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BROWN v. HOLLOWAY.

Isaacs J.

Frederick Pollock in his work on *Torts*, 6th ed., p. 40, gives it as his opinion that such an action would doubtless be treated as an action of contract if it became necessary for any purpose to assign it to one or the other class.

I agree that the appeal of the husband should be allowed.

Appeal of Agnes Brown dismissed. Appeal of Duncan Brown allowed.

Solicitors, for appellants, *Atthow & McGregor.*

Solicitors, for respondent, *Bouchard & Holland.*

H. V. J.

YOUNG AND REES . . . . . APPELLANTS;

AND

QUAINE . . . . . RESPONDENT.

PEASE AND OTHERS . . . . . APPELLANTS;

AND

QUAINE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

MELBOURNE, *March* 1.

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

Criminal law—Information—Conviction—Duplicity—No offence disclosed—Special leave to appeal to High Court—Industrial Disputes Act 1908 (*N.S.W.*) (*No.* 3 *of* 1908), *secs.* 42,* 45.

*Sec. 42 of the *Industrial Disputes Act* 1908 provides that :—

"If any person—

"(*a*) does any act or thing in the nature of a lock-out or strike, or takes part in a lock-out or strike, or suspends or discontinues employment or work in any industry ; or

"(*b*) instigates to or aids in any of the above-mentioned acts,

"he shall be liable to a penalty not exceeding one thousand pounds, or in default to imprisonment not exceeding two months :

"Provided that nothing in this section shall prohibit the suspension or discontinuance of any industry or the working of any persons therein for any cause not constituting a lock-out or strike."

Certain defendants were proceeded against in the Industrial Court of New South Wales upon informations charging them with instigating other persons "to do an act in the nature of a strike, to wit, to discontinue work in the said industry, such discontinuance not being for a cause not constituting a strike," &c. They were convicted and fined, the convictions following the words of the informations, and in default of payment were imprisoned. Rules *nisi* for habeas corpus were obtained on the ground that their detention was illegal inasmuch as the convictions were bad either for duplicity or uncertainty or disclosed no offence. The orders *nisi* having been discharged,

Held, that special leave to appeal to the High Court should be refused on the ground that the case being a criminal one was not one in which special leave should be granted; and

Per Griffith C.J., *Barton* J., *O'Connor* J., and *Isaacs* J., on the further ground that the information sufficiently charged an offence under sec. 42 of the *Industrial Disputes Act* 1908 (N.S.W.), and that the conviction was good.

APPLICATIONS for special leave to appeal from decisions of the Supreme Court of New South Wales.

Robert Young, Daniel Rees, Thomas Pease and eight other persons were proceeded against in the Industrial Court of New South Wales for offences under sec. 42 of the *Industrial Disputes Act* 1908.

The information in each case alleged that the defendant did unlawfully instigate certain coal miners and other persons being employés in a certain industry "to do an act in the nature of a strike, to wit, to discontinue work in the said industry, such discontinuance not being for a cause not constituting a strike, contrary to the Act in such case made and provided."

The informations were heard on 29th December 1909 and each of the defendants was convicted and fined £100, and in default of payment was ordered to be imprisoned for two months, one month being allowed within which to pay the fine. The convictions followed the form of the informations.

The defendants Robert Young and Daniel Rees not having paid the fines were on 31st January 1910 arrested and imprisoned in the Maitland gaol of which James Quaine was the keeper. The other defendants were similarly arrested and imprisoned in the Maitland gaol on 23rd February 1910.

Rules *nisi* were obtained from the Supreme Court on behalf of Robert Young and Daniel Rees calling upon Quaine to show

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cause why a writ of habeas corpus should not isssue on the ground that those prisoners had been illegally convicted and that there was no legal warrant for their confinement inasmuch as the convictions were bad either for duplicity or uncertainty and disclosed no offence.

On the return of the rules *nisi* on 18th February 1910 the Full Court discharged them.

On 25th February 1910 application was made on behalf of Thomas Pease and the eight other defendants for rules *nisi* for habeas corpus on similar grounds, but the Supreme Court, following their decisions in the cases of Young and Rees, refused the rules *nisi*.

The defendants now applied to the high Court for special leave to appeal from these decisions of the Supreme Court.

Wise K.C., (with him *Arthur*), for the defendants. By sec. 42 of the *Industrial Disputes Act* 1908 two separate offences are, among others, created, viz., instigating the doing of an act in the nature of a strike, and instigating the discontinuance of work. The proviso relates only to the second of these offences. The information in this case charges the first offence and then defines that offence in terms of the second offence. It is as if a man were charged with stealing "one sheep, to wit, one bale of wool." The result is that the information is bad on its face as it discloses no offence, and therefore the conviction which follows the language of the information is also bad: *Ex parte Little* (1); *Smith* v. *Moody* (2); *Paley's Summary Convictions*, 8th ed., p. 224. The fact that no one was embarrassed is immaterial: *Ex parte Hopkins* (3).

[GRIFFITH C.J.—It is material before this Court, for the granting of leave to appeal is discretionary.]

This objection goes to a matter of substance: *R.* v. *North* (4); *Cotterill* v. *Lempriere* (5). An information must contain "a direct, positive, single, and definite charge": *R.* v. *Morley* (6). The important principle involved in this case is that a man shall not be liable to be twice vexed for the same charge. The charge

(1) 2 S.R. (N.S.W.), 444.
(2) (1903) 1 K.B., 56.
(3) 17 Cox Cr. Ca., 444.
(4) 6 Dowl. & R., 143.
(5) 24 Q.B.D., 634.
(6) 1 Y. & J., 221, at p. 225.

must be so that he can plead *autrefois convict* or *autrefois acquit*. The information could not have been amended for no offence was disclosed: *Toohey* v. *Kerr* (1); *Knox* v. *Bible* (2); *Ex parte Sin Kye* (3); *Ex parte Price* (4). Sec. 52 of the *Industrial Disputes Act* 1908 does not apply so as to prevent the conviction being challenged, for, as there was no offence disclosed, the whole proceedings were *coram non judice*.

GRIFFITH C.J. We think there is no ground for granting special leave to appeal in this case. The information accused the defendants of instigating certain persons to do an act in the nature of a strike, and then went on to describe the act, which is mentioned in the Statute, and is in its essence in the nature of a strike. If the offence had been charged in the bare words of the Statute without the *videlicet* the information would be good. The point, therefore, is at best one of extreme technicality. I see however, no reason for thinking that there is anything in it.

But if there were any such reason, this is not a case in which special leave to appeal should be granted, and that is so whether sec. 52 does or does not apply. It must not be assumed that we think it does not apply.

BARTON J. concurred.

O'CONNOR J. concurred.

ISAACS J. concurred.

HIGGINS J. I wish to add that I concur upon the ground that this, being a criminal case, is not one in which special leave to appeal should be granted.

Solicitors, for the applicants, *J. Woolf* for *Reid & Reid*, Newcastle.

B. L.

(1) 1907 Q. W.N., 21.
(2) (1907) V.L.R., 485; 29 A.L.T., 23.
(3) 15 W.N. (N.S.W.), 205.
(4) 20 N.S.W. L.R., 343.