[HIGH COURT OF AUSTRALIA.]

PECK . . . . . APPELLANT;
COMPLAINANT,

AND

THE ADELAIDE STEAMSHIP COMPANY LIMITED . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 7, 8, 11, 12, 15.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Practice—Supreme Court of New South Wales—Statutory prohibition—Powers of Supreme Court—Absence of evidence to support decision of justices—Justices Act 1902 (*N.S. W.*) (*No.* 27 *of* 1902) *secs.* 112, 115.

Industrial Arbitration—Award, binding effect of—Relationship of employer and employee—Evidence—Ship—Charter-party—Articles—Authority of agent to employ—Holding out—Prosecution for breach of award—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 44.

By sec. 112 of the *Justices Act* 1902 (N.S.W.) it is provided that "(1) Any person aggrieved by any summary conviction or order of any justice or justices may . . . apply . . . in all cases to the Supreme Court . . . for a rule or order calling on the justice or justices and the prosecutor or person interested in maintaining the conviction or order to show cause why a prohibition should not issue to restrain them from proceeding or further proceeding, as the case may be, upon or in respect of such conviction or order"; and

By sec. 115 it is provided that "If upon the return day, or day to which the hearing has been adjourned, no cause be shown, or if, in the opinion of the Court . . . after inquiry and consideration of the evidence adduced before the justice or justices, the conviction or order cannot be supported, the Court . . . may direct that the writ applied for be issued, and may make such further order as may be just and necessary," &c.

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Held, that under those sections the Supreme Court has power to grant a prohibition in a case where the question is one of fact, if the finding of the justices is one which no reasonable man could arrive at on the evidence.

An award of the President of the Commonwealth Court of Conciliation and Arbitration which fixes a certain minimum rate of wages for members of an organization of employees and is by its terms binding on certain specified employers, is only enforceable against any particular one of those employers where the relation of employer and employee exists between that employer and the member of the organization who is alleged to be entitled to be paid wages in accordance with the award.

A shipping company having been convicted, on a prosecution under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 for not paying to an engineer wages in accordance with an award which was binding on the company as to any ships trading or passing from State to State, the wages being in respect of work done on a ship of which the company were charterers,

Held, by *Griffith* C.J., *Barton* and *Gavan Duffy* JJ. (*Isaacs* and *Rich* JJ. dissenting), that under the charter-party and the ship's articles the engineer was an employee of the owners of the ship and not of the company, and that there was no evidence that the agent who entered into the contract of employment with the engineer contained in the articles was held out as an agent for the company; and, therefore, that there was no evidence upon which the company could properly be convicted.

Decision of the Supreme Court of New South Wales affirmed.

APPEAL from the Supreme Court of New South Wales.

At the Water Police Court, Sydney, before a stipendiary magistrate, an information was heard whereby Walter Peck, secretary of the Sydney District of the Australasian Institute of Marine Engineers, a union of employees duly registered as an organization under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, charged that the Adelaide Steamship Co. Ltd., an organization bound by an award made under that Act on 1st October 1912 wherein the Australasian Institute of Marine Engineers were claimants and the Adelaide Steamship Co. Ltd. and others were respondents, did on 14th March 1913 commit a breach of the award by failing to pay one J. A. Robertson, a chief engineer in their employment, the sum of £4 14s. 8d., being overtime payment earned by him between 27th December 1912 and 11th March 1913, such non-payment being contrary to the award and contrary to the provisions of the Act.

The magistrate having convicted the defendant Company, they obtained an order *nisi* for a prohibition under sec. 112 of the *Justices Act* 1902, on the ground that the magistrate was in error in holding that the Company was the employer of Robertson. The order *nisi* having been made absolute by the Full Court, the informant now appealed to the High Court.

The award in question, which was made on 1st October 1912, and was to come into operation as to the rates of wages on 30th September 1912 and to continue in force for five years from its date, purported to bind, amongst others, the Adelaide Steamship Co. Ltd. as to any ships trading or passing from State to State.

Other material facts are stated in the judgments hereunder.

Mack and *Breckenridge*, for the appellant. The obligation of the respondents to make the payments for overtime which were claimed arose out of the award. Where an employer in an industry and employees who do his work and are under his control are parties to an award, the employer is bound to pay for that work in accordance with that award, and he cannot escape from that liability by getting a third party to supply the employees. In the case of a chartered ship the charterer who has the full control of the ship and uses her exclusively for doing his business is responsible under the award just as if she were his ship. If an employer and employees are associated together in carrying on an industry and the employer has control over the employees, the relationship of employer and employees is established (*Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1)), and that relationship existing, the award operates. There is evidence to support a finding that the relationship of employer and employee existed between the respondents and the appellant. The evidence shows that the exempt master who signed the articles was held out as an agent of the respondents in employing the appellant. Under sec. 58 of the *Merchant Shipping Act* 1894 the appellant is entitled to recover a penalty imposed by the *Commonwealth Conciliation and Arbitration Act.*

[RICH J. referred to *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (2).]

(1) 12 C.L.R., 398.

(2) (1893) A.C., 8, at p. 17.

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If the respondents are not employers in respect of ordinary wages, they are in respect of overtime. [They referred to *The Snark* (1); *Mulrooney* v. *Todd* (2); *Beven on Workmen's Compensation*, 4th ed., p. 139; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate Ltd.* (3); *Jones* v. *Scullard* (4).] On a prohibition under sec. 112 of the *Justices Act* 1902 the Court will not disturb the finding of the magistrate if there is evidence to support it: *Ex parte Elliott* (5).

[GRIFFITH C.J. referred to *Ex parte Bogan* (6).

BARTON J. referred to *Ex parte Tully* (7) and *Ex parte Oesselmann* (8).]

Ralston K.C. (with him *Brissenden*), for the respondents. The magistrate went wrong on a point of law, for he decided the case on a wrong interpretation of the paramount clause of the charter-party. That being so, prohibition should go. The Supreme Court of New South Wales has in recent times treated prohibition under sec. 112 of the *Justices Act* 1902 as an ordinary appeal. See *Ex parte Oesselmann* (8); *Ex parte Gaynor* (9). The duty of the Court is to investigate the evidence, and, if in their opinion it is not such that the conviction ought to be sustained, prohibition should go. There is no evidence upon which the magistrate could reasonably find as he did. Taking the charter-party as a whole, no reasonable man could come to any other conclusion than that the appellant was the employee of the owners. If the articles had been signed by the owners' master instead of by the exempt master there would be no ground for the argument that the appellant was the employee of the respondents. But the fact that the exempt master signed the articles does not alter the relationship created by the charter-party. See *Weir* v. *Union Steamship Co. Ltd.* (10); *Fenton* v. *City of Dublin Steam Packet Co.* (11); *The Beeswing* (12).

Mack, in reply, referred to *Ex parte Tully* (7); *Ex parte Davis* (13).

(1) (1900) P., 105.
(2) (1909) 1 K.B., 165.
(3) (1893) 1 Q.B., 629.
(4) (1898) 2 Q.B., 565.
(5) 2 N.S.W.L.R., 97.
(6) 8 N.S.W.L.R., 409.
(7) 21 N.S.W L.R., 408.
(8) 2 S.R. (N.S.W.), 149.
(9) 2 Legge, 1299, at p. 1300.
(10) (1900) A.C., 525.
(11) 8 L.J. N.S. Q.B., 28.
(12) 53 L.T., 554.
(13) 18 N.S.W.L.R., 39.

[ISAACS J. referred to *The Turgot* (1).]

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales granting a so-called prohibition against a conviction by a stipendiary magistrate. The respondents were charged for that, being an organization bound by an award of the President of the Commonwealth Court of Conciliation and Arbitration, they failed to pay to J. A. Robertson, a chief engineer in their employment, a sum of money earned between 27th December 1912 and 11th March 1913 as overtime payment, such non-payment being contrary to the award. The complaint did not allege that the award was applicable to the engineer in question, but no objection was taken on that ground. The award came into operation on 31st October 1912. Robertson was chief engineer of the steamship *Clan Ross* of which the Clan Line Steamers Ltd. were the owners, and Cayzer Irvine & Co. Ltd., of Glasgow, were the registered managers. The port of registry of the ship was Sydney. Robertson was originally engaged by the owners in Scotland in 1911 under a two years' engagement. At the time when the payment for overtime is alleged to have been earned the ship was under charter to the respondents, having been placed at their disposal on 31st May 1912 under a charter-party dated 12th April 1912. It is common ground that in order to establish the liability of the respondents to pay the sum claimed for overtime it is necessary to show the existence of the relation of employer and employee between Robertson and the respondents. In June 1912, after the *Clan Ross* had been placed at the disposal of the respondents as charterers, the old articles were cancelled, and fresh articles were entered into at Australian rates of wages for a term of six months, which Robertson signed. On 18th December 1912, those articles having expired, new articles were entered into for a further term of six months, during the currency of which the payment for overtime in question is alleged to have been earned. They were signed by Robert Nicholson as master and by

(1) 11 P.D., 21, at p. 24.

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Robertson. The alleged contract of employment upon which the claim is founded is that contained in these articles. The question therefore is whether Nicholson in entering into that contract acted as agent for the respondents or for the owners. *Primâ facie* the master of a ship when engaging the crew is acting as agent for the owners, but that presumption may, of course, be rebutted by showing that under a charter-party by which the ship is demised some other person is the temporary owner. The burden of showing agency for any other person than the owners lies upon the party alleging it.

In the present case the relevant facts are free from doubt, and are all established by documentary evidence. By clause 2 of the charter-party the owners agreed to let and the charterers agreed to hire the ship for a term of twelve months or till completion of any voyage current on the expiration of the term. By clause 3 the owners agreed to "provide throughout the term of this charter and maintain a full complement of officers engineers firemen and crew and pay for all provisions and wages of the captain officers engineers firemen and crew." By clause 5 the charterers were to pay for the use and hire of the ship at the rate of £1,100 per calendar month. By clause 6 it was provided that the ship might be employed on the coasts of Australia and New Zealand, and that the crew should work cargo where allowed and when required, the charterers paying overtime. By clause 9 it was provided that "On the vessel's arrival in Australia the charterers may appoint an exempt master, charterers paying his wages at not exceeding £25 per calendar month until such time as owners' captain obtains his pilotage exemptions." The object of that clause is perfectly familiar. According to the regulations of Australian ports certain ships are exempt from pilotage dues. That exemption is given when the master has made a prescribed number of voyages or voyages extending over a prescribed time. If £25 per month is less than the average monthly pilotage dues, it may be worth the charterers' while to have an exempt master in charge, so as to save the extra expense until the owners' master obtains exemption. By clause 12 "if the charterers shall have reason to be dissatisfied with the conduct of the captain officers or engineers the charterers shall in conjunction with the owners'

agents in Australia have power to suspend the offending officers." At the end of the charter-party is what is called a "clause paramount," which provides, amongst other things, that the charterers shall pay "the extra cost of wages provisions and stores incurred while coasting over those incurred with a white crew under the usual British Board of Trade regulations and scales."

Now, it is clear that clauses 6 and 9 and the clause paramount qualify clause 5, by which the lump sum of £1,100 per month is payable. That sum was not to include any extra expense incurred by the owners under clause 6 or clause 9 or the clause paramount. Those clauses impose an obligation on the charterers as between themselves and the owners, but are quite irrelevant to the question whether the master is the agent of the charterers or of the owners.

Nicholson, who was master when the articles of December were signed, was an exempt master appointed by the respondents under the terms of clause 9. It is plain from the context that the word "appoint" means "nominate." The person so nominated becomes master with all the ordinary authority of a master as to anything to be done by the owners under the charter-party, and there is no doubt that under this charter-party, by which the owners were bound to find a full complement of master, officers, engineers and crew, the master for the time being, although paid by the charterers, was the agent of the owners for all purposes connected with the navigation of the ship and the engagement of the crew. As to that *The Turgot* (1) is a distinct authority. That case was expressly approved by the House of Lords in *Morgan* v. *Castlegate Steamship Co.*; *The Castlegate* (2). It follows that Nicholson when engaging the crew was acting as agent for the owners, and not as agent for the respondents. If that were not so, very extraordinary consequences would happen. In the case of each seaman the question whether he was employed by the owners or by the respondents would depend upon the accident whether the owners' master (who was on board all the time in the nominal capacity of mate) or an exempt master nominated by the respondents was the person who had signed the ship's articles then current.

(1) 11 P.D., 21. (2) (1893) A.C., 38.

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The main contention set up by the appellant was that Robertson, who was not called as a witness, might have thought otherwise; but, in the absence of any evidence of holding out of Nicholson by the respondents as their agent to engage him, what he thought is irrelevant. There is no evidence whatever of any holding out. There is no ground even for suggesting that Robertson was not fully aware of the actual facts. There was express evidence that he was aware of the temporary nature of the appointment of the exempt master. On these facts the Supreme Court were unanimously of opinion that there was no evidence of any contract express or implied between Robertson and the respondents. With that conclusion I agree.

A further contention was set up in this Court, that on an appeal to the Supreme Court by way of so-called prohibition the Court cannot interfere with a conviction if there is even a scintilla of evidence to support it. This so-called prohibition is a form of appeal first instituted in New South Wales by the Act 14 Vict. No. 43—more than half a century ago—long before the form of appeal by special case was thought of, and when there was an extremely limited right of appeal to Quarter Sessions. Since then the settled rule in New South Wales and in Queensland has been that the Court will interfere if the decision of the justices is wrong in law, and, if the question is one of fact, will follow the rules applicable to the case of an application for a new trial after verdict of a jury. If the finding of fact is one that reasonable men could not find on the evidence the appeal will be allowed. So, if it appears that the justices proceeded upon an erroneous view of the law, or, to use the modern phrase, misdirected themselves, and did not consider the relevant facts at all, the conviction cannot stand. Whether in the last case a fresh prosecution can be instituted is a question that does not now concern us. In the present case it is uncertain whether the magistrate proceeded upon his construction of the documents or thought that the oral evidence excluded their operation. In either alternative his decision is clearly wrong, and the appeal must be dismissed.

BARTON J. read the following judgment:—The appellant is the

secretary of the Sydney District of the Australasian Institute of Marine Engineers. So describing himself, he proceeded against the respondent Company in the Water Police Court at Sydney for breach of an award of the Commonwealth Court of Conciliation and Arbitration made on 1st October 1912, between the Australasian Institute of Marine Engineers and a number of respondents, of whom the Company was one. The breach alleged was the failure to pay J. A. Robertson, "a Chief Engineer in their employ," £4 14s. 8d. as overtime payment earned by him between 27th December and 11th March 1913. There were two other informations in respect of alleged failures to make overtime payments to Alexander McFarlane and John D. Watt, other engineers. The three informations were heard together, and in respect of each of them the stipendiary magistrate convicted the respondent Company, which was ordered in each case to pay a fine amounting to twice the sum alleged to be due, half the amount of the penalty to be paid to the complainant.

The principal documentary evidence consisted of (1) the ship's articles signed 18th December 1912, in which Cayzer Irvine & Co. Ltd., of Glasgow, appear as the "Registered Managing Owner or Manager," the ship's name being the "*Clan Ross*"; (2) a charter-party, by which the Clan Line Steamers Ltd., owners of that steamship, agreed to let her on hire to the Adelaide Steamship Co. Ltd., as charterers, "for 12 months" (from 31st May 1912) "or till the completion of any voyage current on the expiration of the term;" and (3) the award of 1st October 1912, the alleged breach of which was in each case the foundation of the proceedings.

The Water Police Court, Sydney, is a Court of summary jurisdiction constituted by a stipendary magistrate under sec. 44 (1) of the *Commonwealth Conciliation and Arbitration Act*, and the proceedings were taken under sub-sec. 2 of that section.

The signatories to the articles, of whom the engineers in question were three, agreed thereby to serve on board the *Clan Ross* "on a voyage from Newcastle to any port or ports in Australia, trading to and fro for any period not exceeding 6 calendar months or until the first arrival at Newcastle after the expiry of that term"; and the ship seems to have traded within that

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description at all material times. As is usual in ship's articles, the agreement to pay wages is by the master. The articles are signed by "Robert Nicholson, Master." They are expressed to be subject to the conditions of the agreement and awards of the Commonwealth Court of Conciliation and Arbitration dated 31st December 1910, 1st December 1911, 27th November 1908, and 10th May 1910, respectively. The award of 1st October 1912 is not incorporated in the articles, but no point has been made of that fact.

The articles were put in by the complainant, and so was the award. It provides for the overtime payments which are alleged to have been withheld. The real question is whether the respondent Company was liable to make these payments, or, in other words, whether the three engineers were "in their employ" as stated in the informations.

The charter-party was put in on behalf of the respondent Company. It provides by clause 2 that the owners, the "Clan Line Steamers Limited agree to let" and the charterers "agree to hire" the steamship as already set forth, and the charter is by the same clause "to commence from the date of her being placed at the disposal of the charterers at Newcastle . . . on 31st May 1912" and "to continue until the redelivery to the owners" by 24 hours' written notice at a port between Fremantle and Newcastle.

Clause 3 is important. So far as it is material it is as follows:— "The owners shall provide throughout the term of this charter and maintain a full complement of officers engineers firemen and crew and pay for all provisions and wages of the captain officers engineers firemen and crew and shall pay for the insurance of the vessel and also for deck and engine stores and galley coal" &c.

Clause 9 is as follows:—"On vessel's arrival in Australia the charterers may appoint an exempt master charterers paying his wages at not exceeding twenty-five pounds (£25) per calendar month until such time as owners' captain obtains his pilotage exemptions."

Clause 12 reads thus:—"If the charterers shall have reason to be dissatisfied with the conduct of the captain officers or

engineers the charterers shall in conjunction with the owners' agents in Australia have power to suspend the offending officers." The power to appoint and dismiss is therefore retained by the owners, acting no doubt through their master.

By clause 5 the charterers are to pay for the "use and hire" of the vessel £1,100 a month, "hire to continue from the time specified for commencing the charter and to terminate upon her redelivery to the owners by written notice as above."

By clause 19 the vessel is to work from 7 a.m. to 7 p.m. in port or during ordinary working hours as customary in such port, charterers paying usual overtime.

By clause 6 the crew are to work cargo where allowed and when required, charterers paying overtime.

By the last paragraph of the clause paramount the charterers were "to pay the extra cost of wages provisions and stores incurred while coasting over those incurred with a white crew under the usual British Board of Trade regulations and scales."

The ship came to Australia under a set of articles signed in England, and under the command of a master named Mee. Under clause 9 of the charter-party the respondent Company appointed Robert Nicholson exempt master, paying his wages, and it was he who signed the new set of articles in evidence, those of 18th December 1912. When the voyage now in question terminated on 29th May 1913, the exempt master was W. Hall. Mee remained on board as owners' captain and paid the crew their wages, including the engineers, as appears in the complainant's case, though on one occasion the engineers were paid one month's overtime by Captain Nicholson.

Cayzer Irvine & Co. were identified in evidence with the Clan Line as owners of the ship. In paying the men and making other outlays on behalf of the owners, Mee drew on the respondent Company, or presented them with the wages sheet and they paid the amount to him. Such payments were deducted by the respondent Company from the money payable by them to the owners for the hire of the ship.

It was in consequence of the provisions of the charter-party between the owners and themselves, in clauses 6 and 19 and the final provision of the clause paramount, that the respondent

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Company made overtime payments. But those clauses were arrangements between the owners and the respondents, and no member of the crew, of course, was party to any such arrangement. From the terms of the articles it is quite clear that the contract of the officers and the crew was with the owners and with the captain as their agent. No claim to be the employees of the respondent Company can be based upon these articles, even though the exempt master was paid by the respondents by arrangement with the owners. The charter-party merely settled the relations between the owners and the charterers. It was contended that it amounted to a demise to the respondent Company. It abounds with internal evidence that it is merely a hiring agreement; and clause 3 shows that the providing and maintaining of the complement of officers, engineers, firemen and crew, and the payment for their provisions and wages, was undertaken by the owners. The extent of the charterers' authority was the power to direct the voyages, loadings, and unloadings of the ship and the carriage of passengers, and they had no power to deal with the employment or direction of the ship's complement or with her navigation or management. It is true that the officers and men were not parties to this document, but as the complainant relied on it as a demise giving the entire dominion over the ship and her complement, one may refer to its contents as amply rebutting that contention. The respondent, then, had no such authority over the ship's complement as would afford ground for inferring the relation of employer and employed. It has been seen that that relation existed between the men and the owners under the ship's articles. Unless, therefore, there is evidence controlling the effect of the articles in relation to a ship which was hired fully equipped by the respondents from the owners, it is impossible to say that these men were employed by the respondent Company. In view of the documents and their plain effect, which cannot be controlled by scraps of interpretative oral evidence, I am clearly of opinion that the depositions contain nothing on which a finding that the men were so employed could reasonably be based.

The informations are founded upon the arbitration award. The Act under which that award was made gives the Arbitration

Court no authority to compel a party to pay wages to persons who are not his employees but the employees of another; nor does this award, in my judgment, attempt to do so.

In the depositions the statement of the conviction and order in each case is preceded by the following words:—"Court decides that the Company has to pay the difference between the rates and holds that wages and overtime are the same." It is said that these words show that the stipendiary magistrate did not apply his mind to the evidence, but decided the case upon a misconstruction of the legal effect of the documents. I am not at all sure that this is the case, but if it were I do not think that the power of the superior Courts to deal with the case by way of statutory prohibition is at all affected. Upon the evidence it is clear to me that the appellant as complainant failed to make out his case, and I quite agree with the remarks of *Cullen* C.J. and *Pring* J. on that subject; but I think it would be quite erroneous to say that the Supreme Court has no jurisdiction to deal with an application for a statutory prohibition where it appears that the magistrate has decided the matter purely upon an erroneous view of the law. It is true that a point of law can be raised upon a special case stated by justices for the Supreme Court, but that is a comparatively recent remedy. The power to grant a statutory prohibition was first given in New South Wales by the Act 14 Vict. No. 43, sec. 12. I think with *Owen* J. in *Ex parte Oesselmann* (1), that such an application is in substance an appeal. As that learned Judge pointed out, the right to apply is given to any person who "feels aggrieved by the summary conviction or order of any justice or justices." That is sec. 12 of the Act of 1850, now sec. 112 of the consolidation of 1902. And for very many years it afforded the only means by which a person who had been summarily convicted through a magistrate's mistake could obtain redress, except the appeal to the Quarter Sessions, which is not a tribunal for the rectification of errors in law by magistrates (see 5 Will. IV. No. 22 and 39 Vict. No. 33). In my opinion the opportunity to resort to a case stated by the justices gives a merely superadded remedy (see 45 Vict. No. 4 and the consolidation of 1902).

(1) 2 S.R. (N.S.W.), 149, at p. 154.

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It is also questioned whether the Supreme Court can set aside a summary conviction where there is some evidence for the complainant, although the great preponderance is for the defence. The criterion stated by *Stephen* C.J. in *Ex parte Godfrey* (1) has been adopted ever since by the Supreme Court of this State. It is that "a conclusion by justices on questions of *fact* is to be looked at in the same light as a verdict of a jury; and, unless we see clearly and unmistakably that they are in error, we shall not interfere, even though we may think that the preponderance of testimony is against that conclusion." In *Ex parte Elliott* (2) *Martin* C.J. said:—"On more than one occasion this Court has decided that, when it is asked to review the judgment of magistrates on a question of fact, it must apply the same considerations that would influence it on a motion for a new trial on the ground that the verdict was against the weight of evidence." He then quoted the extract which I have just read from Sir *Alfred Stephen's* judgment. This has been the consistent course of decision in this State, and in my opinion it has been a correct course.

I am of opinion: (1) that if the magistrate decided this case purely on an error of law, and without applying his mind to the evidence, the Supreme Court had nevertheless the right to allow the application for a statutory prohibition; (2) that if in deciding that "wages and overtime are the same" the magistrate was holding that the provision in the charter-party, that as between the parties thereto the charterers were to pay overtime, bound the respondents to pay overtime to the engineers irrespective of their being or not being the employees of the respondents, that was an error in law for which the Supreme Court could have allowed the prohibition, and we are not concerned with their reasons, since their judgment was correct; (3) that dealing with the evidence as a Court would deal with it on a new trial motion, the learned Judges of the Supreme Court rightly came to the conclusion that the decision of the magistrate is one which cannot be supported.

I therefore agree that this appeal must be dismissed.

The judgment of ISAACS and RICH JJ. was read by

ISAACS J. Two questions present themselves for decision.

(1) 2 Wilk. Aust. Mag., 7th ed., p. 749. (2) 2 N.S.W.L.R., 97, at p. 109.

The first is a question of law of considerable importance to New South Wales, as affecting the powers of the Supreme Court in respect of the statutory writ of prohibition, and appears to be in some need of definition. The other affects the immediate parties seriously, but its general importance consists in the lesson it conveys: it is whether in the present case there is evidence of a contract between the Company and certain marine engineers.

1.—As to the nature and effect of a statutory prohibition, we can see no sound reason for doubt. The language of the Statute is clear; and there is a substantially uniform stream of decisions which supports the ordinary meaning of the language found in the Act. Part V. of the *Justices Act* 1902—in respect of prohibition a re-enactment of provisions that go back over sixty years—provides for proceedings "in the nature of appeal" from the decisions of justices. There may be appeals on questions of law only, and there may be appeals on questions of fact, as well as law.

The legislature has provided three methods of challenging a decision of justices, two of which are to the Supreme Court, and one to the Court of Quarter Sessions. We disregard some provisions auxiliary to habeas corpus or certiorari.

The proceedings relative to the Supreme Court are a method of appeal as to the law; that relative to the Quarter Sessions enables a new trial, so to speak, to be had on the facts.

The functions of the three are distinct. The first (secs. 101 to 111) is called "Appeal to Supreme Court by way of special case." That is, on the face of it, an appeal on the law only. A special case means that all the facts are found by the justices, as stated by them, and then the Supreme Court determines what the law says as to that state of facts. Sec. 101 says, in so many words, "erroneous in point of law." Sec. 106 gives power to the Supreme Court to "hear and determine the question or questions of law" and to (*a*) reverse, affirm, or amend the determination, (*b*) remit the case with its opinion, or (*c*) make such other order as seems fit. The second class of proceeding is called simply "Prohibition" (secs. 112 to 117). This is the proceeding in the present case; and the question is whether it is an open appeal in which the Supreme Court, and therefore this Court, can re-try the facts

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and form an independent conclusion on the merits, or whether it can simply inquire whether in point of law the evidence was capable of supporting the decision.

First of all, the class of decision with respect to which this procedure is open is more limited than in special case. "Special case" applies to "the determination of any information or complaint." Statutory prohibition applies only to "conviction or order," and the rule or order obtainable from the Supreme Court is one calling on the justices and proper persons to show cause why "a prohibition should not issue to restrain them from proceeding or further proceeding . . . upon . . . such conviction or order."

The only power the Supreme Court has (sec. 115) is this: if "after inquiry and consideration of the evidence adduced before the justice or justices the conviction or order cannot be supported," the writ of prohibition may be issued, and any further necessary order may be made.

There is nothing said about giving any decision on the facts. Obviously that could not be. The Supreme Court, not seeing or hearing the witnesses, and not sitting as a Court of Criminal Appeal, cannot decide on the credibility of witnesses or the merits of the charge.

The distinction is shown by the very different language used with reference to the appeal to Quarter Sessions. Sec. 125 says:—"The Court hearing the appeal shall determine the matter of every such appeal," &c.

Consequently, on the plain language and intendment of the enactment, we entertain no doubt that the only function of the Court in statutory prohibition is analogous to that in common law prohibition—analogous, but not identical. On common law prohibition, the only question is jurisdiction to entertain the case, or to make the order. But once there is jurisdiction to entertain a cause, the mere fact that the evidence does not support the claim is no ground for common law prohibition: a wrong decision on such facts is merely erroneous in law, and, unless appeal is given, must remain.

But statutory prohibition partakes of the nature of appeal to this extent: that if that particular kind of error occurs, namely,

where the evidence could not within reason support the claim, in the sense that in acting upon it the magistrate does not in the eye of the law "perform his judicial duty" (*Middleton* v. *Melbourne Tramway and Omnibus Co.* (1)), then and then only can the Court restrain the proceedings, the remedy in such case being so far analogous to the common law prohibition as to deserve the same name. Any other kind of error, where it exists, must find its appropriate remedy.

But if there is any real evidence, however slight, upon which a jury could without passing the limits of reasonableness arrive at a verdict, "the magistrate is the sole judge of the weight of the evidence" (*per* Lord *Kenyon* in *R.* v. *Smith* (2)), and the prohibition fails. But in any event no new order can be substituted by the Supreme Court for that impeached.

No attempt was made in argument to challenge this construction of the Act so long as its own language was to be the test of the legislative intention. On that basis the matter was too plain for hesitation. But it was said that the practice and decisions of the Court went in another direction, and showed that the statutory prohibition was always regarded as an open appeal.

The first case to note is *Ex parte Ward* (3), decided in 1855 by the Full Court, Sir *Alfred Stephen* C.J., *Dickinson* and *Therry* JJ. It was held that "if, after rejecting all improper evidence, and giving due effect to every other legal objection, if any, enough remains which is unobjectionable, the conviction must be sustained." In 1857 the case of *Ex parte Godfrey* (4) was decided by the same Chief Justice (with *Therry* J.), and he said:—"We are of opinion that where the evidence before the justices is conflicting or slight this Court will not defeat the conviction. We think that a conclusion by justices on questions of *fact* is to be looked at in the same light as a verdict of a jury; and unless we see clearly and unmistakably that they are in error, we shall not interfere, even though we may think that the preponderance of testimony is against that conclusion." In other words, the rule, as stated in modern cases, was "that unless the evidence before the justices was such that no reasonable men could

(1) 16 C.L.R., 572.
(2) 8 T.R., 588, at p. 590.
(3) 2 Legge, 872.
(4) Wilk. Aust. Mag., 7th ed., p. 749.

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possibly arrive at a conclusion upon it, the finding could not be interfered with." In 1881 was *Ex parte Elliott* (1). In that case *Martin* C.J. said (2):—"We need not inquire whether, if we had heard it in the first instance, we should have arrived at the same conclusion. We can only consider whether the justices had sufficient evidence before them to justify them in fining the defendant should they, for some reason or other, not have been influenced by the evidence called in his defence." The learned Chief Justice quoted *Godfrey's Case* (3) with approval, and said:—"Appeal is one thing; rehearing is another." *Windeyer* J. (4) said:—"There was conflicting evidence, but it is sufficient for us to say that there was evidence on which the justices could come to their conclusion." In 1896, in *Bartlett's Case* (5), *Darley* C.J. said:—"We look at the depositions to see whether there was that evidence, and we find that they do not contain any such evidence." In 1897 came *Davis's Case* (6), before *Stephen*, *Owen* and *Cohen* JJ. It is noteworthy for a special reason. *Stephen* J. said (7):—"All we have to decide is whether there is *any* evidence to justify the conviction. We cannot reverse the decision 'unless it be manifestly mistaken, or wrong beyond all reasonable doubt': *Ex parte Tranter* (8). . . . I think that there was some evidence to satisfy the magistrates." *Cohen* J. agreed and added (9):—"The evidence was certainly very slight, but I think that the application should be refused." *Owen* J. dissented, and thought himself entitled to enter into an independent consideration of the facts. In *Ex parte Tully* (10) in 1900 *Stephen* J. said of the magistrate's finding:—"We cannot set it aside unless we see that his decision is such that no reasonable man should" (? could) "have come to." In 1901 in *Ex parte Damsiell* (11) *Cohen* J. in Chambers found that certain evidence was improperly admitted, and said:—"The question therefore whether the evidence being erroneously admitted the conviction should be set aside." He referred to *Ex parte Ward* (12), and concluded thus:—"The rule having thus been laid down by the

(1) 2 N.S.W.L.R., 97.
(2) 2 N.S.W.L.R., 97, at p. 109.
(3) Wilk. Aust. Mag., 7th ed., p. 749.
(4) 2 N.S.W.L.R., 97, at p. 112.
(5) 17 N.S.W.L.R., 108, at p. 111.
(6) 18 N.S.W.L.R., 39.
(7) 18 N.S.W.L.R., 39, at p. 42
(8) 7 S.C.R. (N.S.W.), 213.
(9) 18 N.S.W.L.R., 39, at p. 43.
(10) 21 N.S.W.L.R., 408, at p. 410.
(11) 18 N.S.W.W.N., 245.
(12) 2 Legge, 872.

Full Court I must act upon it, and as I am of opinion that apart from the evidence in question there was ample evidence on which to convict the applicant this rule must be discharged." In 1902 came the case of *Ex parte Oesselmann* (1). The point was whether the word "appeal" in a Commonwealth Act included statutory prohibition. All three Judges—*Stephen*, *Owen* and *Cohen* JJ.—thought it did, on the ground that the word "appeal" in the Act in question was not limited to any narrow signification in State decisions. *Owen* J. alone made some observations relied on here for the respondents. But, with great respect to his Honor, the error is palpable. First, it must not be forgotten that the same learned Judge took a different view from the rest of the Court in *Davis's Case* (2). And in *Oesselmann's Case* (1), while recalling the principle that the magistrate's finding was to be regarded in the same way as the verdict of a jury, the learned Judge overlooked the fact that the analogy applied only to a Judge's verdict attacked on the ground that it was against evidence. Mr. *Ralston* was asked if any other judicial utterance could be found to support this wide statement, and the only case he referred to in that connection was *Ex parte Gaynor* (3). That, however, was a common law prohibition, and contains nothing to support the view urged. Lastly, in 1904 was the important case of *Ex parte Moy Shing* (4), before *Darley* C.J. and *G. B. Simpson* and *Pring* JJ. The Chief Justice, after again quoting the initial case of *Ex parte Ward* (5), said (6):—"Since, therefore, there was before the Court below sufficient evidence to support the conviction, this Court must, under the provisions of sec. 115 of the *Justices Act*, refuse this application." *G. B. Simpson* J. said (7):—"I entirely concur with his Honor in all he has said as to our duties in considering whether a writ of prohibition should be granted under sec. 115 of the *Justices Act*. In all such matters we are, in my opinion, bound strictly to follow the provisions of that section." *Pring* J. said in agreeing (7), "I base my decision upon the construction of sec. 115 and upon *Ex parte Ward*" (5).

(1) 2 S R. (N.S W.), 149.
(2) 18 N.S.W.L.R., 39.
(3) 2 Legge, 1299.
(4) 4 S.R. (N.S.W.), 480.
(5) 2 Legge, 872.
(6) 4 S.R. (N.S.W.), 480, at p. 484.
(7) 4 S.R. (N.S.W.), 480, at p. 485.

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It consequently appears to us indisputable that the Supreme Court of New South Wales has from first to last adhered to the natural meaning of the words of the legislature and carefully abstained from regarding the statutory prohibition as an appeal in the ordinary sense.

It is worthy of note that in Victoria and Queensland the same views have been taken in the cases of *R.* v. *Grover* (1) in 1881 and *Long* v. *Rawlins* (2) in 1874.

2.—The only other question, then, is whether there was any evidence, however slight—not merely the classical scintilla—upon which a jury could reasonably find that the Adelaide Steamship Co. employed these men. And it must be borne in mind, as *Coleridge* J. observed in *Fenton* v. *City of Dublin Steam Packet Co.* (3), that the relation between owner and charterer does not necessarily determine the matter. It is the relation between the charterers and the men that has to be ascertained. The men are no parties to the charter-party, and know nothing of its contents; though something could be said for its supporting the claim as to overtime by reason of the distinction drawn by Sir *James Hannen* in *The Turgot* (4). Of one thing there is no possible doubt. Someone employed them and bound them to serve, and that person, whoever it was, undertook in writing to them that they should receive for overtime the Australian rates according to awards and agreement to which the Adelaide Steamship Co. was a party, and the Scottish company was not. Who was that somebody ? No one now seems to know. It is admitted the men came out under British articles for two years, which would have taken them back to the United Kingdom. That set of articles admittedly was between them and the owners. But when they arrived here their articles were cancelled, new articles were entered into with somebody at present in concealment promising them Australian rates, and discharging them in Australia; that the new articles contain arbitration provisions to which the Adelaide Steamship Co., and not the Scottish company, were parties, and there is not a scrap of evidence to show that the Scottish company ever authorized anyone to promise Australian

(1) 7 V.L.R. (L.), 334.
(2) 4 S.C.R. (Qd.), 86.
(3) 8 L.J. N.S. Q.B., 28, at p. 30.
(4) 11 P.D., 21, at p. 23.

rates, or to enter into those articles. The Adelaide Steamship Co. placed their own house flag on the ship: the men in working the overtime were carrying the Adelaide Steamship Co.'s cargoes and earning their profits, wearing their uniform and obeying their selected captain.

The Adelaide Steamship Co. furnished their own printed time sheets, all the accounts for wages were made out on the Adelaide Steamship Co.'s papers, they paid some overtime upon them, and got the men's receipts upon them. But subsequently, and after allowing the men to continue working overtime without cautioning them against looking to the Company for payment, they denied all liability, though their own representative in the box admitted that his company had taken out the articles signed by the men, and although the Company had undertaken by the charter-party to pay the overtime.

Now, the men are in this extraordinary position. They believed they were serving the Adelaide Steamship Co., but that company refuse to pay; and the owners' representative, Captain Mee in Australia, has failed to pay, and, if the contract was made by them, why did he not pay? It is suggested that these impecunious sailors, if entitled to anything whatever for their overtime, can proceed to Scotland and sue the owners there.

In our opinion there is not only some evidence, but a large amount of very substantial and weighty evidence quite outside and independent of the charter-party, which was not relied upon by the complainants and was only put in as a defence, sufficient to sustain the finding of the magistrate, and that consequently the appeal should be allowed.

Though this particular decision on the facts does not affect more than the immediate parties, we consider the circumstances sufficiently striking to call the attention of the legislature to the desirability of providing that agreements of this nature, with a class of men proverbially and traditionally in need of safeguards, shall be so made as to prevent such difficulties as have here arisen. It is astounding that ships' articles, under which men give their labour and risk their lives and limbs, should be so made as not to disclose for whom the captain is acting. There should be some legislative provision that in all cases the principal

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for whom the captain is engaging the men should be distinctly mentioned in the document itself. Such a misfortune as has occurred in the present instance ought not to be capable of repetition.

We are authorized by our brother *Gavan Duffy* to say that he concurs in the recommendation which we have made.

GAVAN DUFFY J. I have had the advantage of reading, in the joint judgment of my brothers *Isaacs* and *Rich*, an exposition of the law as to what may be called statutory prohibition in this State. I entirely concur in the conclusion at which they have arrived, namely, that in cases of this sort, so far as the evidence is concerned, it is our duty to say whether it is such that a reasonable man might upon it properly come to the conclusion to which the tribunal sought to be prohibited has come.

I now proceed to apply the law to this case. I strongly suspect that the magistrate really arrived at his decision because he misinterpreted some of the clauses of the charter-party, but I cannot be certain on that point. That throws me back on a consideration of all the evidence which was given. On a consideration of all that evidence I have come to the conclusion that there is none which would justify the magistrate as a reasonable man in coming to the conclusion to which he came. Therefore I think the prohibition should go.

Appeal dismissed with costs.

Solicitors, for the appellant, *Sullivan Brothers.*
Solicitors, for the respondents, *Norton, Smith & Co.*

B. L.