

## [HIGH COURT OF AUSTRALIA.]

GILMOUR . . . . . COMPLAINANT;

AND

BASTIAN . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Local Government—Breach of ordinance—Penalty—Right of member of public to recover—Necessity for authority of council—Fines and Penalties Act 1901 (N.S.W.) (No. 16 of 1901), sec. 4—Local Government Act 1906 (N.S.W.) (No. 56 of 1906), secs. 179, 187, 190, 191, 199, 202.*

1917.

SYDNEY,  
Nov. 26.

Barton, Isaacs,  
Higgins,  
Gavan Duffy,  
Powers and  
Rich JJ.

By sec. 4 of the *Fines and Penalties Act 1901* (N.S.W.) it is provided that "Any fine penalty or forfeiture imposed or authorized to be imposed by any Act may be sued and proceeded for by any person whomsoever unless by the Act imposing the same such right to sue or proceed is expressly given to any officer or person by name or designation."

Sec. 179 of the *Local Government Act 1906* (N.S.W.) includes in the revenue of a municipality the amount of all penalties payable in respect of offences against the Act or any ordinances. Sec. 187 authorizes the Governor to make ordinances for carrying the Act into effect, dealing with a number of specified matters. Sec. 190 provides that a penalty may be imposed for any breach of an ordinance. Sec. 191 provides that all penalties imposed by the Act or by any ordinance may be recovered in a summary way, and shall when recovered be paid to the council interested. Sec. 202 provides that "(1) The mayor, president, or any person appointed by the council in that behalf, may direct any prosecution or legal proceedings to be taken for or in respect of any offence against this Act or any ordinance or regulation. (2) Any officer or servant of a council appointed by the council in that behalf may represent and act for the council in the conduct of any action, suit, or other legal proceeding in any Court by, for, or on account of or against such council."

*Held*, that the right to sue or proceed for a penalty for the breach of an ordinance is not by the *Local Government Act 1906* expressly given to any officer or person by name or designation, and, therefore, that under sec. 4 of the *Fines and Penalties Act 1901* such a penalty may be sued and proceeded for by any person whomsoever.

H. C. OF A.  
1917.  
GILMOUR  
v.  
BASTIAN.

Special leave to appeal from the decision of the Supreme Court of New South Wales (*Ferguson J.*): *Gilmour v. Bastian*, 34 N.S.W.W.N., 239, refused.

#### APPLICATIONS for special leave to appeal.

On the hearing before a Stipendiary Magistrate of New South Wales of an information whereby George John Gilmour charged that Alfred Arthur Copeland Bastian, who was the returning officer at an election for aldermen for the Council of the Municipality of Willoughby, did not cause to be counted in his presence and subject to his supervision the votes recorded for each candidate at each polling place contrary to the Ordinance in such case made and provided, objection was taken that a prosecution for such an offence could not be instituted or carried on by a person not having any authority to prosecute for or on behalf of the Council, it being admitted that the complainant had no such authority. The Magistrate upheld the objection and accordingly dismissed the information. On the application of the complainant the Magistrate stated a case for the opinion of the Supreme Court, the question asked being whether his determination was erroneous in point of law.

The special case was heard by *Ferguson J.*, who held that under sec. 4 of the *Fines and Penalties Act 1901* any person might sue for a penalty for an offence against an ordinance, there being no provision in the *Local Government Act 1906* expressly giving the right to sue to any officer or person by name or designation, and he therefore held that the decision of the Magistrate was erroneous: *Gilmour v. Bastian* (1).

The defendant now applied to the High Court for special leave to appeal from that decision.

*H. Milner Stephen*, for the applicant. The effect of sec. 4 of the *Fines and Penalties Act 1901* is that the right of a member of the public to sue for a penalty is excluded where the particular Act

H. C. OF A. imposing the penalty confers the right upon some officer or person  
 1917. by name or designation. Secs. 179, 190 and 191 of the *Local Govern-  
 GILMOUR ment Act* 1906, under which all fines and penalties belong to and  
 v. form part of the revenue of the particular council, indicate that all  
 BASTIAN. proceedings for penalties must be on account of the council. That  
 ——— Act provides a system under which breaches of ordinances are dealt  
 with as interferences with the local governing body. See *R. v. Panton* ; *Ex parte Schuh* (1).

[ISAACS J. referred to *Bradlaugh v. Clarke* (2).]

It is a sufficient designation of a person or officer under sec. 4 of the *Fines and Penalties Act* 1901 if the particular Act provides for means by which a person or officer may be designated. There is such a designation in sec. 202 of the *Local Government Act*. The fact that a particular body is solely interested in a penalty is a strong indication that that body must authorize proceedings for the recovery of the penalty (*Anderson v. Hamlin* (3) ). The fact that under sec. 199 the police are not expected to prosecute in cases of breaches of ordinances which come to their knowledge, but only to report them to the councils, is a further indication that prosecutions were intended to be under the control of the councils. Sec. 202 (1) also supports that view. [Counsel also referred to *Bedingfeld v. Keogh* (4).]

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

We have considered this matter and we do not think that there is any reason to doubt the accuracy of the decision of the Court below, and, therefore, special leave to appeal will be refused.

*Special leave to appeal refused.*

Solicitors for the applicant, *Ash & Maclean.*

B. L.

(1) 14 V.L.R., 529 ; 10 A.L.T., 115.  
 (2) 8 App. Cas., 354.

(3) 25 Q.B.D., 221.  
 (4) 13 C.L.R., 601, at p. 604.