[HIGH COURT OF AUSTRALIA.]

PEARCE . . . . . APPELLANT;
INFORMANT,

AND

W. D. PEACOCK & COMPANY LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF TASMANIA.

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MELBOURNE, *June* 11, 18.

Industrial Arbitration—Employer and employee—Dismissal of employee by reason of membership of organization—Onus of proof—Evidence—Information—Who may institute proceedings—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *sec.* 9—*Crimes Act* 1914 (*No.* 12 *of* 1914), *sec.* 13.

A prosecution of an employer for the offence under sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 of dismissing an employee by reason of the circumstance that he is a member of an organization registered under that Act may be instituted by any person.

The respondent company was charged on information with having dismissed an employee by reason of the circumstance that he was a member of an organization. The magistrate in dismissing the information stated that by the *Commonwealth Conciliation and Arbitration Act* the onus was cast on the defendant to prove that it was not actuated by the reason alleged, that L. (who was a director of the defendant company) had sworn that he dismissed the employee because the latter was dissatisfied, and that he (the magistrate) had no reason to doubt L.'s testimony.

Held, by *Barton* A.C.J. and *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the finding of the magistrate should be construed as a finding that the defendant was not actuated by the reason alleged in the charge, within sec. 9 (4) of the Act; that there was evidence to support such finding, and that there was no ground for disturbing it.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

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PEARCE v. W. D. PEACOCK & CO. LTD.

APPEAL from a Court of Petty Sessions of Tasmania.

At the Police Court, Hobart, on 21st February 1917, an information was heard whereby Alfred John Pearce, the General Secretary of the Federated Engine-Drivers' and Firemen's Association, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, charged that W. D. Peacock & Co. Ltd. did on 21st December 1916 dismiss from its employment one Edward Jabez Batchelor by reason of the circumstance that he was a member of that organization.

After hearing evidence for the informant and the defendant, the Police Magistrate dismissed the information, and, in doing so, said: "The defendant in this case is charged with having dismissed an employee, Edward Jabez Batchelor, by reason of him being a member of a certain union, and by the *Commonwealth Conciliation and Arbitration Act* the onus is cast on the defendant to prove that he was not actuated by the reason alleged in the charge, and Mr. Lord, a director of the firm, who dismissed the said Batchelor, has sworn in this Court, and I have no reason to doubt his testimony, that he dismissed the man because he was dissatisfied."

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

The material facts are stated in the judgments hereunder.

H. I. Cohen, for the appellant. The finding of the Police Magistrate is consistent with the defendant having dismissed Batchelor because he was a member of the organization. The evidence shows that the dissatisfaction of Batchelor arose from his adhering to the claim made by the organization, and that he was dismissed because he would not dissociate himself from that claim. The information was properly laid by the informant. The Statute is one for the public benefit, and proceedings for an offence against it may be laid by anyone (*Halsbury's Laws of England*, vol. IX., p. 292). By sec. 13 of the Commonwealth *Crimes Act* 1914 any person may institute a proceeding for summary conviction where a contrary intention does not appear in the Act creating the particular offence.

W. M. Hodgman, for the respondent. The finding of the Magistrate should be read as a finding that the defendant did not dismiss

Batchelor because he was a member of the organization. That is the reasonable way to read it. Read in that way, there is evidence to support the finding.

Cohen, in reply.

Cur. adv. vult.

The following judgments were read :—

June 18.

BARTON A.C.J. The information, we all agree, was properly laid by the informant, now appellant, who is the general secretary of the Federated Engine-Drivers' and Firemen's Association; it charged that the defendants dismissed from its employment one Edward Jabez Batchelor, by reason of the circumstance that he was a member of an organization registered under the *Commonwealth Conciliation and Arbitration Act*.

Batchelor was in fact a member of the Association of which Pearce is the general secretary, and that Association is registered as an organization under the Act.

The information follows the terms of sec. 9 (1) (*a*) of the Act; and sub-sec. 4 of the same section prescribes that "in any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved, it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge."

Beyond the formal proofs of registration and of the membership of Batchelor, the whole of the evidence was given by Batchelor in support of the charge, and by Francis William Lord, a director of the defendant Company, for the defence. There was conflict in that part of the evidence from which the reason for the dismissal may be gathered. The charge arose out of two conversations, on 13th and 14th December 1916. Both parties concurred in saying that on the first date named, Batchelor, in answer to a question, expressed satisfaction with his conditions of work and wages; that the director produced a "log" which he had received from the Association or from the Arbitration Court—it is not clear which—and asked Batchelor whether he would sign a paper stating that he was satisfied; that Batchelor did not then sign, and that it was

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arranged that he would let the director know the next morning. In the interval he appears to have seen some of the men of another employer. It is as to the occurrences of the next day that the conflict, or all of it that is material, occurs. When asked whether he had made up his mind about signing the paper, Batchelor said that he had decided not to sign it. At this point, according to his account, Lord said: "Well, I am very sorry, if you won't sign it I will have to get another man not in the union to take your place. You had better give me a week's notice." Batchelor said: "You will have to give me a week's notice if you want to get rid of me"; and Lord said: "Very well, take a week's notice from to-night." He admits that he told Lord that "the job was all right but the money was no good." In cross-examination he would not deny that Lord said to him: "We have treated you fairly, we have given you employment in winter time, and I do not care having men who are dissatisfied about the place." For the defence, Lord testifies that Batchelor, after saying that he had decided not to sign the paper, went on to say that he was dissatisfied with his wages and that he would like to get the wages in the demand (meaning the "log"); that he, Lord, told him that if he was not satisfied he had better give a week's notice; that Batchelor said, "I don't want to give you notice, you had better give me notice," and that Lord said, "You had better take a week's notice." Lord denied that he had said that "he would have to get another man to take Batchelor's place who was not in the union." He affirmed that he did not concern himself as to whether a man was a member of the union or not; that he dismissed the man because he was not satisfied with his wages and conditions; that the fact that Batchelor might be a union or non-union man did not influence him, Lord, in the slightest degree; and that he would not have dismissed Batchelor "because of being in a union." He added: "I would not keep a man in my employ who was dissatisfied."

It appears that Batchelor was at the time of his dismissal the only member of his Association in the Company's employment, and a good deal has been made of the fact that since Batchelor left the Company had made inquiries (their nature is not expressly

stated) because it did not wish to employ any member of that union. I do not see how this affects the case.

Upon this evidence, the Police Magistrate dismissed the information. In doing so, he said: "Defendant in this case is charged with having dismissed an employee, Edward Jabez Batchelor, by reason of him being a member of a certain union, and by the *Commonwealth Conciliation and Arbitration Act* the onus is cast on defendant to prove that he was not actuated by the reason alleged in the charge, and Mr. Lord, a director of the firm, who dismissed the said Batchelor, has sworn in this Court, and I have no reason to doubt his testimony, that he dismissed the man because he was dissatisfied."

The meaning of the Police Magistrate's words is unquestionably that he found that the defendant Company had discharged the onus cast on it by the Statute to prove that it was not actuated by the reason charged, that is, the circumstance that Batchelor was a member of the organization. When the Police Magistrate stated that he believed the man to have been dismissed because he was dissatisfied, he clearly excluded the notion that he was dismissed because he was a member of the organization. An employee who is dissatisfied with his work and wages may or may not be a unionist. Where the dissatisfaction exists it would be absurd to say that a dismissal on that account is justified when he is not a unionist but is a contravention of the section in question when he is a unionist, and beyond the fact that Batchelor was a member of the organization, I do not think there is anything substantial on which it can be said that the case is altered because he is a member of the organization. The question was solely as to the reason for the dismissal. No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard, though in the present case they seem to have been admitted without objection. But the Magistrate was enabled to form a judgment as to the reason for the dismissal not only upon the mere statements of the witnesses, but also upon their demeanour and upon the manner in which they stood the test of cross-examination, and this Court cannot possibly have any satisfactory knowledge of its own as to the manner in

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which the test was answered. If he believed the evidence for the defence, as he undoubtedly did, it was open to him to come to the conclusion that the statutory onus was discharged. He has come to that conclusion, and I am by no means able to interfere with it. I think, therefore, that this appeal must be dismissed.

ISAACS J. I am of opinion that this appeal should be allowed. The charge was that the firm of W. D. Peacock & Co. Ltd. on 21st December 1916 dismissed an employee named Batchelor by reason of the circumstance that he was a member of an organization called the Federated Engine-Drivers' and Firemen's Association of Australia. It was not denied that the man was dismissed on the date mentioned, by a notice expiring then, but given on the 14th. The defendant, however, denied that it was for the reason mentioned, but asserted that it was simply because Batchelor was dissatisfied. The Police Magistrate dismissed the charge with costs. The matter now comes before us in appellate jurisdiction to consider both on the law and the facts whether we think the decision appealed from was right. The facts are so strong and clear, that this case cannot in my opinion be regarded, in view of the existing authorities, otherwise than as an experiment by the respondent Company as to the possibility of depriving the Federal Arbitration Court of the power of determining an industrial claim by getting rid of an employee who takes part in it. During the hearing the defendant's director Lord, who actually dismissed the man, was asked: "Did you receive a letter from the Employers' Federation showing you how you could get out of the Arbitration case?" The witness gave the remarkable answer: "I cannot say." Then his solicitor interposed: "I object to the witness being asked what took place between himself and his solicitor. That is privileged." In the argument before us, it was explained that the solicitor referred to is also the secretary of the Employers' Federation. So it is not difficult to conjecture how the idea of dismissal originated. The real point, as it presents itself to me, is whether, in such distinct circumstances as exist in the present case, the law permits an escape from sec. 9 of the Act, or this Court considers itself powerless to maintain the law by correcting an error of fact made by the Police Magistrate.

First, it is necessary to consider the law. The *Conciliation and Arbitration Act*, which has for its aim the preservation of industrial peace, for the manifest purpose of securing to the people of Australia the uninterrupted supply of their needs, declares that one of its chief objects is "to facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations." With that object, it empowers the creation of organizations and practically invites men to join them in order that, if dissatisfied with their working conditions, their dissatisfaction shall be dealt with by a public tribunal, and shall not lead either to their dismissal or their refusal to work, or the stoppage of public services either by strikes or lock-outs. As one of the means of effectuating this end, Parliament has enacted in sec. 9, so far as material here, that "an employer shall not dismiss an employee . . . by reason of the circumstance that the employee is a . . . member of an organization." It has guarded the employer against any improper harassing, by forbidding any prosecution except by leave of the President or the Registrar. It also forbids employees from ceasing work by reason of corresponding circumstances, and guards them similarly from harassing prosecutions. And then it has enacted that, when all outward circumstances are proved, the onus is on the defendant—whether employer or employee—"to prove that he was not actuated by the reason alleged in the charge." In this case the defendant had, therefore, to prove it was not actuated by the reason that Batchelor was a member of the organization.

Now, as I read that section, it is designed, among other things, to preserve organizations, so that the method selected by Parliament for settling disputes shall not be thwarted. The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization must not enter in any way into the reason of the defendant, if he desires exculpation. Otherwise he might add any other reason whatever to the membership of a union, and break down the whole structure of the Act, so far as he is concerned, as the defendant has, in fact, done in this case. And as Peacock & Co. are not specially privileged, what they have successfully done, can be done

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by any other employer whenever his employees venture to join in a claim for betterment of conditions. And if we, as the highest Court of appeal in the Commonwealth, are precluded from acting on our own view of the facts because the Magistrate says, as he does here, "I have no reason to doubt his testimony, that he dismissed the man because he was dissatisfied," a very serious position is created. You cannot peer into a man's mind. You can only test his statement as to his mental attitude by his acts. And if his acts contradict his verbal statement, then there is reason to doubt his testimony, and I think we should use our own judgment on the matter. It is quite consistent with a breach of the section that the defendant should also act upon an additional reason as, for instance, that the employee was a dissatisfied employee.

It is very material to remember that the Statute must be construed as a whole. It applies equally both to employers and employees. An employee's dissatisfaction is no more and no less independent of the industrial dispute in which it is expressed, where it is relied on to justify an employer in dismissing an employee, than where it is relied on to justify an employee for striking because of his dissatisfaction with existing conditions. Neither position is, in my opinion, justifiable in law, and both are to be condemned. When we consider the Act as speaking with equal force to both parties to a dispute, then a Court must, in arriving at its view of the meaning of the law, take into account the consideration that whatever is a legal justification in the one case is equally a legal justification in the other. To hold what is relied on here as a legal justification to be so in either case, and consequently in both cases, to my mind would mean reducing the law in all cases to a dead letter, and defeating the objects of the Act to the injury of the general community, which ought to be protected against both employers and employees taking the law into their own hands in disregard of the general welfare.

I assume, therefore, for the purposes of this judgment, that if the employee's dissatisfaction is so bound up with his membership of an organization, and with his course of action as such member, that the employer cannot say one is independent of the other, it is no excuse for the employer to say "I discharged the man because he

was dissatisfied." Such an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached. And if in such a case the accused swore that the horse was not intended to be taken but only the halter, and it was no concern of his if the horse necessarily followed, and if the Magistrate accepted his explanation and excused him, I should nevertheless feel myself bound, sitting in this Court of appeal, to exercise my own reason, and, notwithstanding the weight justly attached in proper cases to the influence of demeanour of a witness, to say the Magistrate was palpably wrong. On the facts here, the position seems to me no less plain.

The general rule as to the weight to be given to the impression made by the demeanour of a witness on the Court of first instance was clearly laid down in the leading case of *Coghlan* v. *Cumberland* (1). But, as *Lindley* M.R., speaking for the whole Court of Appeal, there added : " There may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not ; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." In that case the Court of Appeal acted on those latter observations and reversed the finding of fact arrived at by the primary Judge. I act upon the same doctrine here. The position is made quite plain by what Mr. Lord, the defendant's director, himself admits. I should first refer to the one statement made by the witness which is supposed to destroy the effect of everything else in this case. His counsel asked him : " Give your reason why you dismissed him ? " He answered : " Because he was not satisfied with his wages and conditions." Then his counsel put a leading question to him, in these words : " And the fact that he might be a union or non-union man was not sufficient for you to dismiss him ? " The answer was : " That did not influence me in the slightest. I would not have dismissed him because he was in a union."

The one sentence " That did not influence me in the slightest "

(1) (1898) 1 Ch., 704.

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is taken as conclusively separating "unionism" from "dissatisfaction." It is said that if that is believed by the Magistrate there is an end of the case. It is equivalent, in the illustration I put, to the accused swearing he only intended to take the halter. If that statement had been all that Lord had said, and if the rest of the evidence did not overwhelmingly show the contrary, the fact that the Magistrate had heard him, and believed him, would of course be an almost unanswerable argument. But Lord did give other evidence, and his veracity cannot be confined to the one observation. He himself proved that there was a "horse" attached to the "halter," and that he knew it.

Reading his statement of intention with the rest of the evidence, it is quite consistent with the meaning that "unionism" *alone* would not have impelled the defendant to dismiss the man, but that the additional fact of the man's dissatisfaction determined the employer's mind. And, as I am disposed to construe the Magistrate's finding, that is what it means. In other words, the Magistrate thought that if dissatisfaction entered into the motive it excluded "unionism" as the actuating cause. If that is a proper construction of the decision, then, as I have stated the law, that decision was wrong. But if the decision means more, if it accepts Lord's statement as meaning that unionism did not enter into his reasons at all, then that statement is flatly contradicted by other portions of Lord's own evidence. He admits the following facts:—(1) In 1914 his company was served with the plaint in the Arbitration Court. (2) In December 1916 a fresh log was served. (3) Some little time after its receipt he called Batchelor into his office and asked him if he was satisfied with his conditions of work and wages; Batchelor said he was. (4) Lord then got the log, and read it to Batchelor. (5) Batchelor told him that he was a member of the organization. (6) Lord thereupon requested Batchelor to sign a document stating that he was satisfied, and that he had no dispute. In order that Lord's action may be fully understood, I may observe that, Batchelor being the only unionist in the Company's employ (and until his interview Lord said he did not know that even Batchelor was a unionist), Batchelor's signing the paper required would have brought the Company into the position of the employer

in *Holyman's Case* (1), where, employees having signed such a document, there was no longer any dispute between them and their employers with which the Arbitration Court could deal. So, if Batchelor had signed the document, he would at once have deprived the Arbitration Court of jurisdiction to include Lord's company in the award. Lord stated in his evidence: "We said there was no dispute and we wanted him to sign that he was satisfied"; and further on: "I wanted to forward the document to the Court. I understood that, if it could be shown that there was no dispute, we could not be cited to the Court." (7) Batchelor was given till next morning to consider whether he would sign the paper. Next morning he refused to do so, and he was then dismissed with a week's notice.

These are all matters which Lord himself deposes to—except, of course, my reference to *Holyman's Case*, the effect of which, however, Lord admits he had in mind, and to which, for that reason, I allude.

Now, in the face of these admissions, how can it be said that the fact of Batchelor being a member of the union which was making the demand had nothing to do with his dismissal? The relevant sub-section of the Act does not deprive an employer of his right to dismiss a man for any just cause, independent of unionism. Incapacity, drunkenness, insolence, and any good reason which stands apart from unionism, is always open and allowable. Even if a man comes complaining as being dissatisfied, apart from any union action recognized by law, I do not say the employer has not the right to get rid of him. But Batchelor did not come to his employer expressing dissatisfaction; apparently he was content to go on and do his best, and was doing his best, because no fault was found with his conduct or his work. He was not, however, satisfied that the members of the union were getting enough, and with his fellow unionists he joined in asking for more in the way the law expressly encourages and directs if more is desired. In that sense he was dissatisfied. The employer sought to stop him exercising his union rights recognized by law, and to prevent the highest arbitration tribunal in Australia inquiring into the justice or injustice of the

(1) 18 C.L.R., 273.

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claim, and he sought to coerce the employee into doing what might have been thought a disloyal act to the union, and might have caused him to leave it—a step injurious both to the man and the union,—and, on his refusal to do so, he is dismissed. The employer's demand meant simply " give up your claim or your billet." Further, the employer says the Company do not employ any man who is a member of a union, since Batchelor's dismissal they always inquire, and that apparently quite irrespective of satisfaction or dissatisfaction with the industrial conditions. Batchelor's membership of the union is consequently an inseparable feature of the position as dealt with by the employer.

In my opinion there has been a contravention of the section, and the appeal should be allowed.

HIGGINS J. In my opinion, even if the Police Magistrate believed Lord in everything that he said, the defendant has not in any way proved " that he was not actuated by the reason alleged in the charge." The reason alleged in the charge was that Batchelor was dismissed " by reason of the circumstance that he was a member of the organization "—that is to say, of the Federated Engine-Drivers' and Firemen's Association. It is perfectly apparent, on Lord's own evidence, that Batchelor would not have been dismissed if he had not been a member of the organization; and that his (alleged) dissatisfaction consisted solely of the fact that he was a member of the organization which was claiming, for him and others, better wages and conditions.

Batchelor was a fireman working for the defendant Company. He became a member of the Federated Engine-Drivers' and Firemen's organization in September 1916. In December 1916 the defendant Company received a log of demands from the organization, which covered the case of Batchelor, and about the same time it received a notice of motion under sec. 21AA of the Act, claiming a decision of the High Court on the question whether a dispute existed as to the matters in the log. Lord, a director of the defendant Company, wanted to show that neither the Company nor any of its employees was in the alleged dispute. According to his own account, he called Batchelor into his office, and asked him was he

satisfied with his work and wages; and Batchelor said that he was. Lord then read over the log to Batchelor, and the latter said, "Well, I know nothing about it at all. I have been quite satisfied"; but he admitted that he was a member of the organization. Lord said, "Well, I shall have to reply something to this paper, and I would like you to sign a paper stating that you are quite satisfied and that you have no dispute." There had been some communication received by the Company from the Employers' Federation; but an objection was taken that it was written by the defendant's solicitor, who (as Mr. *Hodgman* assures us) was also the Federation's secretary, and the objection seems to have been, for some reason, allowed. At all events, Batchelor said he would like to think the matter over. In the afternoon of the next day Lord went to Batchelor and asked him had he made up his mind, and Batchelor said yes, and that he would not sign—that he was dissatisfied with his wages and would like to get the wages in the log. Lord then suggested that Batchelor had better give a week's notice. Batchelor said he did not want to give notice; so Lord gave Batchelor a week's notice and Batchelor left.

Now, the question is, is it proved that the fact of Batchelor being a member of the union which was making the demands was not the reason, or one of the reasons, operating on Lord's mind in giving the notice of dismissal? Let Lord's own words speak for him. On cross-examination, Lord said that he had been advised that there was no dispute; said that Batchelor had said so, and that he was perfectly satisfied; and that he (Lord) wanted the paper signed by Batchelor in order to forward it to the Court:—"I understood that if it could be shown that there was no dispute, we could not be cited to the Court. If he signed we should not be cited to appear." After Batchelor left, Lord inquired whether there was any other member of the organization in the Company's employment, "because *we did not wish to employ any member of that union.*" Question: *And you say you did not wish to employ any member of the union?* Answer: *Yes.*

It is hard for me to conceive any position that could be clearer. Batchelor was dismissed so that it could not be shown that the Company was a party to the dispute with the organization; for it

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would be a party to that dispute if Batchelor, being a member, remained in its employment. In order to have no member of the union in the employment, Lord dismisses Batchelor. It is true that Mr. Lord, in answer to a question put to him by his counsel, stated that the fact of Batchelor being a union or a non-union man was not sufficient for him (Lord) to dismiss Batchelor. He says: "I would not have dismissed him because of being in a union." But this statement is quite consistent with the statement that I have above cited, if it be understood as meaning that Lord would not dismiss a man merely because he was in *some* union—because he was *a unionist*; whereas here the charge is that Lord dismissed Batchelor because he was a member of this *specific* union—the Federated Engine Drivers' and Firemen's Association, which was then seeking to bring its claims for better conditions before the Court.

If an employer has an employee who is always grumbling, or an employee who is lazy and inefficient, of course he does not offend against the law in dismissing that employee; but nothing of the sort is alleged against Batchelor. On the other hand, the employer does offend against the law if he dismiss an employee because the employee is a member of a union which is seeking betterment of conditions through the methods of arbitration instead of through a strike (sec. 9). If this appeal be not allowed, it would seem that every man who is covered by a plaint in the Court of Conciliation can be dismissed: "If you are dissatisfied, you can go." This case reminds me of the attitude taken by an employer some years ago. For an answer to a plaint he wrote a letter to the Registrar, thus:—"I have never quarrelled or disputed with a labourer of any kind . . . *If we cannot agree, well, we will part*; *that ends the whole* . . . Love is the power which will end all struggles, not legislation."

The mistake of the Police Magistrate lies, to my mind, in the fact that he thought that dismissal for (alleged) dissatisfaction on the part of the employee disproves the charge that the employer is actuated by the reason that the employee is a member of the organization. The truth is, there was no dissatisfaction apart from the fact that he was a member of the organization which was asking

for better conditions. The result of dismissing this appeal seems to be that the Court of Conciliation may be evaded in any case. For if the employee be not dissatisfied, there is no dispute, and there can be no arbitration; whereas if an employee be dissatisfied, he may be discharged, and cannot get arbitration. The whole of the machinery of the Act is based on dissatisfaction—on what is called "divine discontent."

As pointed out by my brother *Isaacs*, if the view of the Magistrate is right, and if it is to be applied to the converse case of a strike, it may become difficult to secure convictions in appropriate cases. The offence of "strike" depends on intention also—the intention of enforcing compliance with demands made on employers. When wharf labourers have asked and been refused additional pay, they may satisfy the Magistrate that they were also "dissatisfied" with the proximity of the galleys or the latrines.

In my opinion, the Police Magistrate came to a wrong conclusion on the evidence which he believed. He does not say that he disbelieves Batchelor when his evidence conflicts with Lord's; but I have considered the case as if he did say so. He saw the witnesses; we have not seen them. The contest does not turn on the relative credibility of witnesses; the Magistrate has, as it were, misdirected himself on the issue before him; and I am of opinion that the appeal should be allowed.

GAVAN DUFFY AND RICH JJ. We agree with our brother *Barton* in thinking that this appeal should be dismissed. It is not clear how far we are fettered by the provisions of Part II., sec. 4, rule 1, of the Appeal Rules of this Court, but we shall assume in favour of the appellant, without deciding the question, that we are quite untrammelled in the exercise of our appellate jurisdiction and that it is our duty to consider for ourselves whether the charge against the respondent has been proved. In doing so, we should make no presumption in favour of the validity of the decision of the Magistrate but we must follow the well-established rule that on appeal, where the witnesses are not examined, the decision of the primary Court on the question of their credibility must not be interfered

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with except for the gravest reasons. The charge against the respondent has not been proved if he has satisfied the onus imposed on him by sec. 9 (4) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, and if the evidence of Mr. Lord is accepted we think the respondent has satisfied that onus. The Magistrate, having heard the witnesses, accepted Mr. Lord's evidence, and we see no reason for saying that he was wrong in doing so.

Appeal dismissed with costs.

Solicitors for the appellant, *H. H. Hoare* for *A. G. Ogilvie*, Hobart.
Solicitors for the respondent, *Page, Hodgman & Seager.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE REGISTRAR-GENERAL (SOUTH AUSTRALIA) . . . . . } APPELLANT;

AND

WRIGHT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *June* 1, 2.

Isaacs, Powers and Rich JJ.

Real Property—Registration of instruments—Transfer—Production of certificate—Refusal to produce—Issue of summons—Jurisdiction of Registrar-General (S.A.)—Real Property Act 1886 (*S.A.*) (*No.* 380), *secs.* 98, 220 (3).

Sec. 98 of the *Real Property Act* 1886 (S.A.) provides that "When a transfer purporting to transfer any estate of freehold is presented for registration, the duplicate certificate shall . . . be delivered to the Registrar-General; and the Registrar-General shall, upon registering the transfer, enter on the original certificate and also on the duplicate certificate (if delivered to