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chemist and has the knowledge which a person entitled to judge would say qualifies him to be a chemist.

[During argument reference was also made to *Carroll* v. *Shillinglaw* (1); *Pharmacy Act* 1897, secs. 9, 18, 24; *Halsbury's Laws of England*, vol. xx., p. 356.]

The judgment of the COURT, which was delivered by BARTON A.C.J., was as follows:—

We are all of opinion that there is no reason to doubt the accuracy of the decision of the Full Court. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitor for the appellant, *A. C. Roberts.*

B. L.

(1) 3 C.L.R., 1099.

[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;
DEFENDANT,

AND

KIRKPATRICK . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 21.

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

Prohibition—Dismissal of Information—Order for costs—"Summary conviction or order"—"Person aggrieved"—Information disclosing no offence—Justices Act 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *secs.* 65, 112—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 527.

Practice—High Court—Appeal from Supreme Court of State—Special leave—Appeal as to costs only.

Sec. 112 of the *Justices Act* 1902 (N.S.W.) provides that "(1) Any person aggrieved by any summary conviction or order of any justice or justices may . . . apply . . . 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."

An information charged that the defendant did fraudulently appropriate certain property, to wit, a cheque for a stated amount, belonging to another person, but did not allege who that other person was. On the hearing the defendant objected that the information was bad inasmuch as it did not allege who was the owner of the cheque. No application was made by the informant for an adjournment or to amend the information or to have the defendant orally charged with any offence. The justices held that the information was bad, and for that reason dismissed it and ordered the informant to pay a certain sum for professional costs and for witnesses' expenses. On the hearing of a rule *nisi* for a prohibition under sec. 112 of the *Justices Act* 1902, obtained by the informant, the defendant objected that the remedy by way of statutory prohibition was not open to the informant. The Supreme Court made the rule absolute so far as the informant was ordered to pay costs.

Held, by the High Court (*Griffith* C.J. dissenting), that special leave to appeal to the High Court should be refused inasmuch as the appeal, if allowed, would be one as to costs only.

Semble, *per Griffith* C.J., that the remedy by way of statutory prohibition was not open to the informant.

Special leave to appeal from the Supreme Court of New South Wales: *Ex parte Kirkpatrick*, 16 S.R. (N.S.W.), 541, refused.

APPLICATION for special leave to appeal.

At the Police Court at Wanaaring, in New South Wales, an information was heard whereby Roger Huntley Kirkpatrick charged that Robert Francis King "did fraudulently appropriate to his own use certain property to wit a cheque for £15 5s. belonging to another person contrary to the Act" &c. On the case being called, an objection was taken on behalf of the defendant that the information disclosed no offence inasmuch as it did not allege who was the owner of the cheque, and was therefore bad. No application was made on behalf of the informant for an adjournment or to amend the information or to have the defendant orally charged with any offence, but it was contended on behalf of the informant that the

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information was sufficient inasmuch as it followed the words of sec. 527 of the *Crimes Act* 1900. The justices dismissed the information on the ground that it disclosed no offence, and they ordered the informant to pay £26 5s. professional costs and £20 witnesses' expenses, in default two months' imprisonment.

The informant obtained a rule *nisi* for a statutory prohibition to restrain the justices and the defendant from proceeding upon the order upon the grounds (1) that the justices were in error in holding that the information disclosed no offence; (2) that the information described the offence charged in the words of sec. 527 of the *Crimes Act* 1900, and was therefore sufficient in law; (3) that the justices should not have allowed the objection to the information inasmuch as the defect therein (if any) was a defect in substance or in form within the meaning of sec. 65 of the *Justices Act* 1902.

On the return of the rule *nisi* counsel for the defendant objected that under sec. 112 of the *Justices Act* 1902 no appeal lay by way of statutory prohibition where a criminal charge had been dismissed. The Full Court by a majority (*Gordon* and *Harvey* JJ., *Cullen* C.J. dissenting) made the rule *nisi* absolute so far as the informant was ordered to pay costs: *Ex parte Kirkpatrick* (1).

An application was now made on behalf of the defendant for special leave to appeal to the High Court from that decision.

Weigall, for the applicant. Under sec. 112 of the *Justices Act* 1902 an appeal by way of statutory prohibition lies where there has been a "conviction" or an "order." Here there has been no "conviction," and the term "order" is limited to a civil proceeding and follows upon a complaint. There is no case in New South Wales in which a prohibition has been granted in respect of the dismissal of a criminal charge. The remedy is given by sec. 112 only to a "person aggrieved by any summary conviction or order." A prosecutor is not a person who is aggrieved by the dismissal of an information. Even under sec. 101 it has never been held that an appeal lies as to costs only, and the jurisdiction under sec. 112 is more restricted than under sec. 101 (*Peck* v. *Adelaide Steamship* Co. (2)). Assuming that the remedy given by sec. 112 was open, the

(1) 16 S.R. (N.S.W.), 541. (2) 18 C.L.R., 167.

justices were right in dismissing the information. An information which discloses no offence is not an information at all. It is not an information having a defect therein in substance or in form within the meaning of sec. 65 of the *Justices Act* 1902. The jurisdiction of the justices does not arise unless the defendant is in fact charged with an offence (*R.* v. *Hughes* (1)).

[Counsel also referred to *Preston* v. *Donohoe* (2) ; *R.* v. *Garrett-Pegge* ; *Ex parte Brown* (3) ; *Trainer* v. *The King* (4).]

GRIFFITH C.J. The majority of the Court think that special leave to appeal should be refused. I only wish to say for myself that the Supreme Court has assumed an entirely novel jurisdiction, and I think it is proper that leave to appeal should be granted.

ISAACS J. Speaking for myself, I think special leave to appeal should be refused. From beginning to end the application is an attempt to appeal as to costs only, and, whatever the law may be, the circumstances of this case are such as induce me to exercise my discretion by refusing special leave.

GAVAN DUFFY J. I agree with that view of the case.

RICH J. I also agree with that view.

Solicitor for the appellant, *G. A. Bolton*, Bourke, by *F. W. Walker*.

B. L.

(1) 4 Q.B.D., 614.
(2) 3 C.L.R., 1089.
(3) (1911) 1 K.B., 880.
(4) 4 C.L.R., 126, at p. 135.