[HIGH COURT OF AUSTRALIA.]

SPOONER . . . . . APPELLANT;
INFORMANT,

AND

ALEXANDER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 16, 17, 25.

Griffith C.J., Barton and Isaacs JJ.

Master and servant—Servant absenting himself from work—Reasonable cause—Masters and Servants Act 1902 (*N.S.W.*) (*No.* 59 *of* 1902), *sec.* 4.

Sec. 4 of the *Masters and Servants Act* 1902 provides that a servant who having entered into a contract of service of a specified kind absents himself from his work without reasonable cause before the expiration of the contract shall be liable to a penalty not exceeding £10.

The defendant having been convicted under this section and the Supreme Court having granted a prohibition against proceedings under the conviction,

Held by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting) that there was no evidence that the defendant had a reasonable cause for absenting himself from his work, and therefore that the conviction should stand.

Per Griffith C.J. and *Barton* J.—It is sufficient for the defendant on a prosecution under the section to show that he honestly and reasonably believed in the existence of a state of things which, if it had existed, would have established reasonable cause, but *semble* the relationship of cause and effect between the alleged fact and the act of the defendant must also be established.

Semble, that the enactment is not a purely criminal one but its purpose is to enforce obligations arising out of contract, and that on a prosecution for an offence under the section it is not necessary to prove *mens rea*.

Per Isaacs J.—Reasonable cause is such cause as the reason of a fair-minded man would in the circumstances recognize as a legitimate ground for acting in

the way alleged. The enactment being a criminal one, and the appeal turning on a question of fact, the appeal, on the authority of *Bataillard* v. *The King* (4 C.L.R., 1282), should not be entertained.

Decision of the Supreme Court of New South Wales: *Ex parte Alexander*, 11 S.R. (N.S.W.), 532, reversed.

APPEAL from the Supreme Court of New South Wales.

At the Court of Petty Sessions at Lithgow an information was heard whereby John William Spooner, the informant, charged that Hyam Alexander, the defendant, having entered into the service of G. & C. Hoskins, Ltd., as a coal miner, did on 17th July 1911 absent himself therefrom without reasonable cause before the term of his contract had expired.

The Police Magistrate having convicted the defendant, ordered him to pay a fine of £3 and £1 5s. costs, and in default to be imprisoned for one month with hard labour.

The defendant thereupon obtained an order *nisi* for a prohibition, which was made absolute by the Full Court: *Ex parte Alexander* (1).

From this decision the informant now by special leave appealed to the High Court.

The facts fully appear in the judgments hereunder.

Knox K.C. (with him *Pickburn*) for the appellant. The respondent knew all the facts, and was under no mistake as to them. If he made a mistake as to the legal consequences of those facts he is not excused: *Unwin* v. *Clarke* (2), which case was not referred to in *R.* v. *Mollison*; *Ex parte Crichton* (3). The term "reasonable cause" is equivalent to "lawful excuse," which, in the English cases, has been held to excuse a servant leaving his work: *Neighbour* v. *Moore* (4). A "lawful excuse" is either such a state of facts, or a belief in the existence of such a state of facts, as would in law justify the servant leaving his work: *Rider* v. *Wood* (5); *Seth Turner's Case* (6); *Smart* v. *Pessol* (7); *Tighe and Russell on Master and Servant*, p. 86. Even if "reasonable cause" has a wider meaning than "lawful excuse,"

(1) 11 S.R. (N.S.W.), 532.
(2) L.R. 1 Q.B., 417.
(3) 2 V.L.R. (L.), 144.
(4) 4 Q.L.J., 145.
(5) 2 El. & El., 338; 29 L.J.M.C., 1.
(6) 9 Q.B., 80.
(7) 30 L.T., 632.

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there is no evidence to support the defence. The evidence shows at best that the custom was that the union delegate should ask permission to attend the meetings of the union, and that permission should not be unreasonably withheld. There was no evidence, however, that the permission was unreasonably withheld, or that the respondent believed that it was. Nor was there evidence of the existence of a custom that the delegate might attend the meetings without leave, or that the respondent believed that there was such a custom. On the other hand, the evidence shows that the reason the respondent left his work was that the delegate who had been dismissed was not immediately and without discussion reinstated. The Full Court has laid down as a matter of law that the wrongful dismissal of one servant is a reasonable cause for other servants leaving their work, and that is a ground upon which this Court will entertain the appeal even if this is a criminal matter. He referred to *Sobye* v. *Levy* (1). The respondent had to prove that he had a reasonable cause: *Justices (Amendment) Act* 1909, sec. 144.

Wise K.C. (with him *Boyce*) for the respondent. This is a criminal matter: *Seaman* v. *Burley* (2), and this Court will not entertain an appeal on a question of fact: *Collis* v. *Smith* (3); *Bataillard* v. *The King* (4); *McGee* v. *The King* (5). The special leave should therefore be rescinded. There has been no breach of contract by the respondent. It was broken in the first instance by his employers in such a way as to justify him in ceasing to work. If that is not so, the evidence shows that the respondent had reasonable ground for believing, and did *bonâ fide* believe, that a custom existed, and was an implied term of the respondent's contract, that custom being that the delegate should have permission to attend all meetings, and that permission should always be granted. If that custom was an implied term of the contract it does not matter whether it went to the root of the contract or not. The respondent was injured and his contract was broken and put an end to by the dismissal of Cairnes, and he was entitled to cease work. A custom may be embodied in a

(1) 9 C.L.R., 496.
(2) (1896) 2 Q.B., 344.
(3) 9 C.L.R., 490, at p. 495.
(4) 4 C.L.R., 1282.
(5) 4 C.L.R., 1453.

contract: *Whitcombe & Tombs Ltd.* v. *Taylor* (1). If a servant believes that he is acting in pursuance of a right in ceasing work, even though he is wrong in that belief, he has reasonable cause for ceasing work: *R.* v. *Youle* (2); *Rider* v. *Wood* (3); *The Glynoeron* (4); *Earl Beauchamp* v. *Winn* (5); *Smart* v. *Pessol* (6).

[GRIFFITH C.J. referred to *Cornwell* v. *Sanders* (7).]

Mens rea is a necessary ingredient of an offence under the section, and must be averred and proved: *Ex parte Desmond* (8); *R.* v. *Armstrong* (9); *Watkins* v. *Major* (10); *Bank of New South Wales* v. *Piper* (11); *Derbyshire* v. *Houliston* (12); *Ashmore* v. *Horton* (13); *Willett* v. *Boote* (14); *Sidey* v. *Willsallen* (15); *Cheney* v. *Bardwell* (16); *Lord Halsbury's Laws of England*, vol. IX., p. 236.

[ISAACS J. referred to *White* v. *Feast* (17); *Ravenga* v. *Mackintosh* (18).]

Knox K.C., in reply.

Cur. adv. vult.

The following judgments were read:—

April 25.

GRIFFITH C.J. In this case a body of workmen, 32 in number, demanded the immediate re-instatement of a fellow workman who had been dismissed by the common employer, and on refusal of instant compliance with that demand absented themselves and refused to go to work.

Section 4 of the *Masters and Servants' Act* 1902, provides that a servant who having entered into a contract of service of a specified kind absents himself from his work without reasonable cause before the expiration of the contract shall be liable to a penalty not exceeding £10. Several cases were referred to in

(1) 27 N.Z.L.R., 237.
(2) 6 H. & N., 753, at p. 767.
(3) 2 El. & El., 338; 29 L.J.M.C., 1.
(4) 21 T.L.R., 648.
(5) L.R. 6 H.L., 223, at p. 234.
(6) 30 L.T., 632.
(7) 3 B. & S., 206.
(8) 5 S.C.R. (N.S.W.), 387.
(9) 5 S.C.R. (N.S.W.), 36.
(10) L.R. 10 C.P., 662.
(11) (1897) A.C., 383.
(12) (1897) 1 Q.B., 772.
(13) 29 L.J.M.C., 13.
(14) 30 L.J.M.C., 6.
(15) 18 N.S.W. L.R., 341.
(16) 20 N.S.W. L.R., 401.
(17) L.R. 7 Q.B., 353, at p. 359.
(18) 4 D. & R., 187.

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argument, all decided under the *Masters and Servants' Act* then in force in England, which did not contain the words "without reasonable cause." In these cases it was held that the application of the doctrine of *mens rea* was not excluded, and that the existence of an honest belief on the part of the servant that he was entitled to absent himself was a good defence to a prosecution. In my judgment these cases have no application to the New South Wales Act. The test of guilt created by that Act is not *mens rea*, but the absence of reasonable cause. The Act is not of a purely criminal nature, its purpose being to enforce the obligation of contracts of service in cases in which the civil remedy by action would be futile.

The existence of reasonable cause affords a defence to the charge, but whether it exists or not is a question of fact to be determined upon evidence. It is, however, sufficient for the defendant to show that he honestly and reasonably believed in the existence of a state of things which if it had existed would have established reasonable cause. (Compare Queensland *Criminal Code*, sec. 24). But, as at present advised, I am disposed to think that the relationship of cause and effect between the alleged fact and the act of the servant must also be established, so that if the cause set up at the hearing was not known to him at the time of his absenting himself he cannot avail himself of it.

The respondent was in the employment of G. & C. Hoskins Ltd. as a coal miner. Amongst his fellow-workmen was one James Cairnes, who was what is called the "lodge delegate" from the mine, by which I understand a delegate chosen by a lodge or branch of a trade union to represent it at meetings of the governing body of the union. On Thursday 13th July Cairnes absented himself from the mine to attend a meeting, without permission. The appellant, who was manager of the mine, thereupon dismissed him—apparently on the Saturday. On Monday morning, the 17th, a number of the miners came to Spooner at the office of the mine. Their spokesman, one Doyle, asked if Cairnes was to start work, to which Spooner replied "No." The answer was "We are not going to start without him." Mr. Hoskins, one of the directors of the Company, then came up. His version of what took place is as follows:—

"On Monday morning I went to the coal tunnel in consequence of having had a letter on the Sunday from the miners. When I got there I said to the miners 'What's the matter'? There were five of the miners went into Mr. Spooner's office with myself and they told me that Cairnes had been dismissed by Mr. Spooner and they said they would not go down the pit unless Cairnes went with them. I said to them, 'You go down the pit and we can discuss this matter of Cairnes after.' They said 'No, we will not go down the pit unless Cairnes goes with us.' I think one of them said, 'We will give you ten minutes.' I said, 'We will discuss the matter—Mr. Spooner, Cairnes and myself.' They said 'No, we will not have it discussed.' They then left the works in a body."

The respondent was one of the men who left. The only other version of the interview was given by a witness named William Delaney called for the defence, who said :—

"Mr. Hoskins came along after and he went and saw Mr. Spooner. They had a conversation. They then came out to the body of men. Mr. Hoskins asked us the trouble and we informed him of what had taken place, that is, the dismissal of Cairnes. We asked him could he not re-instate Cairnes. Mr. Hoskins said 'No; that Cairnes was in the wrong and would have to go.' Mr. Hoskins then asked us to go to work and he would discuss it with Mr. Spooner, Cairnes and Truscott. Mr. Doyle asked what was there to discuss in the matter. Mr. Hoskins said he did not know. We then pointed out to him that Mr. Truscott was in Sydney and may not be home for a couple of days. Mr. Hoskins then suggested that we go to work and allow Mr. Spooner, Cairnes and himself to discuss it. He said he thought it could be fixed up in a few minutes. Mr. Doyle suggested that he take a quarter or half an hour and we would wait and hear the decision. This Mr. Hoskins refused to do. Mr. Hoskins then left.

"Work would have been resumed had Cairnes been re-instated."

It is quite clear that the immediate cause for the refusal to go to work was the employers' refusal to re-instate Cairnes there and then. It is equally clear that the delay which according to

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Delaney's version was suggested by Doyle was suggested, not to ascertain whether the dismissal was justified, but only to see whether the employers would persist in their refusal to re-instate Cairnes.

The case made for the respondent is that Cairnes in his capacity of lodge delegate was an agent for all the members of the lodge (of whom the respondent is assumed to have been one), that the contract between Messrs. Hoskins and the miners was in substance a collective bargain in which was incorporated a custom that the lodge delegate should be entitled to absent himself from work for the purpose of attending meetings of the union, and that this was a condition precedent to the obligation of the miners to continue their service, so that a denial of this right, or a dismissal of Cairnes for absenting himself for that purpose, would *ipso facto* justify immediate cessation of work. Alternatively it is argued that they honestly believed that this was the contract and that this belief is enough to establish reasonable cause.

First, as to the foundation in fact for these contentions. The respondent, who gave evidence on his own behalf, said as follows: —"It is a fact that I declined to resume work at the Iron Works Tunnel on the 17th July unless Cairnes accompanied the other miners and myself. I had been employed at that mine for about two months. The implied contract with regard to the delegates was the same as in other collieries that when he was required to attend the delegate meeting he was entitled to a day off and it was in consequence of Cairnes being discharged for attending this meeting that we refused to go to work.

"I know of the custom that delegates are entitled to attend delegate meetings. They ask for permission to attend and I have never known it to be refused in any district I have been in."

His statement as to "an implied contract" is, of course, a mere inference of law drawn by himself, and is no evidence of the fact asserted.

Evidence was given by other witnesses to the effect that there was what they described as a "custom" that the delegate should ask the permission of the manager to attend the union meeting, and that they had never known of permission being refused.

There is no room for doubt, upon the evidence, that under the alleged custom it was necessary to apply for permission. The evidence that permission was in practice always given would establish, at most, that it was part of the custom that permission should not be arbitrarily or unreasonably refused. Otherwise the term "permission" used by all the witnesses would be idle. I will leave on one side the difficulty that a custom must be certain, and will assume that the respondent might reasonably have believed that there was a custom that permission to Cairnes to attend the meetings of the union should not be arbitrarily or unreasonably refused. Upon the evidence this is the utmost that can be said for him. A belief without any foundation of fact cannot be even an element in reasonable cause.

As to the circumstances of Cairnes's dismissal all that was directly proved before the Magistrate was that Spooner had told Hoskins that Cairnes had asked for permission. It is a fair inference that it was refused. Spooner was not asked to give his reasons for refusing, and we know nothing about them. He was, from the necessity of the case, called upon to exercise a discretion, and it must be assumed that he did so. Under these circumstances, and in the absence of any evidence on the point, the Magistrate was not entitled to infer either that permission was in fact unreasonably refused, or that the defendant honestly and reasonably believed that it had been so refused.

If this difficulty were out of the way, the further difficulty remains as to the incorporation of the stipulation as to granting leave to the delegate as a condition of the contract with the defendant. It may be that it was a term of the contract. Or it may be that he believed that it was. But I am unable to find any evidence to establish that fact, if it be one, or any reasonable ground for belief in its existence.

In my opinion, therefore, there was no evidence on which the Magistrate could find the existence of reasonable cause.

Nor do I think that this was, in truth, the position taken up by the 32 men.

Their position was, not that permission had been unreasonably refused to Cairnes, but either that such permission was not necessary and that the dismissal was therefore wrongful, or that

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they and not the employers were the judges of the matter, and that in either case the dismissal of Cairnes justified their refusal to go to work. They said to the employers, in effect, " We have decided that Cairnes should not have been dismissed. Re-instate him *instanter*, or we strike." The employers refused to "stand and deliver " on this challenge, whereupon they absented themselves from service.

In my opinion there was no evidence to justify the position so taken up.

If it had appeared on the evidence that the respondent and his fellow workmen honestly believed and had reasonable ground for believing that Cairnes was wrongfully dismissed, and that it was a term of their own contract that his dismissal, if wrongful, should entitle them to discontinue their service, the result would be different.

For these reasons I think that the appeal should be allowed.

BARTON J. In July last year the appellant, the manager of a coal mine at Lithgow for C. & G. Hoskins Ltd., laid a complaint against the respondent, an employé of the colliery, under the *Masters and Servants Act* 1902, sec. 4, for having without reasonable cause absented himself from his service before the term of his contract had expired. The complaint was heard by the Police Magistrate, who after taking evidence on both sides convicted the respondent and fined him £3 with costs. If he should make default in payment the respondent was adjudged imprisonment with hard labour for one month, according to a scale fixed by the *Justices Act* 1902, sec. 82. The respondent obtained from the Supreme Court a statutory prohibition against the conviction, and the colliery manager now appeals against that decision by special leave.

The contract for service was not for any fixed period but was terminable on 14 days notice either by the employer or by the employé.

The circumstances were these. One Cairnes, another employé of this colliery, was the delegate of the miners to a board which held meetings from time to time, presumably to discuss matters of common interest to the workers at the appellant's colliery and

to other bodies of coal miners. On the 13th July last he asked the manager for permission to leave his work and attend a meeting of the board. This was refused. The ground of the refusal is not stated in the evidence for either party, nor apparently was any witness asked to state it. I cannot under these circumstances presume that the refusal was unreasonable, because the reasonableness of the refusal of leave to Cairnes was not a necessary ingredient of the case for the prosecution against Alexander, and that is a sufficient reason for the absence of evidence of it on the part of the complainant. The defence rested on grounds which eliminated that question and maintained that any refusal at all justified the respondent. Cairnes having failed to obtain permission absented himself from the 13th to the morning of 17th July. The 16th was a Sunday. On his return he sought to resume work, but was not permitted to do so. The employés as a whole demanded that he should be allowed to return to work, and threatened that they would not go down the pit unless Cairnes went with them. Cairnes not having been reinstated, they left the work in a body without having given any notice. The respondent was prosecuted for thus absenting himself.

The circumstances more immediately leading to the abandonment of work were these. On the Monday morning (the 17th) the men came to the pit mouth, but did not go to work as usual. At this time Cairnes, the delegate, had evidently been already refused permission to return to work. The spokesman of the men, one Doyle, asked the appellant whether Cairnes was to go to work. The reply was that Cairnes had been dismissed. Doyle asked for his reinstatement on the ground that he had attended to the men's business by going to the meeting of the delegate board on the 13th. Reinstatement was refused. Doyle said they would not go into the mine without Cairnes, but would wait for Mr. Hoskins (apparently the managing director of the Company) for whom they had sent. Mr. Hoskins, after he had consulted with the appellant, presently came, and a deputation of five miners went into the office and spoke with Mr. Hoskins. According to him the following conversation ensued. The men said that Cairnes had been dismissed by the appellant, and they would not go into the pit unless Cairnes went with them.

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Hoskins said, "You go down the pit, and we can discuss the matter of Cairnes after." They repeated that they would not go down the pit unless Cairnes went with them. Hoskins said, "We will discuss the matter—Mr. Spooner, Cairnes and myself." The men said "No, we will not have it discussed," and they left their work in a body. Delaney, a witness for the respondent, gives the latter part of the conversation thus: "Mr. Hoskins then asked us to go to work and he would discuss it with Mr. Spooner, Cairnes and Truscott" (the Secretary of the Western Coal Miners' Association). "Doyle asked what there was to discuss in the matter? Mr. Hoskins said he did not know . . . Mr. Hoskins suggested we should go to work and allow Mr. Spooner, Cairnes and himself to discuss it. He said that he thought it could be fixed up in a few minutes. Mr. Doyle suggested that he take a quarter or half an hour, and we would wait and hear the decision. Mr. Hoskins refused to do so." (Hoskins had said in evidence that he thought one of the men had said, "We will give you ten minutes.")

Between these two versions it is easily gathered that the point at which the parties came to a deadlock was that Hoskins wanted the men to do their work pending a discussion between himself, Spooner, Cairnes and probably Truscott, while the men refused to entertain any proposal to work until Cairnes should be re-instated or until the suggested discussion should have been held and a decision arrived at. It is also clear that they had made up their minds not to return to work if after discussion the dismissed man was not reinstated. Either way, then, the respondent and his fellow employés refused to resume work until Cairnes should be reinstated. Their attitude was consistent throughout. There is no evidence that they professed to base their position on any breach of a custom or of an implied condition. The management must take back the dismissed man or they would strike work. He was not taken back, and they struck. Thus the defence to the charge of leaving work without reasonable cause is based on the employer's refusal to take back, or his persistence in dismissing, a fellow workman of the respondent who had absented himself without leave on business which was not that of his employer, or, as they put it themselves, on

the men's business. If the matter rested there this was no better excuse for the conduct of the respondent and his fellow workmen than if Cairnes had been dismissed for going to Sydney, after a refusal of leave, in order to collect or bank a sum of money for the respondent and other miners. Cairnes had contracted to give his working time to the mine owners for hire. He deprived them of it for at least two days to attend to the business of the respondent and other men working at the mine. That is alleged to be a reasonable cause for the admitted abandonment of work. In the absence of any other defence, it cannot be said that there was a shadow of legal excuse for the respondent's desertion of his work, or even that any reasonable claim of right could be founded on the events which had happened.

But there was other evidence which requires consideration.

A custom or an implied term in the contract was set up at the hearing. Witnesses for the respondent used both expressions, interchangeably or in the alternative. In favour of the respondent we may take it that the evidence of what was called custom was tendered as proof of a usage that had become so fully accepted as to amount to an implied term in the contract of employment. Of course, the assertion by a witness that something is an implied term in a contract is by itself of no value. Facts may, however, be proved from which a custom or an unwritten or unspoken contractual term may be implied by the tribunal. It was argued that the alleged term was a condition precedent to the duty of the miners to perform their contract of service, and that, if it were broken, any miner might rightfully refuse to do his work. I am quite unable to agree with this proposition. Whatever consequences might be entailed by a breach of such a term, if it existed, it could scarcely be said that one of them was the entire release of the other party from his obligation. But what was the proof of the alleged usage or term? Whether the evidence on this head be looked at from the one standpoint or the other, it is difficult to discover any definite thing that is proved by way either of implication or of usage. And a further difficulty arises, that of seeing how the custom or implied term, in whatever form it may be found to exist, can affect any contract except the individual contract of each person whose obligation it

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modifies. There is no evidence in this case of any collective contract. The question is as to the contract between Alexander and his employers.

Several miners called by the respondent spoke of a custom or an implied contract that delegates are entitled to attend meetings of a delegate board. But, on further examination, they said that a delegate asks the manager for permission to attend a meeting. They also said that they had never known permission for the purpose to be refused. One witness said that it was the custom for a delegate to "notify" the manager that there would be a meeting next day, and that he would be absent from work. But on cross-examination he said that a correct statement of the custom would be that the delegate should see the manager and ask permission to attend the meeting. Another said there was a custom that the delegate be granted permission to attend meetings. One or two said that more than once they had even absented themselves without permission in order to attend meetings as delegates, and that on their return they had not been asked to explain their absence. I think they were treated with forbearance. One witness who spoke thus, and who had been a delegate from the mine managed by the appellant, also said that he "always" asked the appellant for permission to attend.

Taking all this evidence for the respondent together, I think it shows that the practice was for a mine employé, being a delegate, to ask the manager for permission when a meeting of the delegate board was impending. Apart from its use in some Statutes when coupled with a command or direction, the word "permit" or "permission" implies that something asked may be granted or refused. But though so many said that they had never known the permission to be refused, I cannot conclude that the right to refuse permission, if the manager considered a refusal to be in the interest of his employer, was ever relinquished. It is almost impossible that such a right should not be retained. Its entire abandonment would oblige the manager to consent to such absences at times when for the strongest reasons of necessity every miner ought to be at his post. Such occasions will readily suggest themselves to the mind. But I do not think the legal effect of the evidence is to establish a practice so unreason-

able, and to limit the right of the management to an altogether impracticable and, in cases easily conceivable, an unsafe, degree. If there is no absolute right in the delegate to absent himself against the wish of the manager, then on what ground of reason can the line be drawn at the point suggested by *Pring* J.? If the manager is not bound to let a delegate leave work whenever there is a meeting to be attended, he must be the judge of the occasions when the owner's interest requires the presence of the worker at the mine. And no doubt permission, when such occasion has not arisen, has been very freely, perhaps invariably, given. These considerations give the strongest probability to the evidence of the appellant, who gives the right complexion to the facts stated for the respondent when he says "It had been the custom to allow the delegates to attend the board meetings with permission, but that permission would be withheld if necessary." I take the word "necessary" to mean necessary in the interests of the employer, to the best of the manager's judgment. I conclude then that the practice is to ask the manager's permission, as is stated with practical unanimity, but that the manager has a discretion to withhold it when he thinks it necessary to do so in the employer's interest. It could only be an absurd futility that permission must be asked on every occasion, and yet must be granted as often as asked. Either the delegate may attend every meeting without asking leave at all—a right which was not claimed even in an argument in which claims were many and large—or the necessity to ask permission means that it must be obtained before work is left.

If the view I have taken be correct, then the appellant's refusal of leave to Cairnes, to enable him to attend the meeting, was not a breach of any custom embodied in his contract with his employers, or of any implied term in that contract. *A fortiori* it was not a breach of custom, or of implied term, in relation to the contract between any other miner and the employers.

What, then, is the result? In the first place, the claims of *positive* justification founded on custom or on implication must fail. The manager had a right to refuse Cairnes permission to leave his work and attend the delegate meeting, in the absence, at least, of any proof that such refusal was without reason, or

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capricious. When Cairnes left his work without leave he broke his contract. Whether he rendered himself liable to conviction under sec. 4 or not, it is not material to inquire. But he rendered himself liable to dismissal. A servant may be rightfully dismissed, and yet not be liable to prosecution. It follows that the dismissal of Cairnes gave the respondent no right to absent himself from his work, and by doing so he broke his contract of service. Does it follow that the respondent was liable to be convicted under sec. 4 ?

It is argued that, even if the respondent wrongly left his service, still he acted under a *bonâ fide* belief that he had a right to do so, and however mistaken that belief might be, its existence, it is said, protects him, since the section is an enactment of criminal law, and his belief negatives the guilty mind or *mens rea* necessary to constitute a criminal offence. In one sense the proceeding against him is a criminal one, as it might result in imprisonment: *Seaman* v. *Burley* (1), where a judgment of the Queen's Bench Division, in a special case stated by justices on an application to enforce a poor rate by distress, was held by the Court of Appeal to be a judgment in a "criminal cause or matter" within sec. 47 of the *Judicature Act* 1873, and therefore not appealable, for the reason that the proceedings before the justices might end in imprisonment of the person in default, and the question whether there was an appeal depended on the nature, not of the obligation, but of the proceedings. But that case has nothing to do with the distinctions as to *mens rea* and *bonâ fide* claims of right. These depend on a broader question than mere procedure. Is the enactment under which the complaint is laid a criminal law as distinct from a law to preserve and enforce civil obligations ? It was passed for the purpose of protecting the contract from wanton breaches on the part of the servant, just as the right to recover wages or damages already gave the servant protection against similarly reckless conduct on the part of the master. The correlative to wrongful dismissal is abandonment of the service without good reason. If the Act were repealed the servant would still have his contract protected, but the protection, so far as the master was concerned, would vanish. The enactment, then,

(1) (1896) 2 Q.B., 344.

being intended to give more effectual protection to a civil right—the right to have a contract performed by the promisor—is it in its essence what is known as a criminal law in the sense that it is a rule of conduct which is not violated unless "the mind goes with the act"? I am somewhat inclined to think that it is not, and, therefore, that the doctrine of *mens rea* does not apply to it, though a defendant charged under it with a breach of his contract has still open to him the answer which ousts the jurisdiction of a Magistrate in such summary proceedings—namely, that he acted under a *bonâ fide* claim of right. But this question becomes unnecessary to decide in face of another. Can the defence either of the absence of *mens rea*, or of the presence of a *bonâ fide* claim of right, prevail here? A man cannot negative *mens rea* by showing that, although he intentionally did the thing with which he is charged, he did it mistaking the law. Nor can he rest a *bonâ fide* claim of right on such a ground. But a mistake of fact may save him in either case.

In the case of *Unwin* v. *Clarke* (1), an employé had during a two years' contract of service absented himself "without lawful excuse," and had been convicted and committed to prison. After his release and before the end of the two years he refused to return to his service, and was charged under the same section with a fresh offence of absenting himself. In defence he said that he had refused because he considered that his contract had been ended by the commitment in the prior case, and the justice found this to have been a *bonâ fide* belief on his part. The Court held that the servant in thinking that he could legally absent himself, had made a mistake as to the law, and that he could not set up in his defence even a *bonâ fide* mistake of that kind. *Shee* J. would have differed from the majority of the Bench (*Blackburn* and *Mellor* JJ.) had he not felt himself obliged by the weight of authority to agree. The case of *Rider* v. *Wood* (2), on which Mr. *Wise* relied, was cited in *Unwin* v. *Clarke* (1), and was distinguished by *Blackburn* J., who had been a member of the Court which decided it. He said that in *Rider* v. *Wood* (2) the servant had absented himself under a mistake of fact in thinking that he had given a good notice when he had not done

(1) L.R. 1 Q.B., 417. (2) 2 El. & El., 338; 29 L.J.M.C., 1.

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so; and that it was held that a man who acted under a mistake of fact could not be said to have absented himself without lawful excuse, inasmuch as there was no wilful intention to break his contract.

In *Unwin* v. *Clarke* (1), another case relied on for the present respondent, *R.* v. *Youle* (2) was cited. It had been decided five years before *Unwin* v. *Clarke* (1), but the Court declined to follow it.

I think the present case is directly within the last mentioned authority. Just as in *Unwin* v. *Clarke* (1) the servant could not rely on his belief that his contract had been ended by his first commitment, so here the respondent cannot rely on his belief assuming him to have believed, that in the state of the facts known to him and not denied, as to the granting of leave to delegates, the refusal of leave to Cairnes was in law a breach of a custom, or of an implied term, in relation to the respondent's contract with his employer. That was a conclusion of law upon facts which cannot be said to be controverted, and not a matter of fact, within the distinction which, in *Unwin* v. *Clarke* (1), *Blackburn* J. drew between these two things.

The above considerations, I think, cover the case so far as it relates either to the question of reasonable cause in fact or to that of *bonâ fide* belief. If there remain any doubt on the latter head, I turn to the case of *White* v. *Feast* (3). The Act 24 & 25 Vict. c. 97, sec. 52, provides that "Whosoever shall wifully or maliciously commit any damage . . . to or upon any real or personal property whatsoever . . . shall on conviction thereof before a justice of the peace be subject to" imprisonment or fine, provided "that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of." It was held by the Court of Queen's Bench that this express proviso overrode the proviso usually implied as to summary convictions, that a *bonâ fide* claim of right ousts the jurisdiction of the justices. *Cockburn* C.J. said (4): "The legislature have chosen to put a different restriction upon the jurisdiction of the justices

(1) L.R. 1 Q.B., 417.
(2) 6 H. & N., 753.
(3) L.R. 7 Q.B., 353.
(4) L.R. 7 Q.B., 353, at p. 357.

from that which would otherwise have been implied. . . . It is not for us to impose any other limit." *Blackburn* J. said (1): "As the proviso expressly says that the claim of right must be founded on reasonable grounds, the ordinary proviso, usually implied as to mere *bona fides*, is superseded." *Mellor* and *Quain* JJ. agreed. The manner in which the principle of that case seems to me to be applicable is this. Had the New South Wales *Masters and Servants Act* omitted the words "without reasonable cause" there would have been implied a proviso something like the implication in *Seth Turner's Case* (2), but including not only the necessity for lawful excuse or reasonable cause, but also the further proviso ordinarily implied that the summary jurisdiction shall not be exercised in cases where the act has been done under a *bonâ fide* claim of right. But as the Act has specified expressly that there shall be no conviction unless the act has been done without reasonable cause, then "the ordinary proviso, usually implied as to mere *bona fides*, is superseded," and only cases of reasonable cause are to afford a defence. The Statute has created the offence, and as *Mellor* J. put it in *White* v. *Feast* (3), "The Statute itself states in precise terms what shall restrain the justices from acting," and "We are not at liberty to imply any other restriction."

With reference to the case of *R.* v. *Mollison*; *Ex parte Crichton* (4), I should like to say that on comparing it with the case of *Unwin* v. *Clarke* (5), I am constrained to prefer the authority of the latter, which was not apparently brought to the notice of *Stawell* C.J. If *R.* v. *Mollison* (4) really purports to lay down that a servant is not liable if he has a *bonâ fide* belief, founded on a mistake of law, that he had a right to absent himself from his service, then I cannot agree with it.

On the whole case I am of opinion that the conviction was right and should be restored.

Isaacs J. The Police Magistrate convicted Alexander of the offence of absenting himself without reasonable cause, inflicted a fine of £3 and £1 5s. costs, and ordered that in default of pay-

(1) L.R. 7 Q.B., 353, at p. 359.
(2) 9 Q.B., 80.
(3) L.R. 7 Q.B., 353, at p. 360.
(4) 2 V.L.R. (L.), 144.
(5) L.R. 1 Q.B., 417.

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ment he be imprisoned, and kept to hard labour for one month in Bathurst gaol. The Supreme Court of New South Wales reversed that decision, and now this Court is asked to restore the sentence. In my opinion that should be refused, and this appeal dismissed.

The proceeding was instituted under sec. 4 of the *Masters and Servants Act* 1902 a mere formal reproduction by way of consolidation of an Act passed in 1857, which, with some modifications, was based on the English Act 4 Geo. IV. c. 34. It is worthy of note that the English statutory prototype was repealed by the British Parliament over a quarter of a century ago, by 38 & 39 Vict. c. 86, s. 17. But the New South Wales Act still survives, and as its continuance is solely a matter for the consideration of the legislature, the Courts have a duty to enforce it in any case properly falling within its ambit. But we should see first that the case does properly come within it.

The offence charged is "absenting from service without reasonable cause before the term of the contract is expired," and the whole question for the Supreme Court turned on whether Alexander had or had not reasonable cause. The three learned Judges who composed the Court unanimously thought he had, and, to my mind, the evidence overwhelmingly shows they were right.

Confusion sometimes arises from applying the English decisions, which introduce the implied exception of "without lawful excuse" or "with knowledge that there was no lawful excuse," because *mens rea* was held to be essential to the offence. They shew that in England the Act was thought to be truly a criminal enactment. In the local Act, it is not a question of "lawful excuse," but of "reasonable cause" which may be quite different, as an exculpation, though the nature of the enactment is criminal all the same. The first exculpation makes the law the test, and whatever falls short of that test is no lawful excuse. The second assumes reasonableness as the standard. An illustration I put in the course of the argument may be repeated here. A man might absent himself because his wife or child was ill. Strict law would not excuse him, but reasonableness would. Naturally, if the cause is a lawful excuse, it is *ex necessitate* reasonable. And that, as it appears to me, is the case in the present instance. "Reason-

able cause," I take to be such cause as the reason of a fair-minded man would, in the circumstances, recognize as a legitimate ground for his absence. The Act itself means now what it meant originally, but changing circumstances of life and modern notions of what is fair and right between man and man may affect its application by rendering a cause "reasonable" that half a century ago would, under harsher social standards, have been quite beyond the pale of consideration.

In the present case something depends upon the mutual attitude of master and men, and their respective intentions towards each other in the dispute that arose, and in that connection I attach considerable importance to the general provisions of the Statute, the aid of which the master has invoked. It is a most material circumstance in that aspect that—as both parties must have known—its severity and criminal responsibilities are all on one side. If there were equal responsibility placed on both sides for a refusal to continue the contract, it might be fairly said each would be anxious not to press the matter so far as to commit a punishable breach. If, in other words, an employer or his representative, who, without proper notice and without reasonable cause, excluded a workman, were made liable to criminal proceedings, in the same way as is a workman who absents himself without reasonable cause, then the attitude of the employer in the present case would be entitled to more weight, because a man who risks something in standing by his view may be supposed to believe in it. In such event, however, it is more than doubtful whether Cairnes would ever have been discharged in the summary manner he was, in circumstances which, as was actually decided on his prosecution, protected him, because it was held he had reasonable cause for absenting himself. But the truth is that no penalty whatever is placed upon an employer or his representative who, however harshly, arbitrarily, and causelessly, discharges a workman; he runs no risk whatever of criminal proceedings; while, with singular discrimination, the workman, however honestly he believes he is justified, is still exposed to criminal consequences, *R.* v. *Tyler* (1), if the Court which deals with him considers he acted without reasonable cause. Even the luxury of

(1) (1891) 2 Q.B., 588.

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bringing a civil action is hardly a practicable remedy by an impecunious workman against a wealthy employer.

This makes the position of the parties disputing so unequal as possibly to affect the inference of fact arising out of their respective contentions. The servant who stands by his assertion of rights knows of the impending sword; the master can afford to be firm in his refusal to move because he knows that, though the sword may at his desire fall on the employé, he himself, even though the employer is not, as here, a limited company, is absolutely safe so far as this Act is concerned. The greater seriousness of the former's position is, to my mind, a strong circumstance in determining the *bonâ fides* of his acts and contentions. To begin with, I wish to emphasize one fact as being of importance. The 32 men—Alexander and others—who are charged with this offence were not engaged in a strike as that is ordinarily understood. By that I mean, that a strike as ordinarily understood is a simultaneous cessation of work by employés in order to compel the employer to concede some new terms of employment, terms which up to then he had refused to concede, and which were therefore no part of the existing bargain between them. In other words, it is resorted to as a means to compel the employer to agree to terms which he so far has never agreed to, but to which the men claim he ought to agree as a matter of justice.

But in this instance, nothing of the kind took place. Neither Alexander nor any of his fellow workmen were asking for any new condition of industry whatever. All they were requesting was that the bargain already freely and voluntarily entered into by the employer and so far kept by them should be faithfully kept by him. They asserted rightly or wrongly that he had deliberately broken, and as deliberately continued to break, a distinct and vital term of an existing contract. The employer on the other hand, rightly or wrongly asserted his contractual right to act and continue to act as he did. There is therefore no analogy between this case and that of an ordinary strike. Nor is Alexander charged with participation in a strike. If he were, the only tribunal to deal with him would be the Industrial Court (*Industrial Disputes Act* 1908, sec. 45), and so he ought not in

any case to be considered directly or indirectly as liable on the ground of participating in a strike.

Now the term of the mutual contract asserted by Alexander was this. He said to the employer:—"It is an implied term in the engagement of every coal miner in your mine, that the particular miner selected by your employés to attend as their delegate to the board of delegates to represent their interests shall be permitted to attend, and you have broken and still continue to break that term of my contract by discharging my delegate for so attending, and by declining to reinstate him at my request. That is the most effectual way of refusing to perform this term of our agreement. Until, therefore, you withdraw from that breach you are still refusing to adhere to the terms of our contract, and while that is so I claim to be entitled to proceed no further with it." That is the substance of the position, and the question is whether that is a reasonable cause.

Coal mines are universally recognized to be dangerous places to work in. Life and limb are in peril there, and the legislature of New South Wales, as elsewhere, have enacted (Act No. 73 of 1902) elaborate and necessary provisions for the protection of employés during their life, and the careful investigation of the causes of their death when that takes place in coal mines. Restrictive conditions of employment as to age and sex are imposed on the common law power of the owners. By other well known enactments provision is made for establishing proper industrial conditions. But in view of the risks to themselves and the obvious consequences to those dependent upon them, it is thought a necessary precaution by the coal miners themselves—as is evidenced by a long standing and well recognized practice—that the employés at each mine should appoint a delegate to represent them at the board of delegates, the obvious purpose being, or, at all events, including, the discussion of, and if necessary, taking action with reference to, the conditions actually observed and existing in that mine. The safety and security of the men and boys engaged in the mine consequently fall within the ambit of the delegate's functions. No doubt their collective interests generally as workers in coal mines are also within the purview of their delegates, as if each and every miner were there

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in person, but the delegation from the particular mine primarily refers to conditions in that mine. It is obvious, therefore, that to penalize a delegate for attending to his duties as such, is as much an injury to the interests of the miners who send him, as penalizing a member of the legislature for attending Parliament would be a direct and patent injury to his constituents.

And, further, a refusal to permit delegates to attend is a breach of the compact which cannot be compensated for in damages. It sets aside an agreed precaution for which no money compensation can be regarded as a substitute, and no pecuniary standard can be assigned. It makes the contract a different and a more dangerous one, it makes the work a more hazardous, and altogether less desirable work to engage in, and, therefore, I am of opinion that the contention of Mr. *Wise*, that the breach of this term goes to the root of the bargain, and entitles the miner to rescind it altogether, is sound. The miners clearly rely on the performance of such a condition as a vital part of their bargain, and not on a monetary compensation for its breach, and, therefore, on the authority of such cases as *Franklin* v. *Miller* (1) and *Bettini* v. *Gye* (2), the breach by the employer would give the employé the right to withdraw altogether from the contract.

Then was there such a term, and was there a breach of it, or, at least, was Alexander acting reasonably in thinking there were both the term and the breach; because men in his position are not lawyers, and, as I think, ought not to be sent to gaol with hard labour for acting upon what seemed to them the honest truth at the time. My learned brothers think there was no evidence of such a term, and as I have the misfortune to take the opposite view it is my duty to refer to the testimony itself.

The custom of delegation has, according to the uncontradicted evidence, been in force for a great number of years. And the evidence is equally clear and undenied that, except the refusal of the prosecutor on this occasion to permit Cairnes to attend, there is no evidence on record of any employer whatever attempting to prevent a delegate representing his fellow miners at a board. The practice of granting this permission has been universal, and

(1) 4 A. & E., 599, at p. 606, *per Littledale* J.

(2) 1 Q.B.D., 183, at p. 187, *per Blackburn* J.

has grown into a custom. Self-preservation dictates it to the workers; humanity and fair-play have, up to Cairnes's dismissal, led the employers to acknowledge it. It is a right that has come to be regarded as a term mutually though tacitly understood by both employer and employé when a man is engaged, and so to be a term incorporated into their agreement, just as the universal Saturday half-holiday was held to be by *Foster* J. in *Hebden* v. *Buxton* (1). The testimony is remarkably consistent and strong. The respondent Alexander says:—"The implied contract with regard to the delegate was the same as in other collieries that when he was required to attend a delegate meeting he was *entitled* to a day off, and it was in consequence of Cairnes being discharged for attending this meeting that he refused to go to work." He added "I knew of the custom that delegates are entitled to attend delegate meetings. They ask for permission to attend, and I have never known it to be refused, in any district I have been in."

Counsel for the prosecution did not ask the defendant a single question in cross-examination. He did not question his *bonâ fides*; he did not suggest that he had any reason or motive whatever for declining to proceed except the one assigned by Alexander himself.

William Delaney, a miner, said:—"The custom with regard to delegates is that they should attend the meetings. There is a *custom that they be granted permission to attend meetings*, and I have never known such permission being refused." In cross-examination he said, "Mr. Hoskins broke his implied contract with us in dismissing Cairnes."

Edmund Truscott is the Secretary of the Western Coal Miners Mutual Protective Association. He is a practical miner of 25 years standing. He said:—"The custom with regard to delegates attending board meetings to my knowledge is *that every delegate has the right to attend delegate meetings*; and the reason they ask the managers is that they will be off next day and so he would not be inconvenienced. I have never known a delegate being refused permission to attend a meeting before this time of Cairnes. That *is one of the implied conditions under which miners are engaged.*"

(1) 10 W.N. (N.S.W.), 69.

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Then he states a most material circumstance, which goes to show two things, first, the utmost *bona fides* in the respondent's contention, and the strongest reason for doubting the *bona fides* of the appellant in refusing Cairnes the desired permission. It is this. Truscott says :—" I remember a conference when a Wages Board was sitting. It was settled then, that there would never be any trouble about delegates getting away, and there was no need to put it in the award."

Frederick Gregory, another miner, and the Wages Board representative of the Coal Miners' Association, with 9 or 10 years experience of mines, corroborates Truscott's evidence as to both the custom and conference, the latter with more detail. These are his words " I remember a conference being held when the Wages Board was sitting in 1909. We were discussing the claims generally and clause 31 with regard to the delegates attending meetings, when a question of jurisdiction was raised. The matter was discussed, the general understanding arrived at was that there had never been any friction in the past and would not likely be any in the future and that it was not necessary to be embodied in the award." As both employers' and employés' representatives agreed to the reasonableness of such a practice it can hardly be held by a Court to be unreasonable or impracticable. He adds " This custom of the delegate attending these meetings is an *implied condition of the contract* on which the men commence work."

Robert Pillans, Mayor of Lithgow, and a miner of 40 years experience, corroborates the statement as to the custom, and states that it is one of the implied conditions of the contract.

Thomas Jackson a miner for ten years gives similar evidence.

So strong is the custom, that Charles Hood, a miner with 20 years experience, on several occasions attended meetings without even asking permission and without rebuke.

Now Truscott and Gregory both stated in cross-examination that the custom is for the delegate to ask the manager for permission. That of course read with the rest of their evidence does not mean that the permission may be refused at the manager's will and discretion. Hood in cross-examination gives the same evidence that the delegate asked the manager but adds the obvious understanding " and gets the day off."

What is the evidence on the other side? Spooner says:—"It had been the custom to allow the delegates to attend their meetings with permission but that permission could be withheld if necessary." He however does not say that permission ever had been withheld, and as a custom depends on what is done and not on some mental reservation never communicated, his qualification is worthless, because it is only his opinion of what he could do. Mr. Hoskins said "I do not know anything about any implied contract about the delegates being permitted to attend meetings. I asked Mr. Spooner if the men had any authority under any law or anything else to leave. He said 'No. I admit there is a custom, but I do not admit it takes away the right of the employer.'" I rather think Mr. Hoskins was giving these last words as part of Spooner's answer to him. And as before it is only an opinion as to the employer's right, not a statement of what was done. The only other witness for the prosecution was John Durrie, manager of another colliery. He denies there is such an implied term as that the delegate has permission to go to meetings.

But in cross-examination he admits that, though he has been connected with mines since he was a boy he has never himself prevented a delegate attending a meeting, and has never known of any manager having refused permission. So that as far as concerns acts done, which alone can constitute the custom, he supports the respondent's witnesses. He says:—"The manager can refuse permission," but that is plainly his opinion founded on no communicated fact or overt act whatever.

It is said the word "permission" connotes "power to refuse"; ordinarily it does, but it depends upon the connection in which it is used. If an Act of Parliament requires any person to permit an officer to inspect goods or documents—in the *Commonwealth Distillation Act* 1901 (No. 8 of 1901), sec. 67 for instance, it is a vehicle or boat—it could hardly be said the permission was optional. Men can have a contractual or even a statutory right to leave of absence, although it must be asked for when wanted to allow the necessary arrangements being made accordingly. And the admission of a custom by the prosecution, would be meaningless if it indicated that there was merely a custom for one party to ask for permission and for the other to grant or

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refuse it at will. You would not speak of a custom to apply for higher wages which may be arbitrarily granted or refused at the will of the employer. The contention reduces the admitted custom to a nullity. To give it any meaning at all, it must be at least this: that a delegate on application is entitled to receive permission unless there exist some exceptional reasons of necessity to be notified to him, why it cannot in the circumstances be granted.

In the present case no reason whatever was given, though the fullest opportunity arose for doing so. A bare and absolute refusal was given and that is all.

The law as to incorporating a usage into an agreement is settled by the Privy Council in *Juggomohun Ghose* v. *Manickchund* (1), where it is said: "It is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." That fits the present case exactly. I therefore fail to see why there was no evidence of the implied term. To my mind, there is not only strong testimony of it, but there is no particle of evidence the other way. This should determine the case, for it is, in my opinion, an entire fallacy to rest the respondent's responsibility on an alleged refusal to discuss the matter. The charge is not that he refused without reasonable cause to discuss the matter, but that he absented himself from service without reasonable cause. If, as I have shown, the master had already broken his contract, the employé was under no legal obligation to enter into any discussion whatever, and incurs no penalty for not doing so. Nevertheless the men were willing to await a discussion, but the master was not willing to discuss the position before the men surrendered. Spooner dismissed Cairnes. The miners, on Sunday, 16th July, saw Mr. Spooner and had a short discussion with him as long as he would permit. He declined really to discuss the matter on the Sunday. Then the men wrote to Hoskins a letter which he got on the Sunday. They were therefore far from precipitate. Hoskins and Spooner had full notice of the men's complaint and abundant time for consideration before Monday morning. On the Monday morning, Hoskins wanted the men to go down the pit first, and have a dis-

(1) 7 Moo. Ind. App., 263, at p. 282.

cussion as to Cairnes' re-instatement after. The men said—"No, we will not go down the pit unless Cairnes goes with us."

So far there is no dispute as to what was said. Then Hoskins deposes:—"I think one of them said, 'We will give you ten minutes.'" Note, he only *thinks* so. "We will discuss the matter—Mr. Spooner, Cairnes and myself." Plainly he meant a discussion after the men had gone down. They said—"No, we will not have it discussed." They then left the works in a body. It is remarkable that Spooner does not corroborate that version. Delany's evidence is definite and precise. He said that Hoskins was clear that Cairnes could not be re-instated and would have to go, that Hoskins asked that the men go to work and he would discuss it with Spooner and Cairnes, and added he thought it could be fixed up in a few minutes; so it was not time Hoskins wanted. Doyle, on behalf of the men, suggested a quarter or half an hour, and they would wait and hear the decision. This Hoskins refused to do and left. The net result of this is that Hoskins insisted that the men must first yield by going to work before he would even discuss the matter as to who was right or wrong. The men, on the other hand, said—"First discuss the matter," which meant that neither side should yield until the discussion was ended.

The men did not attempt to coerce the employers—they could not if they wished—they simply asserted their own right to treat the agreement as at an end, at all events until by re-instating Cairnes the employers restored the bargain as made, and they ought not to be compelled to work under a different contract. The employers did however attempt to coerce the men by forcing them back to work before they would even discuss the rights or wrongs of the matter, and they have followed this attitude up by resort to the criminal law. A fine and sentence of alternative imprisonment with hard labour is as sharp and effective an instrument of compulsion as can well be devised in modern times.

So far as unreasonableness of attitude is concerned, I am unable to see how Alexander is at fault. On the other hand, to all appearance the dismissal of Cairnes and the refusal to restore him were purely despotic and arbitrary acts, incapable of reasonable explanation; and acts which, as decided in Cairnes's case, he was justified in disregarding.

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Alexander had clearly, in my opinion, a reasonable cause for not going down the mine without an assurance that he, for instance, if selected as the next delegate, would not be similarly refused permission or similarly discharged, or that, if another were selected as delegate to protect and further his interests, these interests would not be hampered and imperilled by a like refusal, followed by a like discharge.

There is a second ground on which, in ordinary practice, I think this appeal should be dismissed. Criminal appeals are brought, as this was, by leave, and where they turn on a question of fact—as this does—the rule is not to entertain them. In my opinion the precedent of *Bataillard* v. *The King* (1) governs it, and the leave should be rescinded.

There is even a third ground, which, though not so important as either of the others, ought to be applied in a case of this nature where punishment is inflicted. When before the Supreme Court, learned counsel admitted, as Mr. Justice *Pring* says, that it was sufficient for the defendant that he honestly and *bonâ fide* believed that he was justified in absenting himself. So far, therefore, as the Supreme Court rested its judgment on that position, I do not think the prosecution should be allowed to withdraw from that admission. And that ground was certainly included in the judgment. The present appellant lost, and should abide by the result. It is not as if he had won, and was now defending his position by any argument which could sustain it. The law on this branch is laid down in several cases, as in *Varawa* v. *Howard Smith Co. Ltd.* (2). For these reasons I would dismiss the appeal with costs.

Appeal allowed. Order appealed from discharged. Order nisi for prohibition discharged.

Solicitor, for the appellant, *H. S. Williams.*

Solicitor, for the respondent, *A. J. Tartakover*, Lithgow, by *G. H. Turner.*

(1) 4 C.L.R., 1282.

(2) 13 C.L.R., 35.

B. L.

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