Court of New South Wales for a writ of *certiorari* to bring up an order of justices in Petty Sessions purporting to remove him from the office of Inspector of Weights and Measures for the District of Sydney and other districts in the neighbourhood of the metropolis. The appellant was appointed to that office by justices in Petty Sessions in the year 1883 under the Act then in force, 16 Vict. No. 34, since repealed, but substantially re-enacted in the Act No 19 of 1898. I will refer presently to the provisions of that Act. From the time of his appointment he received the fees under that Act, and also a moiety of fines, and in addition a fixed salary of £200 a year. From the year 1897 he was paid by salary, presumably voted annually by Parliament in the usual way. He appears to have submitted himself after that time to a certain extent to the jurisdiction of the Public Service Board. In the year 1907 he obtained leave of absence for six months, and on his return offered to resume duty. It does not appear that he ever did resume duty.

In 1908 he was called upon to show cause before justices in Petty Sessions why he should not be removed from office, and having come before them, the justices made an order removing him from office. That is the order in respect of which *certiorari* is asked for.

The learned Judges of the Supreme Court were of opinion that the appellant was a public servant, holding office at the

(1) (1907) 2 Ch. 236, at p. 252.
(2) (1907) 7 S.R. (N.S.W.), 576, at p. 587.
(3) L.R. 5 H.L., 636.
(4) 4 C.L.R., 422, at p. 429.

pleasure, and removable at the pleasure of the Governor in Council, and, therefore, that the action of the justices by whom he was removed was to be regarded as an act done by the Crown, and amounted to a determination, at its pleasure, of his office.

The first thing to be considered is the nature of the appellant's office. The Statute 16 Vict. No. 34 provided by sec. 7 that "as soon as conveniently may be after the passing of this Act and from time to time as occasion may require the justices in their respective Petty Sessions shall appoint one or more persons in their respective districts to be Inspectors of Weights and Measures," &c. By sec. 16 every inspector was required to enter into a bond or recognizance in the sum of £200 "for the true and punctual performance of the duties of his office and for the safety of the stamps and copies of the standard weights and measures committed to his charge." He was entitled to fees according to the scale contained in the Schedule to the Act "for every examination comparison and stamping as is hereby required to be made by him." One of the terms of the recognizance was that he should restore and surrender the stamps and models committed to his charge immediately on removal, or other cessation of office, to such person as might be appointed to receive them by justices in Petty Sessions.

The appointment of officers of certain kinds by justices in Petty Sessions is not at all uncommon in England, and it was formerly not uncommon in New South Wales. For instance, under the *Impounding Act*, poundkeepers were appointed by justices in Petty Sessions. The nature of an office of that sort was discussed by the Supreme Court of New South Wales in *Ex parte Everingham* (1), in which the Court granted a rule *nisi* in the nature of *quo warranto*. The point taken was that the office was not one to which *quo warranto* would lie, unless it be an office held for the public benefit. The Supreme Court, *Stephen* C.J. presiding, held that the office of poundkeeper was an office in respect of which *quo warranto* would lie, that it was not an office determinable at the pleasure of the Governor in Council or of the justices, and that the poundkeeper could not be removed

(1) 9 S.C.R. (N.S.W.), 250.

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without being called upon to show cause, and being heard. In 1883 the question of the nature of the office of Inspector of Weights and Measures came directly before the Court in the case *Ex parte Duggan* (1) the appellant being apparently the predecessor in office of the present appellant. One Dent had been appointed by the Governor in Council to be Inspector of Weights and Measures for the district of Sydney, and upon a prosecution being instituted by him against Duggan, the point was taken that Dent was not an inspector because he had not been appointed by justices in Petty Sessions, and the Court were of opinion that the appointment was void. They pointed out that by sec. 47 of the *Constitution Act* 1902 then in force, and which has been referred to in the argument of this case, the provision for the appointment of officers by the Governor in Council, except in the case of certain minor offices, did not apply to offices of this kind, the appointment to which is by Statute vested in magistrates. That case, apparently, was not cited to the Supreme Court in this case. If it had been they would not, I think, have come to the conclusion that the appellant was an officer of the Government, holding office at pleasure, and dismissible without notice.

I am of opinion that the case of *Ex parte Duggan* (1) was rightly decided, and that the removal of an officer of this kind can only be effected by justices in Petty Sessions, after giving the officer an opportunity of showing cause against his removal.

After a certain time the appellant was remunerated by salary only. That came about in this way: The *Audit Act*, passed in 1902, provided by sec. 22, that: "Any person who by any law, regulation, or appointment is charged with the duty of collecting or receiving, or who actually collects or receives, or who is charged with the duty of disbursing or who actually disburses any public monies, is declared to be an accounting officer." And all such moneys are to be paid into the Treasury: sec. 27. Those sections only apply to persons who deal with public moneys. But the fees which are collected by the Inspector of Weights and Measures are not public moneys. They are fees which he collects for his own use and benefit. They are his own property, so that any provision for the payment of public moneys into the Treasury

(1) 4 N.S.W., L.R., 323.

would have no application to him. Sec. 22 provides further: sub-sec. (2)—"Any person employed in any branch of the public service who receives any fees pursuant to any statutory or other authority is also declared to be an accounting officer in respect of such fees; and such fees are declared to be public moneys, within the meaning of this Act." Again the question is whether these are public moneys within the meaning of the Act. In my opinion they are not. I think, therefore, that that Statute has no bearing on the case. But even if it had I do not think it would make any difference in the result. I am of opinion that the appellant in this case was not an officer in the Public Service within the meaning of the *Constitution Act*, and that on that ground he was not liable to be dismissed by the Governor in Council, and that the arrangement, for such it was, for commutation of his fees into an annual salary made no difference in this respect.

The next question is, what was the tenure of his office? A similar office came under the consideration of the House of Lords in the case of *M'Mahon* v. *Lennard* (1). The office there was that of Weigh-master in a market town in Ireland. It was held that that was a freehold office, and that the appointment ought to be for life. In the case of *Darley* v. *The Queen* (2) the learned Judges were called upon to advise the House of Lords as to the tenure of office of Treasurer in the County of the City of Dublin. It was held for various reasons that that was a public office. Lord Chief Justice *Tindal*, in expressing the opinion of the learned Judges, said:—"After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function of employment of a deputy or servant held at the will and pleasure of others; for, with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie." Then he went on to say further:—"There are then only two questions in respect to this office. Was it public? and was the treasurer a mere servant of the Dublin

(1) 6 H.L.C., 970. (2) 12 Cl. & F., 520, at pp. 541-2.

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magistrates? The functions of the treasurer were clearly of a public nature; he was to applot the assessment, receive and hold the money for a time, keep it subject to his order on the bank, pay the expense of public prosecutions, and pay other public moneys. It is clearly, therefore, of a public nature, and it is equally clear that, though appointed by the magistrate, he is not removable at their pleasure, and must, we think, be treated not as their servant, but as an independent officer."

The reasons for holding the present office to be a public office are not quite the same, but in the opinion of the learned Judges in the case cited, the holder of a public office is not removable at the pleasure of the magistrates. The matter also came up for consideration in the case of *Reg.* v. *Guardians of St. Martin-in-the-Fields* (1). In that case the office in question was that of Clerk to the Board of Guardians. The Statute under which the officer was to be appointed was 4 & 5 Will. IV. c. 76, sec. 46, and one of the articles made by the Poor Law Commissioners under that section provided that:—"Every officer appointed in or holding any office under their order, other than a medical office, shall continue to hold the same until he die or resign or be removed by Commissioners or be proved to be insane to the satisfaction of the Commissioners." It said nothing about notice being given him before removal, or the conditions of his removal, but during the discussion a rather remarkable expression of opinion was given that it must be taken that an officer of that sort is only removable for misbehaviour. In the course of his judgment, *Coleridge* J. said he thought that the case came within that of *Darley* v. *The Queen* (2), already referred to, and added: "It certainly does do so as regards the source of the appointment and the tenure of the office." Lord *Campbell* C.J. in the same judgment, said (1), that "the tenure of it (the office) is during good behaviour, that is for life." These authorities clearly establish that the office is not held at pleasure, or at will, and that the officer can only be removed on cause being shown, after he has had an opportunity of being heard.

The next question is whether *certiorari* will lie to review an order of justices in Petty Sessions in the exercise of such a

(1) 20 L.J.Q.B., 423, at p. 425. (2) 12 Cl. & F., 520.

power of removal. The law on that subject is laid down in the case of *Rex* v. *Woodhouse* (1). *Fletcher Moulton* L.J., in the course of his judgment, says:—"The writ of *certiorari* is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of *certiorari* is given by Statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts'; but the cases by which this limitation is supposed to be established show that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial.'" I think it is clear that as the power of justices to appoint an officer is examinable on *certiorari*, it certainly follows that the order of removal is also examinable. The Lord Justice says further:—"The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

Vaughan-Williams L.J. expressed himself to the same effect.

I therefore come to the conclusion that *certiorari* will lie to review the act of any body of persons like justices which has the effect of depriving a man of his legal right.

Then it is suggested that if *certiorari* ever did lie it has been taken away by sec. 146 of the *Justices Act* 1902. That section provides:—"No conviction or order of a justice or justices, or adjudication upon appeal to a Court of Quarter Sessions, shall be removed by any writ or order into the Supreme Court."

I think it is manifest that that Act, which was a consolidation of existing law, relates only to matters with respect to convictions and orders of justices in Petty Sessions, and to orders made for the purposes with which the Act is dealing. It relates entirely to proceedings instituted by way of complaint calling upon a man to show cause why he should not be punished, or have an order

(1) (1906) 2 K.B., 501, at pp. 534-5.

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made against him for payment of money. Sec. 146 has in my opinion no application to the case of an order made by justices in the exercise of a jurisdiction altogether different.

Then the only question left is, whether this is a case in which a *certiorari* ought to be granted. What are the facts? A Royal Commission had been appointed in consequence of complaints of general dissatisfaction with the administration of the Weights and Measures Department, and the Commission took evidence and recommended a radical change in the system, which could not be carried out without an alteration of the law. The Government thought, apparently, that they could take a short cut, dismiss the existing officers, and start afresh. The appellant was then called upon to appear before justices in Petty Sessions and show cause why he should not be removed from his position. Up to that point the Government may be assumed to have acted properly in directing the magistrates to call upon the appellant to show cause why he should not be removed, and the action taken was properly taken under the *Weights and Measures Act* 1898. Having been called upon to show cause, the appellant appeared, and certain charges were made against him. Soon after the inception of the proceedings the presiding magistrate, according to the appellant's sworn statement, read a letter from the Department of the Attorney-General, the purport of which was that a new arrangement had been made, and that the present inspector and two other officers were to be removed from office. The presiding magistrate announced that the bench intended to remove the inspector. The magistrate, it is true, has made an affidavit in reply, saying that he did not state that it was the intention of the bench to remove the inspector whether any evidence was brought forward or not, but he does not contradict the statement that he read a letter telling the magistrates that the appellant should be removed. The Attorney-General had no authority to interfere in this way with justices in the exercise of their discretion. During the progress of the case the report of the Royal Commission was put in, and the Bench stated that on the conclusions of the Royal Commission before them a *primâ facie* case had been made out for the removal of the appellant from office. At a later stage they said they were not going to review

the findings of the Royal Commission. The appellant offered evidence, but the Bench again said that, though he might call evidence, they were not going to review the findings of the Royal Commission.

It is impossible to regard that as a real investigation. Somebody else had come to the conclusion that the appellant had been guilty of conduct which was unsatisfactory, and thereupon the Bench made an order for his removal. There was no real inquiry; it was a mere travesty of justice. The action taken was not really the action of the justices at all as such. I agree with the opinion expressed by the learned Chief Justice in the Court below when he says (1):—"In point of fact the applicant was dismissed, not by the justices, but by the Crown." In my opinion, such a proceeding is a mere nullity, and cannot be supported. I think, therefore, that a *certiorari* ought to go, unless the appellant has by his conduct disentitled himself to the aid of the Court. It is suggested that by submitting himself to the jurisdiction of the Public Service Board he has done so. When originally appointed he was authorized to receive the prescribed fees and an additional sum of £200 a year. Later on he received a larger salary and all fees were by arrangement paid into the Treasury. I think that may be regarded as evidencing an agreement between the appellant and the Government that a commutation of fees for salary should take place, but I think that this arrangement must be taken to apply only to the mode of remuneration, not to the tenure of office. It may be that the Government was entitled to put an end to that arrangement, leaving the appellant to his legal rights. But it could not do more. It appears that ten years ago at least the law officers of the Crown advised that the appellant was not an officer of the Government liable to be dismissed at will, and when it came to a question of removing him, apparently, the law officers were still of the same opinion. Accordingly, instead of purporting to remove him themselves, they instructed the justices to remove him. In my opinion the proceedings were entirely erroneous, and the appeal must be allowed.

(1) (1908) 8 S.R. (N.S.W.), 309, at p. 314.

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BARTON J. I am entirely of the same opinion, and agree that the appeal must be allowed.

O'CONNOR J. read the following judgment:—The appellant was appointed by justices in Petty Sessions in accordance with the powers vested in them by the Act regulating weights and measures passed in 1852. Between that year and 1898 the whole Public Service of the State was constituted and organized under a series of Statutes. Yet in the *Weights and Measures Act* 1898, by which the whole Statute law on the subject was consolidated, the power of justices in Petty Sessions to appoint officers is conferred in precisely the same terms as in the old Act. From which the inference may, I think, be reasonably drawn that, notwithstanding the direct control actually exercised by the Government in the administration of the Act, the legislature intended to leave the appointment of Inspectors of Weights and Measures officers as it was under the old law. It has been taken for granted, and I think rightly, in the early decisions of the New South Wales Supreme Court to which I shall refer, that the justices in Petty Sessions, having power to appoint officers, have also power to remove them. The respondents on 22nd February 1908 acting on that view notified the appellant that they would, sitting in Petty Sessions, on a day named, consider the question of his removal as Inspector of Weights and Measures for the metropolitan police district. Six days later followed a more formal notice calling upon him to show cause on 5th March why he should not be removed from his position. In that way were initiated the proceedings which resulted in the order now called in question. A few days after the opening of the proceedings the grounds of accusation were formulated into five specific charges, two of them at least alleging corrupt and dishonest conduct; and the appellant was formally called upon to show cause why he should not be removed on the grounds thus particularized. The justices sat in Petty Sessions, the appellant appeared, the Government were represented, the form of an inquiry was gone through—I need not refer in detail to the proceedings because it was abundantly clear that the justices in Petty Sessions never

exercised their own discretion at all in coming to the decision which they pronounced. They acted and intended to act merely as the mouthpiece of the Government in publishing the ukase of the Minister at the head of the Treasury Department. The order which purports on the face of it to be that of the justices in Petty Sessions directs the plaintiff's removal from his office. The appellant contends that the justices acted entirely without jurisdiction. The order he alleges was not the result of their inquiry, nor does it represent any act of their minds, or any exercise of their judgment with respect to the subject matter of the inquiry. In other words, that which purports to be the decision of justices in Petty Sessions is merely the announcement by the justices of a determination which a government Department had previously arrived at. I gather from the perfectly frank statement made by the presiding justice at the outset of the proceedings that the justices never intended their finding to amount to more than that. The appellant's contention is, to my mind, unanswerable. The first answer put forward is that the magistrates, having jurisdiction, as they undoubtedly had, to enter on the inquiry, their decision cannot be questioned on this application. But it is clear that they had no jurisdiction to make an order without any real inquiry, and without applying their own minds to the consideration of the matter in reference to which they purported to express their own decision. There could hardly be a stronger illustration of want of jurisdiction arising from denial of natural justice than is afforded by these proceedings. However, notwithstanding the way in which the order has been made, it cannot be treated as a nullity. So long as it stands it is an order of the Court of Petty Sessions removing the appellant from his position, and it will be effective, and is evidently intended to be used as effective for that purpose, if this Court does not intervene by way of *certiorari*. To my mind it is clear that unless the respondents can succeed in making good the objections they have raised the appellant is entitled to the relief which he has asked at the hands of this Court. I pass by the objection that sec. 146 of the *Justices Act* 1902 would in this case prevent the issue of a *certiorari*. The order there referred to is obviously not an order such as that now in question. One of the main objections

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is that the order is merely ministerial and cannot be the subject of review by *certiorari*. The general principles which should guide a Court in determining whether an order of justices is merely ministerial or is such that it may be regarded as judicial for purposes of *certiorari* is admirably summed up by Lord Justice *Fletcher Moulton* in *Rex* v. *Woodhouse* (1) in the following passage of his judgment. After an explanation of the purpose of the writ of *certiorari*, he says:—"It is frequently spoken of as being applicable only to 'judicial acts,' but the cases by which this limitation is supposed to be established show that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial.' For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. From very early times the common law Courts considered that they had jurisdiction to examine into rates by *certiorari*, and the case of *Rex* v. *King and Others* (2), which is cited in the text books as an authority to the contrary, tends to support the view that their refusal to grant writs of *certiorari* in cases of poor rates was based on reasons of expediency and not on any doubt as to their powers. Orders of the Poor Law Commissioners can be brought up on *certiorari*, and the provisions of the *Poor Law Amendment Act* (4 & 5 Will. IV. c. 76), relating thereto do not purport to give the right, but treat it as a case of restricting the exercise of a right assumed to exist. In the case of *In re the Constables of Hipperholme* (3) the Court held that the order of two justices appointing a constable under the powers of 5 & 6 Vict. c. 109, sec. 19, could be examined on *certiorari*. Other instances could be given, but these suffice to show that the procedure of *certiorari* applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which

(1) (1906) 2 K.B., 501, at pp. 534-535. (2) 2 T.R., 234.
(3) 5 D. & L., 79.

could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

A test may well be found in the last sentence of that quotation. Does the order purport to be made in pursuance "of some right or duty to decide?" A strong illustration of the principle so laid down is to be found in the case of *The Queen* v. *Coles* (1), where a Court of Quarter Sessions which was empowered to fix a scale of fees made the following order:—"Ordered that no officer of this Court do hereafter take or demand any fee or payment whatsoever from any defendant in misdemeanour." *Denman* C.J., and the other members of the Court of Queen's Bench who heard the case, entertained no doubt that the order in that case was judicial in the sense in which the law understands the expression in applications for *certiorari*. In this case the duty with which the Court of Petty Sessions was charged was to exercise its discretion in determining whether the appellant should or should not be removed from his office. The order purports to have been made as the result of an exercise of discretion in the performance of that duty. In my opinion, therefore, it fulfils all the conditions necessary for enabling it to be brought before a superior Court for the purpose of review in accordance with the principles laid down by Lord Justice *Fletcher Moulton*.

Another objection relied on was that the office was not a public office. It was contended that the justices in making the appointment acted merely on behalf of the Government in pursuance of the *Constitution Act* of New South Wales, and that acting similarly on the Government's behalf they were entitled to remove the appellant at the pleasure of the Government. I dissent entirely from that view of the duty which the *Weights and Measures Act* imposes on the justices. In *Ex parte Duggan* (2), which related to an appointment by justices to an office under the *Weights and Measures Act*, Sir *James Martin* C.J. held that the section of the *Constitution Act* in that case mentioned, which is identical with the corresponding provision of the Act of 1902, cannot be taken to refer to such appointments.

(1) 8 Q.B., 75. (2) 4 N.S.W. L.R., 332.

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The observations of Mr. Justice *Faucett* in *Krefft* v. *Hill* (1) bear in the same direction. The appointment under consideration in the latter case was under the *Museum Act*, which gave the trustees of the museum power to appoint all officers and servants of the institution. The learned Judge pointed out the importance of giving full meaning to the words "public officer under the Government" contained in the section of the Constitution relied on. It is, to my mind, impossible by any reasonable construction of these words to interpret them as including offices created by Statute in such terms as the *Weights and Measures Act* has used. The whole responsibility therefore of appointing and removing the appellant was imposed by the *Weights and Measures Act* on the justices, and they were bound to exercise it according to their own discretion and not as agents of the Government. The contention that the appellant's office was not a public office seems to me equally untenable. To find a clear statement of the law on that question it is unnecessary to go beyond a judgment of the Supreme Court of this State in *Ex parte Everingham* (2), delivered nearly 40 years ago by Sir *Alfred Stephen*, then Chief Justice. The question there under discussion was that of poundkeeper. The *Impounding Act* 1865 vests the appointment in the justices in Petty Sessions in substantially the same terms as those used in the *Weights and Measures Act*. The application was for a writ of *quo warranto*, and the question under discussion was in substance whether the office was a public office. Sir *Alfred Stephen* C.J. said:— "Consider, in the first place, the nature of the office. It has been created by a public Statute for the public benefit. Generally, when an office is established by legislative authority, the power of appointment belongs to the Crown; but here the Crown has, by the Statute, delegated that power to the justices of the district assembled in Petty Sessions for that purpose. This office then is derived from the Crown, though it is held immediately under the justices. Again, the duties of a poundkeeper, as defined by the Act, are of a public nature, and appear to be of considerable importance." It was further urged on the respondents' behalf that they were entitled to dismiss the appellant at pleasure, that

(1) 13 S.C.R. (N.S.W.), 280, at p. 298. (2) 9 S.C.R. (N.S.W.), 250, at p. 255.

their calling upon him to show cause was entirely unnecessary, that the inquiry following thereon was merely surplusage, and and that their order was therefore merely a ministerial executive order. It is not necessary to determine whether the office carried with it the tenure in every respect of what is called a freehold office. There is nothing in the *Weights and Measures Act* to prevent the appointment being made for such term and on such conditions as the justices might think fit to arrange. But in the absence of anything to show the right of the justices to remove at pleasure, it must be taken that the office was held on the conditions generally applicable to public offices not under the Government, that is to say, on the condition that the holder should not be removed without being called upon to show cause.

The best evidence of the conditions in which the appellant held his office has been furnished by the justices themselves. They having called upon him to show cause why he should not be removed, it is difficult to believe that that was not their own view at that time of the terms on which he had been appointed. Having regard to all these considerations the respondents' objections must, in my opinion, fail. It follows that the order may be brought up for examination and should be quashed, and the judgment of the Supreme Court to the contrary should be set aside. For these reasons, in my opinion, the appeal must be allowed.

Appeal allowed, order appealed from discharged. Rule absolute for certiorari, with costs.

Solicitor, for the appellant, *H. E. McIntosh.*

Solicitor, for the respondents, *J. V. Tillett,* Crown Solicitor for New South Wales.

C.A.W.