[HIGH COURT OF AUSTRALIA.]

MUNDAY . . . . . APPELLANT;
INFORMANT,

AND

GILL AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1930.

SYDNEY, *April* 14, 15; *Aug.* 14.

Isaacs C.J., Gavan Duffy, Rich, Starke and Dixon JJ.

Justices—Jurisdiction—Summary convictions—Unlawful assembly—Continuance with knowledge—Separate informations against several defendants—Similar charges—Hearing together by consent—Evidence—Partly inapplicable to some defendants—Admissibility of depositions of evidence given in preceding case admitted by consent—Irregularity or nullity—Waiver—Defendants not prejudiced—Sufficient evidence aliunde—Statutory prohibition—One order nisi in respect of several defendants severally convicted—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 545C (1), (2), (3)*—*Crimes* (*Intimidation and Molestation*) *Act* 1929 (*N.S.W*) (*No.* 31 *of* 1929), *sec.* 2*—*Justices Act* 1902-1918 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 32 *of* 1918).

Separate informations were laid under sec. 545C of the *Crimes Act* 1900 (N.S.W.) (inserted therein by the *Crimes* (*Intimidation and Molestation*) *Act* 1929 (N.S.W.), sec. 2) against a number of persons for knowingly continuing in an

* Sec. 545C of the *Crimes Act* 1900 (N.S.W.), as inserted by sec. 2 of the *Crimes* (*Intimidation and Molestation*) *Act* 1929 (N.S.W.), provides:—"(1) Whosoever knowingly joins an unlawful assembly or continues in it shall be taken to be a member of that assembly, and shall, on conviction before a police or stipendiary magistrate, be liable to imprisonment for a term not exceeding six months or to a fine not exceeding twenty pounds. (2) Whosoever being armed with any weapon or loaded arms, or with anything which used as a weapon of offence is likely to cause death or grievous bodily harm, is a member of an unlawful assembly, shall be liable, on conviction before a police or stipendiary magistrate, to imprisonment for a term not exceeding twelve months or to a fine not exceeding fifty pounds. (3) Any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do or to abstain from doing what he is legally entitled to do, shall be deemed to be an unlawful assembly."

unlawful assembly, and against others for that, being armed with something which used as a weapon of offence was likely to cause death or grievous bodily harm, each was a member of an unlawful assembly. At the commencement of the hearing before the magistrate the defendants objected to the cases being heard together, and one case was proceeded with and a conviction was recorded therein. By consent all the remaining informations were then taken together, and evidence given in the preceding case by two police officers was, by consent, read over to them, adhered to and admitted, the depositions of the evidence of two other witnesses (T. and W.) also being tendered and by consent of counsel for the defendants admitted as evidence. The evidence showed that during the night of 15th and early morning of 16th December between five thousand and ten thousand men came from considerable distances and assembled at R. At dawn on the 16th—some being armed with sticks, pit-bottles, &c.—they moved on to the grounds of the R. Colliery with the declared object of "getting the scabs," i.e., other men engaged to work and then on the Colliery, and of preventing them from working. Some of the defendants left the grounds shortly after arrival there, when spoken to by police officers; but the disturbance continued for several hours afterwards. At the close of the case for the prosecution the magistrate, at the request of the defendants' counsel, stated that the whole of the evidence given in the "lumped" cases would be taken into consideration in respect of each defendant for the purpose of determining whether there was an unlawful assembly. The defendants were all severally convicted and fined.

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ. (*Isaacs* C.J. dissenting):—

(1) That although the defendants, charged upon different informations for summary offences were entitled to separate hearings, it was a right which could be renounced or waived by them and did not go to the jurisdiction of the magistrate.

R. v. *Justices of Staffordshire*, (1858) 32 L.T. (O.S.) 105; 23 J.P. 486, followed.

R. v. *Crane*, (1920) 3 K.B. 236; (1921) 2 A.C. 299, and *R.* v. *Dennis*, (1924) 1 K.B. 867, distinguished.

(2) That upon the issue what the purpose and object of the assembly was, the evidence of the whole incident, which was entire and inseparable, was strictly admissible. Although, as regards some of the defendants, part of such evidence was unnecessary, it was not therefore irrelevant.

By *Gavan Duffy* and *Starke* JJ., that the admission of the depositions of T. and W. was an irregularity, but, in the circumstances, such irregularity was unattended by any unfair consequences to the accused and was not such a failure or miscarriage of justice as to constitute a mistrial.

By *Rich* and *Dixon* JJ. (*Isaacs* C.J. dissenting), that the reading by consent of such depositions before the magistrate was not contrary to law.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

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APPEAL from the Supreme Court of New South Wales.

Separate informations were laid on 7th January 1930, by Robert William Munday, a sergeant of police, against nineteen persons for knowingly continuing in an unlawful assembly contrary to the provisions of sec. 545c (1) of the *Crimes Act* 1900 (N.S.W.) as inserted by sec. 2 of the *Crimes* (*Intimidation and Molestation*) *Act* 1929 (N.S.W.). Informations were also laid by Munday against two persons, Timothy Patterson and Harold Mitchison, for that, being armed with something which used as a weapon of offence was likely to cause death or grievous bodily harm, each was a member of an unlawful assembly contrary to the provisions of sec. 545c (2) of the *Crimes Act* 1900, similarly inserted. These offences were triable summarily before a Police or Stipendiary Magistrate. The cases came on for hearing before a Police Magistrate, and that of one Edward Aubin, charged with knowingly continuing in an unlawful assembly, was taken first. A suggestion was made at this stage that all the cases be taken together, but the defendants objected and the magistrate proceeded with the case against Aubin. The evidence showed that for some time previously to 16th December 1929 no mining operations had been carried on at Rothbury Colliery but that preparations had been made to resume work on that day, which was a Monday, and that the men who had been engaged for that work, or some of them, had been on the colliery premises since the preceding Friday. During the night of 15th December, or the early morning of the 16th, a considerable body of men, variously estimated at from five thousand to ten thousand, assembled near the colliery, and at dawn moved on to the colliery grounds. Their object, vociferously declared, was to " get the scabs " in the colliery, by which was meant the men who had been employed and were preparing to work the colliery. There was evidence that some few of the men in the assembly had firearms in their possession, and particularly that Mitchison had a stick, approximately three feet long, in his possession, and Patterson a bottle. Although it was argued that the men employed at the colliery were not legally entitled to do so because they were engaged at less than the rates fixed by some arbitral tribunal or award, the evidence failed to establish the precise terms of the award and whether the employers

or the employees at the Rothbury mine were covered or bound by it. Aubin's presence in the assembly was proved, and he was convicted by the magistrate, who fined him £5, in default one month's imprisonment with hard labour. The other informations remained for hearing but, instead of each being heard separately, counsel for the defendants consented to the several informations being heard (or "lumped") together, and they were accordingly so heard. During this hearing the depositions of two police officers, who had given evidence in Aubin's case, were, by consent, read over to them and adhered to. These depositions were then admitted in evidence in the "lumped" cases. Further, the evidence of two witnesses, Richard Thomas and Archibald Gilmour Virtue Wood, given in Aubin's case was tendered and, by consent of the defendants' counsel, admitted as evidence. The presence of each accused in the assembly was proved—some for a long period, some for a short period; and evidence was also given that some left as soon as they were spoken to by police officers, the disturbance continuing for several hours after their departure. The evidence showed that the accused travelled considerable distances throughout the night to reach the place of meeting, and some of them stated that they had so travelled to attend an aggregate meeting of miners' lodges at Rothbury, which was never held. At the close of the case for the prosecution the magistrate, at the request of the defendants' counsel, stated that the whole of the evidence given in the "lumped" cases was taken into consideration in respect of each defendant for the purpose of determining whether there was an unlawful assembly. Nine of the accused then gave evidence; after which counsel for the defence stated that he did not wish to tender any more witnesses, and that "there was no conflict with the evidence of the police in respect of the other defendants who state that they withdrew the moment they realized it was an unlawful assembly." The defendants were all severally convicted and fined

All the defendants, except Aubin, Mitchison and Patterson, applied to and obtained from the Supreme Court a single order nisi for statutory prohibition to restrain further proceedings on or in respect of "the conviction . . . wherein" the defendants "were each" convicted. On the return of the order nisi the point was taken before

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the Full Court of the Supreme Court that the convictions could not be supported because the informations had been heard together and the Court, following its decision in *Russell* v. *Bates* (1), reversed on another point (2), held that a magistrate had no jurisdiction to hear together several informations against different defendants even by consent, and made the rule absolute.

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

Other material facts are stated in the judgments hereunder.

Lamb K.C. (with him *Hardwick*), for the appellant. If a magistrate, without objection, tries accused persons together who are separately charged on separate informations he acts irregularly, but does not exceed his jurisdiction (*R.* v. *Justices of Staffordshire* (3); *Halsbury's Laws of England*, vol. xv., p. 232, par. 485). Where no objection is made to separate offences being taken jointly the irregularity is waived (*Wells* v. *Cheyney* (4)). The trying of all the defendants together does not bring about a want of jurisdiction (*R.* v. *Biggins* (5)). The irregularity, if any, was cured by the defendants consenting to be tried together. A magistrate has jurisdiction over the charges laid against accused persons (*Russell* v. *Bates* (6)). Under the *Justices Act* 1902-1918 (N.S.W.) the mode of bringing a person before the Court is a mere matter of procedure, and justices have authority to proceed if the person charged is before them (*Ridley* v. *Whipp* (7); *R.* v. *Hughes* (8)). Magistrates have been held to have jurisdiction in cases where persons have been charged wrongly (*Bishop* v. *Chung Bros.* (9)). All the defendants in this case were working towards a common object.

[STARKE J. referred to *In re Mandamus to the Stipendiary Magistrate, Brighton* (10).]

That case establishes that if persons are summoned to appear before a magistrate he can try their cases together whether they consent or not. In *R.* v. *Crane* (11) the two accused persons could

(1) (1927) 27 S.R. (N.S.W.) 257.
(2) (1927) 40 C.L.R. 209.
(3) (1858) 32 L.T. (O.S.) 105.
(4) (1871) 36 J.P. 198.
(5) (1862) 5 L.T. (N.S.) 605, at pp. 606, 607.
(6) (1927) 40 C.L.R., at p. 213.
(7) (1916) 22 C.L.R. 381, at p. 385.
(8) (1879) 4 Q.B.D. 614.
(9) (1907) 4 C.L.R. 1262, at p. 1269.
(10) (1893) 9 T.L.R. 522.
(11) (1920) 3 K.B. 236.

have been tried together if they had been jointly indicted, but, as this had not been done, it was held by the House of Lords on appeal (*Crane* v. *Director of Public Prosecutions* (1)) that they could not, in the circumstances, be tried together. No consent was given by the defendant to the course adopted in *Hamilton* v. *Walker* (2). Here an unlawful assembly continued for some hours, and the question for the magistrate was whether each of the defendants took part in such assembly. The Court will not set aside the decision of the magistrate if there is evidence on which he could have arrived at the decision appealed against. Where a person is in an unlawful assembly he must be deemed to be a part of such assembly even though he has done nothing towards making the assembly an unlawful one. Once it is established that there was an unlawful assembly, the only question is: was the accused present? The principles by which a Court should be guided on an application for a writ of prohibition directed to a magistrate are as set out in the judgment of *Isaacs* and *Rich* JJ. in *Peck* v. *Adelaide Steamship Co.* (3).

Evatt K.C. (with him *J. S. Clancy*), for the respondents. The magistrate had no power to hear these twenty separate charges together. The question in this case was not decided in *Russell* v. *Bates* (4) but was deliberately left open. The consent of the defendants to be tried together, even if given by their counsel, does not confer jurisdiction on the Court (*R.* v. *Dennis* (5)), and this applies also to proceedings under the *Justices Act*. The principles laid down in *Crane* v. *Director of Public Prosecutions* (1) are equally applicable whether the issue is tried by a jury or by a magistrate. Each case should be separately determined on its own facts: a magistrate has no authority to determine a case otherwise (see *Justices Act* 1902-1918, secs. 57, 70 (3), 74, 75, 77-81). There is nothing in those sections of the Act which prevents or forbids the application to the practice and procedure at Courts presided over by magistrates of the principles which Lord *Atkinson* in *Crane* v. *Director of Public Prosecutions* (6) says properly apply. The decisions in *R.* v.

(1) (1921) 2 A.C. 299.
(2) (1892) 2 Q.B. 25.
(3) (1914) 18 C.L.R. 167, at pp. 182, 183.
(4) (1927) 40 C.L.R. 209.
(5) (1924) 1 K.B. 867.
(6) (1921) 2 A.C., at p. 321.

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Justices of Staffordshire (1) and *R.* v. *Biggins* (2) are distinguishable, as the offences in those cases were really joint offences whereas here it is a question of individual or separate offences. The objection to the power of the magistrate does not depend upon whether it is possible to join more than one defendant in the one information. Although the defendants consented to all the cases being heard together, the procedure adopted at the hearing amounted to a mistrial. As the question involved was one as to the administration of criminal justice it was not one which could be waived by an accused person. The Court will not do anything to interfere with the judgment of the Supreme Court other than on the grounds in respect of which special leave to appeal was granted. According to the definition of "unlawful assembly" in the *Crimes* (*Intimidation and Molestation*) *Act* 1929, sec. 2 (*a*), such an assembly within the meaning of that Act is really a conspiracy at common law, but it does not necessarily include an unlawful assembly at common law. "Intimidation" means such a threat of personal violence as would justify a Court in binding the intimidator over to keep the peace (*Ware and De Freville Ltd.* v. *Motor Trade Association* (3)). It was not proved in essential particulars that the assembly was an unlawful one. There is no evidence as to the legal rights or duties of the persons who are alleged to be aimed at by the unlawful assembly (*R.* v. *McKenzie* (4)). It is nothing to the point to show that the gathering assembled in an unlawful manner. It must be a body which simply used or intended to use intimidation as a means to an end, that is to say, to prevent a person or persons from doing something he or they is or are legally entitled to do. It is consistent with the evidence that the men comprising the gathering were attending an ordinary and lawful meeting of their union. No inference can be drawn that the meeting was an unlawful one. It is a necessary ingredient in the proof of an unlawful assembly to show what the common object was, and this must be an intention to interfere with the legal rights of other persons. Although the evidence may show an unlawful assembly at common law, and even an intention to cause injury to the volunteer workers at the

(1) (1858) 32 L.T. (O.S.) 105.
(2) (1862) 5 L.T. (N.S.) 605.
(3) (1921) 3 K.B. 40, at p. 82.
(4) (1892) 2 Q.B. 519.

mine out of revenge, that is not the " unlawful assembly " contemplated by the Act. The evidence does not show the rates of remuneration proposed to be paid to the volunteer workers, and the probable inference would be that the unionists objected to persons unlawfully working at other than award rates. There is no evidence to show that the defendants " knowingly continued in an unlawful assembly " ; on the contrary it shows that the majority of them left the gathering immediately after they were spoken to by police officers. Notwithstanding the fact that the words of the Act have been followed, the convictions are bad because the informations did not contain a proper statement of the charge preferred against the individual respectively named therein (*R.* v. *McKenzie* (1)). Although some of the defendants were charged with a different offence, all the cases were heard together and therefore the position is not the same as in *R.* v. *Justices of Staffordshire* (2). As a result of the confusion of evidence the magistrate was unable clearly to define the evidence pertaining to each respective defendant (*Ex parte Watts* (3)). The magistrate was in error in admitting certain evidence objected to by the defendants, and its admission amounted, in substance, to a mistrial. As to the effect of a consent given by an accused person in a criminal case, see *R.* v. *Bertrand* (4). The question as to whether there should have been a separate rule nisi for each defendant is not material to this appeal. It is, at most, a question of practice of the Supreme Court, and, if the Court is against the main point in the appeal, special leave to appeal should be rescinded.

Lamb K.C., in reply. When dealing with the guilt or innocence of persons the Court must disregard technicalities. The principles laid down in *R.* v. *McKenzie* (1) will not be applied by the Court in the interpretation of a Federal or State Act. The Courts have laid great stress on the provisions of sec. 65 of the *Justices Act* for the overcoming of technical objections. The procedure laid down in the *Justices Act* as to the bringing of offenders before magistrates is different from the procedure which obtains in other Courts, and

(1) (1892) 2 Q.B. 519.
(2) (1858) 32 L.T. (O.S.) 105.
(3) (1906) 23 N.S.W.W.N. 69.
(4) (1867) L.R. 1 P.C. 520, at pp. 534, 535.

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this applies also to the hearing of the matter. The powers of the Court on an application for prohibition are set out in sec. 115 of the *Justices Act*, and the attitude of the Court in respect of such an application is as set out in *Peck* v. *Adelaide Steamship Co.* (1). So far as the facts are concerned, the defendants have the right under the *Justices Act* of appealing to a Chairman of Quarter Sessions for a hearing *de novo*. The intention of the defendants must first be shown, after which the common object is proved. There was ample evidence before the magistrate on which he could base the conclusions he arrived at. As to what constitutes conspiracy and the evidence necessary to prove it, see *Russell on Crimes*, 8th ed., vol. I., p. 188. The evidence shows that there was a violent disturbance and that the defendants were amongst the crowd inside the colliery grounds which created that disturbance. In cases of this kind it is not necessary to show that persons who were in an unlawful assembly were taking an active part in the things which were being done by the assembly (*McKinlay* v. *Hart* (2)). The affidavits filed in support of the application for a statutory prohibition did not show a prima facie case of error on the part of the magistrate as required by sec. 113 of the *Justices Act*. As to whether the Court will consider the application in a case where such requirement has not been satisfied, see *R.* v. *Mackenzie*; *Ex parte Balloch* (3). Time which is fixed by statute cannot be extended (*Moxham* v. *McDonald* (4)). It is sufficient to describe the offence in the words of the Act (*Justices Act* 1902-1918, sec. 145A; *Preston* v. *Donohoe* (5)).

Cur. adv. vult.

Aug. 14. The following written judgments were delivered :—

ISAACS C.J. The almost complete unanimity of British Courts in various parts of the Empire, and particularly the commanding authority of the Privy Council, in enforcing the fundamental principle of individual liberty involved, leave me no room for hesitation in holding that the unanimous decision of the Supreme Court of New South Wales, as expressed by *Street* C.J., was correct and should be affirmed.

(1) (1914) 18 C.L.R. 167.
(2) (1897) 35 Sc.L.R. 32.
(3) (1881) 7 V.L.R. 328; 3 A.L.T. 33.
(4) (1874) 4 S.C.R. (Q.) 41.
(5) (1906) 3 C.L.R. 1089, at p. 1096.

Eighteen persons were separately informed against and summoned for alleged offences against the *Crimes Act* of New South Wales 1900, as amended by the *Crimes* (*Intimidation and Molestation*) *Act* 1929. Each of sixteen of those persons was charged that on 16th December 1929, at Rothbury, he "did knowingly continue in an unlawful assembly," that is, contrary to sub-sec. 1 of sec. 545C. The penalty is liability to "imprisonment for a term not exceeding six months or to a fine not exceeding twenty pounds." The other two were charged with contravention of sub-sec. 2 of sec. 545. The penalty is liability to "imprisonment for a term not exceeding twelve months or to a fine not exceeding fifty pounds."

The first of the two was Harold Mitchison, against whom the charge was that on the same date and at the same place he, "being armed with something which used as a weapon of offence was likely to cause death or grievous bodily harm, to wit, a stick and a pit bottle, was a member of an unlawful assembly." The second was Timothy Patterson, the charge against him being the same as that against Mitchison, except that the weapon was described as "a bottle" only. All eighteen were on 22nd January 1930 convicted and sentenced by the Police Magistrate to fines, costs, and in default imprisonment with hard labour. There was one fine of £10, in default two months' imprisonment with hard labour, and the rest of the sixteen were fined £20 and costs, and in default three months' imprisonment with hard labour. Mitchison and Timothy Patterson were each fined £20 and costs, and in default four months' imprisonment with hard labour, and were also required to enter into recognizance with penalty to be of good behaviour for twelve months, in default to be imprisoned for a further three months.

On 11th March 1930 a rule nisi for statutory prohibition as to all eighteen convictions came on for hearing in the Supreme Court, and a reserved judgment was delivered on 28th March making the rule absolute. The ground on which the decision was rested was that the cases were heard together by the Police Magistrate. The Court added that it was unnecessary to consider the further question they reserved, "that is to say, whether, notwithstanding that the Judge had not before him proper and sufficient material on which to make the order nisi upon the other grounds upon which he made

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it, we should allow Dr. *Evatt* to review the whole of the proceedings in this application." Before us there was full argument, both as to the ground on which the Supreme Court founded its decision and as to the other grounds relied on by Dr. *Evatt*, as well as the question of the material before the learned Judge (*Maxwell* A.J.), who granted the rule nisi.

There emerge four questions of substance for our consideration. They are (1) as to the admissibility of a further affidavit verifying the proceedings in the Court of Petty Sessions, but made and filed after the rule nisi was granted; (2) as to the jurisdiction of the Police Magistrate to make the convictions, having regard to the lumping of the cases so far as regards the fact of unlawful assembly; (3) as to the sufficiency of the evidence as to the unlawfulness of the assembly; (4) as to the sufficiency of the evidence that the applicants "knowingly continued" in the assembly.

With regard to the first question, the proper answer is that the further affidavit is admissible. The objection to its admission is not specified in the notice of appeal to this Court, and the special leave to appeal cannot be thought to have included such a ground. But apart from that, the objection is untenable. Sec. 113 of the *Justices Act* does no more than require as a preliminary to the rule "an affidavit or . . . affidavits showing a prima facie case of error or mistake." There is nothing making that material exclusive. So long as the condition imposed by sec. 113 is satisfied, sec. 115 gives power inconsistent with the objection. The words "after inquiry" seem to leave the Court free to admit whatever further evidence it thinks just in accordance with ordinary principles of law. In the present case the material placed before *Maxwell* A.J. presented a prima facie case of error or mistake, and his Honor expressly permitted later material to be filed, a direction that has not been set aside.

1. *Statutory Prohibition.*—Before proceeding to deal with the grounds relied on, it is essential to observe the nature of statutory prohibition. That subject received very close attention in this Court in *Peck* v. *Adelaide Steamship Co. Ltd.* (1). No difficulty was raised by learned counsel during the argument, as to the duty of

(1) (1914) 18 C.L.R. 167.

the Supreme Court in view of that decision. It was not disputed that if the principle of *Crane's Case* (1) and *Dennis's Case* (2) was applicable, the convictions could not stand.

In the circumstances, however, it is necessary to analyse *Peck's Case* (3). In that case secs. 112 and 115 of the *Justices Act* 1902 were interpreted by the light of a long series of decisions in New South Wales. *Griffith* C.J. (4) pointed out that there were two classes of error which came under those provisions, errors of law and errors of fact. He said:—" The Court, . . . 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." Then: " 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." It will be observed that both positions assumed that no breach occurred of any fundamental principle of law which would vitiate the whole proceeding and preclude any decision being given, that, however, being the present case. My brother *Rich* and I (5), after a close examination of the cases and their history, held with reference to statutory prohibition that (1) the Supreme Court was not empowered to give any decision on the facts; (2) the only function of that Court is partly identical with and partly analogous to its function in common law prohibition; (3) identity exists in respect of absence of jurisdiction to entertain the case or make the order—that is, pure error of fundamental law; (4) analogy is limited to error where the evidence does not in reason support the decision—that is, error substantially of fact; (5) *any other kind of error is excluded.* With regard to the last point mentioned, we said (6): " Any other kind of error, where it exists, must find its appropriate remedy." That is, the Supreme Court, under secs. 112 and 115, is not an ordinary Court of appeal. As to the fourth point, we pointed out that a long series of decisions established that *with reference to that objection only* (namely, there

(1) (1921) 2 A.C. 299.
(2) (1924) 1 K.B. 867.
(3) (1914) 18 C.L.R. 167.
(4) (1914) 18 C.L.R., at p. 174.
(5) (1914) 18 C.L.R., at pp. 181 *et seqq.*
(6) (1914) 18 C.L.R., at p. 183.

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was not sufficient evidence on which reasonable men could act), if, after eliminating all evidence erroneously admitted, there still remained sufficient to enable reasonable men to arrive at the conclusion challenged, *that objection* failed. But only that objection. In the basic decision, *Ex parte Ward* (1), decided in 1855, 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." *Ward's Case* (2) was followed by *Pring* J. in *Ex parte Moy Shing* (3) and by my brother *Rich* and myself in *Peck's Case* (4). But that leaves entirely untouched the third point tabulated, namely, the " identity " point. It leaves untouched, that is to say, the saving words of Sir *Alfred Stephen* in *Ward's Case* (2): " giving due effect to every other legal objection." Those words are of the highest importance.

Now, the main point relied on by the applicants here, namely, the lumping of the cases, is what Sir *Alfred Stephen* calls " other legal objection." That is to say, it has nothing to do with the question whether there was sufficient evidence to enable a reasonable man to give such a verdict. It is not a jury matter in any sense, nor a question of fact in any sense. No amount of evidence can cure or affect it. It is a radical question for the Judge as a fundamental question of law, and assumes that, in view of the course adopted at the trial, the question of guilt or innocence should never in law have been submitted to the jury, or, what is the same thing, considered as a matter of fact by the composite tribunal in its character of a tribunal of fact. In truth, the doctrine that after elimination of objectionable evidence there remains sufficient to support a verdict by reasonable men, never comes into play in this case at all, because, as to the alleged want of jurisdiction, the objection is not that of lack of sufficient evidence but of " another legal objection " and as to the insufficiency of evidence respecting the " unlawful assembly ": there is no elimination in question, it is simply whether, taking the whole of the facts as proved, enough exists to satisfy the requirement of criminal proof.

(1) (1855) 2 Legge 872.
(2) (1855) 2 Legge, at p. 874.
(3) (1904) 4 S.R. (N.S.W.) 480, at p. 485.
(4) (1914) 18 C.L.R., at pp. 183, 185.

2. *Lumping the Cases.*—The second question relates to the actual ground of the Supreme Court decision. Mr. *Lamb*, with great earnestness and vigour, sought to destroy with one stroke the basis on which the decision rested. He contended that the cases of *Crane* (1) and *Dennis* (2) were inapplicable to cases of summary jurisdiction, and that the magistrate's error was merely one of irregularity which could be and was waived. He referred to *Plunket's Australian Magistrate* (1870 and 1876), by *Wilkinson*, in which a quotation appears from *Oke's Synopsis* with reference to *R.* v. *Biggins* (3). This, it was urged, justified the course taken by the Police Magistrate, or, at all events, rendered it, at most, irregular, however fatal it would have been on indictment. But neither there nor in any later work or edition, such as *Wilkinson's Australian Magistrate* (7th ed., 1903, at p. 686), is found any justification for the position that the fundamental principles enumerated in *Crane's Case* and *Dennis's Case* are not applicable in summary jurisdiction. There is no decision which adopts any such distinction. The slightest consideration reminds us that an accused person needs at least as much protection from a sentence of twelve months' imprisonment with hard labour when inflicted by a Police Magistrate, as when inflicted on a jury's verdict guided by a Supreme Court Judge.

The view opposite to the contention is inherent in the following cases, among others:—In England: *Hamilton* v. *Walker* (4); *Parker* v. *Sutherland* (5). In New South Wales: *Watts's Case* (6); *Russell* v. *Bates* (7); *Ex parte Uhrig* (8), where it is said "Convictions by justices and a conviction upon an indictment" are "on precisely the same footing." In Victoria: *Rattray* v. *Roach* (9); *Larkin* v. *Penfold* (10). In Canada: *McBerney's Case* (11); *R.* v. *Lapointe* (12); *R.* v. *McDonald* (13); *R.* v. *Theirlyock* (14), which was applied in *R.* v. *Hart and Kozaruk* (15). But while this is

(1) (1921) 2 A.C. 299.
(2) (1924) 1 K.B. 867.
(3) (1862) 5 L.T. (N.S.) 605.
(4) (1892) 2 Q.B. 25.
(5) (1917) 25 Cox C.C. 734; 116 L.T. 820.
(6) (1906) 23 N.S.W.W.N. 69.
(7) (1927) 27 S.R. (N.S.W.) 257.
(8) (1900) 21 N.S.W.L.R. (L.) 259, at p. 261.
(9) (1890) 16 V.L.R. 165; 11 A.L.T. 188.
(10) (1906) V.L.R. 135, at pp. 546-547; 28 A.L.T. 42, at p. 45.
(11) (1897) 3 Can. C.C. 339.
(12) (1912) 4 D.L.R. 210.
(13) (1928) 50 Can. C.C. 65.
(14) (1928) 50 Can. C.C. 296.
(15) (1929) 51 Can. C.C. 145.

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the case, there is, perhaps, a qualifying consideration to be later referred to, when the tribunal consists of a single individual combining the functions of deciding both law and fact.

For the present, the question under consideration is whether the fundamental principles enunciated in the two leading cases mentioned are not also valid in summary jurisdiction. It is to be noted that all offences were originally indictable at the suit of the Crown, and an accused person had by *Magna Charta* immunity from punishment unless convicted by the verdict of his peers. Gradually jurors ceased to be witnesses, and became judges of fact, the justices being still the judges of law. The changing circumstances of society have brought about the creation of minor offences. They have also led to the entrusting of jurisdiction in some criminal matters to a single tribunal determining both law and fact. But that latter change is procedural only, and in no way destructive of the inherent principles of the common law safeguarding the liberty and the property of the individual when the Crown seeks to punish him for an alleged breach of the criminal law.

In *Burn's Justice of the Peace* (29th ed., edited by *Thomas Chitty*) it is said with reference to the "statement of the offence itself" (vol. I., at p. 967): "All acts which subject men to new and other trials than those by which they ought to be tried by the common law, ought to be taken strictly." And it is said, at p. 1011: "The execution of the powers confided to justices of the peace in summary convictions is generally watched by the Courts with jealousy, such summary convictions being derogatory to the liberty of the subject; *and all powers given in restraint of liberty must be strictly pursued*" (*Bracy's Case* (1); and see *Wilkins* v. *Wright* (2)). Those passages are repeated in the 30th edition, edited by *J. B. Maule* (vol. I., at p. 1115, and vol. III., at p. 135). Apart from statutory relaxations of those principles, they are still to be adhered to. Consequently, in the absence of any statutory direction to the contrary, there is every reason for applying the fundamental doctrine of *Crane's Case* (3) and *Dennis's Case* (4) to summary convictions.

(1) (1696) 1 Salk. 348; 91 E.R. 305.
(2) (1833) 2 C. & M. 191, at p. 201; 149 E.R. 728, at p. 733.
(3) (1921) 2 A.C. 299.
(4) (1924) 1 K.B. 867.

In New South Wales, the principle that summary jurisdiction does not weaken the application of elementary safeguards in criminal prosecution has been recognized for thirty years. In *Ex parte Uhrig* (1) *Darley* C.J., referring to legislation corresponding to what is now contained in Part XIV. of the *Crimes Act* 1900 as amended in 1924, said that " The intention of the Legislature to merely substitute a hearing before justices for a trial upon an indictment, and a conviction by such justices for a conviction upon an indictment appears to me to be manifest." To that legislation may be added, for purposes of present reference, sec. 80 of the *Justices Act* (No. 27 of 1902), and this adds still greater force to what the learned Chief Justice there said.

The decision now under appeal, certainly, as to the absence of the suggested distinction between conviction on indictment and summary conviction, has the support of long-standing judicial decisions, well known to the Legislature when the recent amending *Crimes Act* was passed.

But the deeper consideration remains, whether the course pursued by the magistrate in the present cases leads to the legal result that the convictions were made without jurisdiction, so as to attract the remedy of statutory prohibition. It is no answer to say that the magistrate had jurisdiction to entertain the case to begin with. He had, of course. But had he, in the circumstances, jurisdiction to take the final step of convictions, because to sustain them he must *throughout* have had jurisdiction to " hear and *determine* " ? Nor is it always sufficient to say that there has been a determination in fact. If, for instance, there has been introduced a consideration unauthorized by law, it may be of such a character as to vitiate the determination, as *Blackburn* J. said in *R.* v. *De Rutzen* (2), " the justices have not determined according to law," and therefore mandamus was the proper remedy. In *R.* v. *Cotham* (3) *Kennedy* J., after referring to *De Rutzen's Case*, said : " Where . . . they " (justices) " have disregarded the provision of the statute which gives them jurisdiction, and *have considered matters which they ought not to consider*, they have made themselves subject

(1) (1900) 21 N.S.W.L.R. (L.), at p. 261. (2) (1875) 1 Q.B.D. 55, at p. 57.
(3) (1898) 1 Q.B. 802, at p. 808.

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to the remedial powers of the process by mandamus." In other words, there had, in that case, been no authorized determination.

The basic principle relevant to this case is that stated by Lord *Atkin* (then Lord Justice) in *R.* v. *North* ; *Ex parte Oakey* (1), namely, " the want of jurisdiction . . . is based upon the breach of a fundamental principle of justice." The principle has been variously phrased in prior cases, notably by *Lush* J. in *Martin* v. *Mackonochie* (2), who held that where an irregularity in procedure is " so vicious as to violate some fundamental principle of justice," a prohibition is proper. That language was upheld by *Thesiger* L.J. in the Court of Appeal in *Martin* v. *Mackonochie* (3), and by *Scrutton* L.J. in *R.* v. *North* (4). See *In re Dillett* (5). It is a fundamental principle of the common law that " each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge." *Pollock* B. so held in *Hamilton* v. *Walker* (6), and applied it to the *Justices Act*. And, so far from the doctrine of *Crane* (7) and *Dennis* (8) being negligible in this case, it is, if possible, even more conspicuously clear that it should be applied. As it will later on be explained, the departure from the elementary principle referred to was in *Hamilton* v. *Walker* and in the present case a virtual breach of the distinct legislative enactment in sec. 57 of the *Justices Act* that the information should be confined to one offence. If the information, so the hearing and determination of " the case." To admit evidence of two offences before deciding either, says Lord *Reading* C.J. in *Parker* v. *Sutherland* (9), " *is an infringement of an elementary principle as to the admission of evidence in criminal law.*" The principle and the recognition of the basic duty of a Court to adhere to the procedure of dealing with separate criminal cases separately are definitely established by *Crane's Case* and *Dennis's Case*. In the former, Lord *Atkinson* (10) said it is " elementary in criminal law " that the issue of " not guilty " in separate and independent indictments cannot be tried together. No one would suggest that any other rule should be

(1) (1927) 1 K.B. 491, at p. 506.
(2) (1878) 3 Q.B.D. 730, at p. 739.
(3) (1879) 4 Q.B.D. 697, at p. 732.
(4) (1927) 1 K.B., at p. 504.
(5) (1887) 12 App. Cas. 459.
(6) (1892) 2 Q.B., at p. 28.
(7) (1921) 2 A.C. 299.
(8) (1924) 1 K.B. 867.
(9) (1917) 5 Cox C.C., at p. 708 ; 116 L.T., at p. 821.
(10) (1921) 2 A.C., at p. 321.

applied to an accusation by way of criminal information by the Crown. For breach of that elementary principle the House of Lords held the proceedings resulted in a " mistrial and a nullity." That is, they were a " nullity " as to legal efficacy when appropriately challenged, though of course not a nullity in the sense that there was nothing to challenge. Lord *Sumner* and Lord *Parmoor* were of the same opinion. But being a " nullity " as to legal efficacy when challenged, it is an inescapable corollary that it is impossible to hold the conviction can be supported by eliminating the vitiating circumstances and considering the case on the residue. *Dennis's Case* (1) shows that the failure to observe the rule resulted in a want of jurisdiction. *McBerny's Case* (2) was decided in 1897 and was a particularly strong case and was carefully reasoned out. The accused was tried by a County Court Judge in criminal jurisdiction, the Judge being both judge and jury, just as justices are here in summary jurisdiction. McBerny was tried on four distinct charges of theft. In each case the circumstances were similar, for he made a small purchase, tendering a note of considerably larger amount in payment, and then he confused the person from whom the purchase was made, thereby obtaining a larger amount in change than he was entitled to. He was convicted of each offence, and a case was stated for the Supreme Court of Nova Scotia. It was heard by *McDonald* C.J. and five justices. Reliance was placed by the Crown on a section of the *Code* which said : " The Judge may adjourn any trial from time to time until finally terminated." The Court unanimously held that even that provision did not permit of the Court departing from the fundamental principle of not intermingling charges whereby evidence on one affected or may affect another. *Townshend* J. (in whose judgment *McDonald* C.J. and *Ritchie* J. concurred) said (3) :—" The object of this clause is to empower the Judge to adjourn the particular trial from time to time for such necessary purposes as receiving further evidence, or, in case of some unforeseen accident, such as sudden illness of counsel or a witness, or for the purpose of considering his judgment. Full effect and meaning is given to the words by this construction. The

(1) (1924) 1 K.B. 867.
(2) (1897) 3 Can. C.C. 339
(3) (1897) 3 Can. C.C., at p. 342.

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wide interpretation by the Judge below of unlimited and undefined power of adjournment, is both contrary to the spirit of our system in the administration of the criminal law and subversive of the right of the accused, and cannot be upheld. But it does not, in my opinion, touch the question submitted for our consideration, that is to say, whether it was competent for the Judge to postpone his decision on the first charge, *until he had heard all the evidence on the several other charges against the same accused party, and then decide all.* This is a more important question than at first sight it appears to be. I was, at first, impressed with the view that, inasmuch as the Judge in this case rightfully admitted evidence of the other charges, to show the animus of the accused, there would be no objection to reserving his decision until after the evidence in all was heard. In this particular case I doubt if the prisoner was at all prejudiced by this course. We are, however, bound to decide on general principles applicable to the administration of criminal justice. *It is a fundamental principle that the accused must be tried, and tried only on the evidence given in relation to the particular charge on which he is then indicted, and to which he has pleaded. All extraneous matters, which may affect the minds of the Judge or jurors, must be rigidly excluded.* In the County Court criminal jurisdiction, the Judge is also the jury to find on the facts. Now it is hardly conceivable that his mind would not be more or less influenced, in determining the first charge, after listening to the evidence on subsequent charges against the same individual. It would hardly be possible, in aiming at a conclusion in the first case, to dismiss from his consideration impressions created by facts in the others, and, in this way, the accused would necessarily suffer prejudice. It is no answer to say that this objection would equally apply to all subsequent trials after the first, even if he did decide the first before entering on the others, for at least in the first the prisoner would not be fairly tried on the evidence in relation to that alone." With reference to the rule of separate hearing, the learned Judge said (1):— " I am, however, of opinion that, in criminal trials before the County Court, when the Judge is the jury, that rule should be followed in all its strictness. While it may be fairly argued that the mind of the Judge,

(1) (1897) 3 Can. C.C., at p. 344.

even though he gives his decision on the first charge, may be biassed in succeeding trials against the same accused person, this is incident to the constitution of the Court to which the defendant, it must be remembered, voluntarily submits his rights, but *it forms no just reason for changing the ordinary course of criminal procedure, which can only be done by statute.* For these reasons, I am of opinion all these convictions must be quashed and a new trial granted." *Henry* J. said (1) :—" The objection is, that each of the first three cases was not disposed of before another was commenced, and it is said that, in every case, the learned Judge improperly had before him, not only the evidence in that case, but the evidence in the three other cases. There is little, if any, direct authority upon this matter. That is not to be much wondered at, because, in criminal proceedings at common law, all trials being by jury, such a question as the present could not arise. I am of opinion, however, that the solution of the difficulty is to be made by having regard to the relation of the statutory to the common law in this respect. *It is an elementary position that the incidents of criminal procedure under the common law are to be affected or modified by statute, only in so far as a clear intention to affect or modify such incidents is apparent.* Some light on this question may be obtained by seeing how statutory inroads upon the common law system of criminal trials were first made. If we look at the history of the growth of the jurisdiction of justices, in and out of sessions, we find that a naked authority ' to hear and determine ' offences implied a proceeding conformable to the common law mode of determination only, that is, by the common law method of inquisition and the verdict of a jury. See the historical introduction to *Paley* on *Summary Convictions*, pp. 3 and 9; 4 Co. 74 b, and authorities there referred to. This indicates the stability of the jury system and its incidents, and emphasizes the necessity of restricting the operation of statutory modifications of the law in this respect to the limits of express provisions. Now, under the common law, the jury could not postpone their decisions, and withhold their verdict, on the trial of a prisoner for one crime, until after they had heard the evidence brought forward in support of one or two or three other indictments

(1) (1897) 3 Can. C.C., at p. 348.

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against the same prisoner for other crimes, and then find him guilty of all the crimes charged. That being so, one naturally asks: Where is the authority for subjecting a prisoner to different incidents in this respect from those which would prevail if he were being tried by a jury? The mere substitution of one Judge for twelve jurymen cannot of itself involve the result that the facts may be tried under different conditions when tried by the one man, from those under which they must be tried when tried by the twelve. Nor can I see that any weight in favour of the course pursued here is to be given to the fact that one of the sections of the speedy trials scheme (sec. 777) provides that the Judge may adjourn any trial from time to time, until finally terminated. This section falls far short of authorizing what was done here, and there is obviously ample scope for it without giving it the effect contended for on behalf of the Crown. Moreover, the very existence of this express provision for the adjournment of a trial seems to me to afford good ground for the argument that, if it were intended that the Judge should have the power to postpone his decision in one or more cases until he should hear the evidence in another or others, that unprecedented and unnecessary power would be expressly given, just as the much less important power of adjournment is expressly given." That case was followed by the same Court in 1904 in *Burke's Case* (1). In 1928, in *R.* v. *Theirlyock* (2), the Supreme Court of Alberta, Appellate Division, before *Harvey* C.J.A. and four Justices of Appeal, held that a trial of two persons by a Police Magistrate on different charges for different offences is a nullity. In that case the point was not even raised by the notice of appeal, but for the first time was taken in argument. The Court applied *Dennis's Case* (3). *Theirlyock's Case* was followed in 1929 by the same Court in *R.* v. *Hart and Kozaruk* (4), where the two accused were tried and convicted by a magistrate on separate informations charging each with being the keeper of a gaming house.

Want of jurisdiction for this reason begins at the point where the elementary rule referred to is infringed. It is elementary because the infringement is a breach of natural justice. See *Ex parte*

(1) (1904) 8 Can. C.C. 14.
(2) (1928) 50 Can. C.C. 296.
(3) (1924) 1 K.B. 867.
(4) (1929) 51 Can. C.C. 145.

Webber (1). In *Ex parte Mansfield* (2) *O'Connor* J. puts the position very clearly: "That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that *the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.*" If against "natural justice," which means only that some fundamental rule of justice has been transgressed, then, as already shown, there is *want of jurisdiction*, and the basic error cannot possibly be cured by saying "there was sufficient evidence properly admitted, which if taken alone would have supported the conviction."

So far as it is not expressly or by necessary implication negatived by statute, it is a principle that is inherent in all grants to tribunals of criminal jurisdiction. The reasoning supporting this proposition is approved by the highest authority. In *Sharp* v. *Wakefield* (3) Lord *Halsbury* L.C. stated, with instances, the principle that power confided to justices in their capacity as justices to be exercised judicially, is granted subject to certain understood though unexpressed rules of conduct. In *Local Government Board* v. *Arlidge* (4) Viscount *Haldane* L.C. gave utterance to the same principle. He said: "In the case of a Court of law tradition in this country has prescribed certain principles to which in the main procedure must conform." His Lordship referred with approval to *Board of Education* v. *Rice* (5), where Lord *Loreburn* held that neglect of a fundamental rule of conduct might be met by certiorari or mandamus. In *R.* v. *Hughes* (6) it is held that "the question of the *power* of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form."

I have said there is perhaps one qualifying circumstance where the tribunal is single and determines both fact and law. In *R.* v. *Fry* (7), although the subsequent cases were heard before the decision in the first was announced, the Court of Queen's Bench Division accepted the evidence of the justices that the first case was considered entirely separately and in fact decided before

(1) (1886) 7 N.S.W.L.R. 317, at pp. 320, 321 and 322.
(2) (1899) 20 N.S.W.L.R. 75, at pp. 82-83.
(3) (1891) A.C., 173, at pp. 179, &c.
(4) (1915) A.C. 120, at p. 132.
(5) (1911) A.C. 179.
(6) (1866) L.R. 1 P.C. 81, at p. 91.
(7) (1898) 19 Cox C.C. 135.

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commencing the second. But, said *Wills* J. (1), " we should be very sorry to give any countenance to the notion that *justices may mix up two criminal charges,* and convict or acquit in one of them without any reference to the facts appearing in the other. Such a course would be contrary to law; and, undoubtedly, as a general rule it will be prudent and right for justices to avoid any course which reasonably bears the aspect of such a mistake. If a prima facie case is made out that such an error has or may have been committed it will in general *lie upon the justices to show* very clearly that it has not been committed." See, in accordance therewith, *Williams* v. *Millett* (2); *R.* v. *Justices of Staffordshire* (3); *Makin* v. *Attorney-General for New South Wales* (4). That is in accordance with the well-recognized principle obtaining even in such cases (*Anthony* v. *Halstead* (5); *Lionel Barber & Co.* v. *Deutsche Bank* (*Berlin*) *London Agency* (6)). In *R.* v. *Bullock* (7) the Supreme Court of Ontario followed *Fry's Case* because the Judge certified that he was not influenced in one case by the evidence in the other.

The elementary right which the accused has is to have each case against him considered on its own separate footing. If there be intermingling, that right is taken to be infringed, and intermingling is presumed unless it is clearly shown that, notwithstanding the apparent error, the cases have, in fact, been kept separate and distinct. See per *Channell* J. in *R.* v. *Fisher* (8) and *Kenny's Cases on Criminal Law* (6th ed., at pp. 475-477).

3. *Irregularity or Nullity.*—If a breach of a fundamental principle of justice occurs, and so gives rise to a want of jurisdiction to proceed further, there is, of course, an irregularity in one sense, but in the relevant sense it is more than an irregularity, it is a nullity, and must, if challenged, be set aside unless there is statutory provision to the contrary. The distinction is thus stated in *Macnamara* on *Nullities and Irregularities*, at pp. 2, 3:—Speaking of " irregularity " in its more limited and common sense, the learned author says:—" A defect is here supposed, but one that does not take away the

(1) (1898) 19 Cox C.C., at p. 138.
(2) (1900) 25 V.L.R. 513; 21 A.L.T. 181.
(3) (1858) 32 L.T. (O.S.) 105.
(4) (1894) A.C. 57, at p. 70.
(5) (1877) 37 L.T. 433.
(6) (1919) A.C. 304, at 323.
(7) (1903) 8 Can. C.C. 8.
(8) (1910) 1 K.B. 149, at p. 153.

foundation or authority for the proceeding, or *apply to its whole operation*. This distinguishes an irregularity from a nullity, which is the highest degree of an irregularity in the most extensive sense of that term, and is such a defect as renders the proceeding, in which it occurs, *totally null and void, of no avail or effect whatever, and incapable of being made so*." (The italics are mine). At p. 6 it is said: "An irregularity may be waived; a nullity can never be waived." That, however, as will presently be seen, does not mean that every irregularity (so-called) may be waived. *Coleridge* J. in *Holmes* v. *Russel* (1), however, said that the safest rule to determine "what is an irregularity and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity, if he cannot, it is a nullity." So per *Taunton* J. in *Garratt* v. *Hooper* (2). And see per *Bankes* L.J. in *Smythe* v. *Wiles* (3). Judged by this standard, the inability of an accused person by admission or consent to permit an unauthorized exercise of criminal jurisdiction is decisive. The line of demarcation between a mere irregularity and a nullity does not depend on the mere gravity of the circumstances. It is not, for instance, to be sought for by inquiring "Is the accused really guilty?" or, "Having regard to the evidence, ought he, in our opinion, to be convicted?" That would be usurpation of jurisdiction of a very marked nature. It would be contrary to *R.* v. *Gibson* (4), repudiating the report in *Russell & Ryan* of *R.* v. *Ball* (5), and it is opposed to the views expressed by Lord *Atkinson* for the Privy Council (including Lord *Parker of Waddington* and Sir *Samuel Griffith* in *Vaithinatha Pillai* v. *The King-Emperor* (6). The statutory prohibition law gives, as I have said, no authority to the Supreme Court, and therefore, to none of us, to form or express any opinion as to the guilt or innocence of the accused. The law requires that to be done by the designated tribunals of fact, either primary or appellate, and by them alone. *Makin's Case* (7) is directly in point as to that. In *Ibrahim* v. *The King* (8) Lord *Sumner* for the Privy Council says:

(1) (1841) 9 Dowl. 487.
(2) (1831) 1 Dowl. 28.
(3) (1921) 2 K.B. 66, at 75.
(4) (1887) 18 Q.B.D. 537.
(5) (1807) Russ. & Ry. 132; 1 Camp. 324; 168 E.R. 721; 170 E.R. 973.
(6) (1913) L.R. 40 Ind. App., at p. 199.
(7) (1894) A.C. at p. 70.
(8) (1914) A.C. 599, at p. 616.

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"Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury *may* have been influenced by it, *even though without it there was evidence sufficient to warrant a conviction.*"

But in truth, though even such a test would not support the conviction here, it is not the real test, for that is found in the question whether the fundamental principle above stated has been departed from. If it has, the line of *ultra vires* has been passed and the proceeding is past repair, for, as will appear, consent is unavailing.

Where an error or defect occurs on the jurisdictional side of the line it may, in appropriate proceedings, have to be considered whether the provision infringed is merely directory or amendable, and whether it is too serious to be passed over, waived or consented to. In such a case also, it may also be the subject of inquiry whether substantial injustice has occurred, as, for instance, when discretion is invoked, or where a statute requires or authorizes such consideration. And a serious defect or error in criminal procedure is not one that can be waived or consented to, still less one in contravention of the words or public policy of a statute. When the line is for any reason passed, and the case is in the region of *ultra vires*, there is no room for any such inquiry, for legal injustice is then inevitable, and the accused is entitled to an annulment of the conviction, and therefore the introduction of an inquiry as to substantial injustice would be of the nature of a legal narcotic. See, for instance, *Bannister* v. *Clarke* (1).

The case of *Hamilton* v. *Walker* (2) already referred to, when closely examined, is a valuable guide. *Jervis's Act*, sec. 10, prescribed (as does sec. 57 of the New South Wales *Justices Act* 1902) that "every . . . information shall be for one offence only, and not for two or more offences." Literally the provision was complied with, since two separate informations were laid for two separate offences. The facts were almost identical in each case, and were treated by the Court as being "the same in both cases" (3). But the lumped hearing was held to be "within the spirit of the section." The old

(1) (1920) 3 K.B. 598, at p. 606. (2) (1892) 2 Q.B. 25.
(3) (1892) 56 J.P. 583, at p. 585.

common law practice of permitting several counts of different felonies or different misdemeanours was obviously calculated to be embarrassing and unfair. There was certainly a discretionary power in the presiding Judge to limit the prosecution to one charge, or as he thought just. But the joinder, however oppressive, was not illegal. The position at common law is sufficiently expounded in *Castro* v. *The Queen* (1) by Lord *Blackburn*, in *R.* v. *Bailey* (2) and *R.* v. *Southern* (3). Parliament, however, when committing the summary determination of criminal accusations to magistrates untrained in law, and less able to apply discretionary distinctions in this connection (*Jervis's Act*, sec. 10, and New South Wales *Justices Act*, sec. 57), took the matter into its own hands and forbade the possibility of unfairness or embarrassment by the joinder of offences in the one information. A contravention of that prohibition is positively illegal. The legislation was manifestly not directed to mere pleading, leaving the real evil and abuse untouched. By requiring the charge itself to be thus limited, it became a *necessary implication* or concomitant of the words of the enactment that "the case" so launched must be dealt with by itself. *Pollock* B. said (4): "In other words, *the statute requires that each case shall be considered on its own merits, and on the evidence given under one information.*" The learned Baron added:—"Here there is nothing to show that the justices, in acting on each information, proceeded on the evidence applicable *solely* to that information. In my opinion, therefore, the spirit of the enactment was violated, and both convictions must be quashed." *Williams* J. was of the same opinion. That *Pollock* B. meant by "the spirit" the necessary implication is shown by the report in the *Law Reports* of *Hamilton* v. *Walker* (5), where he refers to the well-known principle of the criminal law that each case should stand on its own merits, a principle that necessarily, in the absence of words to the contrary, attached, and was on the palpable reason of the enactment intended to attach, itself to the direct *prohibitory* provision as to the information. A direct decision, because on *habeas corpus*, that a summary conviction on an information for two offences is

(1) (1881) 6 App. Cas. 229, at pp. 244, 245.
(2) (1924) 2 K.B. 300, at pp. 304, 305.
(3) (1930) 22 Cr. App. R. 6, at pp. 8, 9.
(4) (1892) 56 J.P., at p. 585.
(5) (1892) 2 Q.B., at p. 28.

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illegal, in the presence of a section in the words of sec. 57 of the *Justices Act* is found in *R.* v. *Chue* (1), *cor. Hunter* C.J. (K.B. of Supreme Court of British Columbia). Precisely the same view was taken in an analogous case by the Privy Council in *N. A. Subramania Iyer* v. *The King-Emperor* (2). An Act provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The accused was tried on three charges and convicted. One charge was conspiracy. The acts charged were forty-one in number and extended over two years. It was argued that every single act was not an offence or the subject of a separate charge. Then it was argued that all the acts charged could have been given in evidence under the other two charges not open to objection, and therefore the accused was not prejudiced. On that view the Indian Court had struck out the first count and overruled the objections to the others. On appeal to the Privy Council (Lord *Halsbury* L.C. and Lords *Macnaghten*, *Davey*, *Robertson* and *Lindley*) it was held that the whole conviction was fatally bad. "The reason of such a provision" (that is, restriction of a trial to three offences within twelve months), said the Lord Chancellor (3), "is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to Judges and accused. It is likely *to cause confusion and to interfere with the definite proof of a distinct offence* which it is *the object of all criminal proceedure to obtain*. The policy of such a provision is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of *the essence of criminal procedure*." Then said Lord *Halsbury* (4): "Their Lordships think that the course pursued, which was plainly illegal, cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury. Upon the assumption that the trial was illegally conducted, it *is idle to suggest that there is enough left* upon the indictment upon which a conviction might have been supported if the accused had been properly tried. *The mischief sought to be avoided by the statute has been done*." Then his

(1) (1924) 42 Can. C.C. 382.
(2) (1901) L.R. 28 Ind. App. 257.
(3) (1901) L.R. 28 Ind. App., at pp. 262, 263.
(4) (1901) L.R. 28 Ind. App., at p. 263.

Lordship turned to an argument that it was merely an irregularity which sec. 537 might cure. Said Lord *Halsbury* (1):—" Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. *Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time*, and those offences spread over a longer period than by law could have been joined together in one indictment. . . . The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the *Code* positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the *Code* comes within the description of error, omission, or irregularity." I may interrupt that judgment by observing that, *mutatis mutandis*, the reasoning of Lord *Halsbury* fits exactly the reasoning of *Pollock* B. For it would be a singular distinction that would confine the legal effect of sec. 57 of the *Justices Act* (in New South Wales) to the information, which may be curable under the statute before conviction, leaving the Court at large to commit the real injustice by lumping the hearing of as many cases as it pleased. Sec. 57 separates offences from first to last by the necessary implication of its *prohibitory* words. The common law separates the hearing of " cases " ; and the section confines " a case " to a single offence, and, so read, the enactment carries the all-important and necessary implication that the common law rule as to separate consideration of each case is to be observed in accordance with the express statutory provision. After conviction the damage is done. Lord *Halsbury* went on to add (2) :—" Some pertinent observations are made upon the subject by Lord *Herschell* and Lord *Russell of Killowen* " in *Smurthwaite* v. *Hannay* (3). " Where in a civil case several causes of action were joined, Lord *Herschell* says (4) that ' if unwarranted by any enactment or rule it is much more than an irregularity ' ; and Lord *Russell of Killowen* in the same case says (5) : ' Such a joinder of plaintiffs is more than an irregularity : it is the constitution of a

(1) (1901) L.R. 28 Ind. App., at p. 263.
(2) (1901) L.R. 28 Ind App., at pp. 263, 264.
(3) (1894) A.C. 494.
(4) (1894) A.C., at p. 501.
(5) (1894) A.C., at p. 506.

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suit in a way not authorized by law and the rules applicable to procedure.' " The conviction was set aside.

It seems to me, with great respect, that there is no room left for argument as to the convictions in this case being nullities so far as their legal efficacy is concerned. Their only claim to existence is as facts devoid of legal warrant, and the fit subject of prohibition, because the justice acted " contrary to legal principles." (See per *Wright* J. in *R.* v. *Longe* (1).)

4. *Consent.*—In such a case as the present the jurisdiction derived from the King to dispense his royal justice is transgressed, and private submission is incapable of condoning it where personal liberty and forfeiture of property for crime are concerned. Over three hundred years ago *Ley* C.J. in *William's and Floyd's Case* (2) said : " It is a rule, that the assent of the parties cannot make that good which is against any fundamental point of the law." As is said by the late Professor *Kenny* in his *Cases on Criminal Law* (6th ed.), at pp. 475-476 : " The public interests are so deeply concerned in every instance of the administration of criminal justice that this maxim " (*Jus publicum privatorum pactis mutari non potest*) " applies with full force to each fundamental rule in criminal procedure ; and not least to those relating to evidence." He quotes *Erle* J. in *R.* v. *Bateman* (3), namely, " We cannot in a criminal case take anything as admitted," and says, " Hence in every criminal trial ' it is the duty of the Judge to see that the accused is condemned *according to law* ; and the rules of evidence form part of that law.' " The passage is founded on *Best* on *Evidence*, and the italics are those of Professor *Kenny*.

The classic modern authority is *Bertrand's Case* (4), which lays down the common law rule that " a prisoner can consent to nothing." And, says Sir *John Coleridge* for the Judicial Committee, " it is a mistake . . . to consider the question . . . . with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party."

(1) (1897) 66 L.J. Q.B. 278, at p. 279.
(2) (1623) Godb. 428, at pp. 430-431; 78 E.R. 251, at p. 253.
(3) (1845) 1 Cox C.C. 186.
(4) (1867) L.R. 1 P.C., at p. 534.

The basic principle is that stated by *Alderson* B. in *Graham* v. *Ingleby* (1), namely, "an individual cannot waive a matter in which the public have an interest." This is reaffirmed by the Privy Council in *Anctil* v. *Manufacturers' Life Insurance Co.* (2), and again stated by *Vaughan Williams* L.J. in *Norwich Corporation* v. *Norwich Electric Tramway Co.* (3). The subject is well treated in *Maxwell* on *Statutes*, 7th ed. (1929), at p. 331. The inability to consent in criminal matters is only an instance, though a very pronounced and well guarded instance. If what Lord *Halsbury* said in the case of *N. A. Subramania Iyer* v. *The King-Emperor* (4) be recalled to mind, it is plain that a course of criminal procedure that causes "embarrassment to Judges" cannot be made lawful by the simple consent of an individual. In *Bertrand's Case* (5) Sir *John Coleridge* said practically the same regarding the jury. If Parliament lays down, as it has laid down in criminal administration, a public policy of one offence only at a time, that policy must be adhered to and private consent cannot justify its contravention. In *Park Gate Iron Co.* v. *Coates* (6) *Montague Smith* J. said: "It is a rule in criminal matters that the parties cannot waive what the law directs." It is not correct to say that all irregularities can be waived. In *Abdul Rahman* v. *The King-Emperor* (7) Lord *Phillimore*, for the Judicial Committee, said: "They wish it to be understood that no serious defect in conducting a criminal trial can be justified or cured by the consent of the advocate of the accused." That is so, of course, apart from statutory alteration of the common law, and as such is a reaffirmation of what was said in *Bertrand's Case.* The Indian case just referred to was an instance of an *intra vires* irregularity by departing from affirmative directions, an irregularity which, however, fell within sec. 537, providing that no irregularity should lead to reversing a finding unless it had, "in fact, occasioned a failure of justice." That is, an affirmative finding was required. Their Lordships held the necessary fact had not been proved, since the irregularity was "unaccompanied by any probable suggestion

(1) (1848) 1 Exch. 651, at p. 657; 154 E.R. 277, at p. 279.
(2) (1899) A.C. 604, at p. 609.
(3) (1906) 2 K.B. 119, at p. 126.
(4) (1901) L.R. 28 Ind. App. 257.
(5) (1867) L.R. 1 P.C., at p. 535.
(6) (1870) L.R. 5 C.P. 634, at p. 639.
(7) (1926) L.R. 54 Ind. App. 96, at p. 104.

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of any failure of justice having been thereby occasioned" (1). It stands in marked contrast to *Subramania's Case* (2), and, as pointed out (3), the procedure adopted in that case "was one which the *Code* positively *prohibited*, and it was *possible* that it might have worked actual injustice to the accused." In *R.* v. *Gibson* (4) the Court, notwithstanding that prisoner's counsel in the exercise of his discretion did not object to evidence which was legally inadmissible, quashed the conviction. Lord *Coleridge* C.J. said it was the duty of the *Judge* in criminal trials to exclude inadmissible evidence. *Wills* J. expressly said that the duty was not lessened by counsel's mistake. The Judge "must take care that the prisoner is not convicted on any but legal evidence." *R.* v. *Dennis* (5) is an illustration of the futility of consent in such a case. In *Rattray* v. *Roach* (6) it was held that no admission, either in the primary Court or in the appellate Court, will supply the place of legal evidence. See *Larkin* v. *Penfold* (7). In Canada the point is clearly illustrated in *R.* v. *Cassidy* (8); *R.* v. *Theirlyock* (9), following *Dennis's Case*; and in *R.* v. *Hart and Kozaruk* (10), the same Court following the preceding case. *Biggins's Case* is reported in the *Law Times Reports* and the *Justice of the Peace Reports* (11). In the latter report *Cockburn* J. says (12):—"As to the point that the men were all tried together in the lump, it appears that the facts were *entirely* the same in all the cases." (I italicize the word "entirely.") The application there was for a rule nisi for certiorari, which was granted on one ground and refused on the "lump" ground, and that case is both on the fact and the law completely distinguishable from the present. In any event, the case on this point, even guarded as it is, appears to me in principle at variance with the later cases. *Crompton* J. thought that lumping the cases was not even an irregularity. *Blackburn* J. said nothing about it.

(1) (1926) L.R. 54 Ind. App., at p. 110.
(2) (1901) L.R. 28 Ind. App. 257.
(3) (1926) L.R. 54 Ind. App., at p. 109.
(4) (1887) 18 Q.B.D., at pp. 542-543.
(5) (1924) 1 K.B. 867.
(6) (1890) 16 V.L.R. 165; 11 A.L.T. 188.
(7) (1906) V.L.R., at pp. 546-547; 28 A.L.T., at p. 45.
(8) (1927) 49 Can. C.C. 93 (Ont. Sup. Ct.).
(9) (1928) 50 Can. C.C. 296 (Alb. Sup. Ct., App. Div.).
(10) (1929) 51 Can. C.C. 145.
(11) (1862) 5 L.T. (N.S.) 605; 26 J.P. 244.
(12) (1862) 26 J.P., at p. 246.

In this case the facts, so far from being entirely the same in all the cases with respect to the "unlawful assembly," were, or at least probably were, very markedly different. There was stone-throwing from 4.45 to 9.30 in the morning. Some of the evidence related to the state of assembly even later. There was firing on both sides at different times. There was shouting at times and a lull at others. Evidence was given, as, for instance, by Constable Sands, as to the state of the assembly at 5.30 a.m., and later at 9.30 a.m., and afterwards as to disorder and stone-throwing and violence. Constable Scholtz gave evidence as to the state of affairs after 5.30 a.m., when Timothy Patterson was in question. And these instances are not exhaustive. But in any event, and disregarding details of the evidence, there exists the broad principle stated by Lord *Halsbury* in *Subramania's Case* (1) that the Legislature has required that the tribunal shall not run the risk of considering any other matters than those appertaining to one case at a time, and that the accused shall not be embarrassed by having to separate them. That renders minute dissection of the evidence necessary. At p. 42 of the appeal case this passage appears: "At the request of Mr. *Clancy*, the Bench stated that the whole of the evidence given in these cases is taken into consideration in respect of each defendant for the purpose of determining whether there was an unlawful assembly." Not only were the informations separate, but the act of a specified individual "knowingly continuing" in an unlawful assembly must of necessity be a separate act. It could only be joint, if at all, in conjunction with the whole assembly, which would be nonsense. As several of the accused had left the place after police direction about 5 o'clock, it is plain that they were prejudicially affected by evidence that ought in all reason to have been disregarded so far as they were individually concerned. This is unquestionable, because no person can "continue" to be part of an assembly after he has severed himself from it, and evidence as to the state of the assembly *after* he has quitted it cannot rightfully form part of the evidentiary criterion of a necessary element of his guilt or innocence.

(1) (1901) L.R. 28 Ind. App. 257.

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This case, therefore, is one where the lumping of the cases was presumptively contrary to the implication of the prohibitory words in sec. 57, but also raised the presumption of prejudice, and those presumptions are not removed by any of the considerations that operated in *Biggins's Case* (1) or *Fry's Case* (2). The case falls within Lord *Reading's* judgment in *Parker* v. *Sutherland* (3), which incidentally approves of *Hamilton* v. *Walker* (4).

5. *Unlawful Assembly.*—I turn to the question of whether there was sufficient evidence to discharge the Crown's burden of proof that the assembly was unlawful. The statutory definition is as follows: "Any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do or to abstain from doing what he is legally entitled to do, shall be deemed to be an unlawful assembly."

The crucial problem here is whether the evidence sufficiently shows that any person sought to be intimidated or injured was "legally entitled" to work in the Rothbury mine. I would wholly dissent from any suggestion that a presumption should be made, in the absence of evidence, that any person attempting to work in the mine as an employee was legally entitled so to do. Such a presumption would violate the initial presumption of law in the absence of an express statutory enactment to the contrary, that an accused person is innocent until he is *proved* to be guilty. In relation to this case, such a presumption would throw upon the defendants the intolerable and, indeed, impossible burden of (*inter alia*) (1) identifying every person employed or intended to be employed on the mine, and then as to each such person negativing every possible circumstance that would entitle him to work at the mine, either on the terms of the award or otherwise; and (2) identifying the employers or proposed employers and similarly negativing their right in the circumstances to do what they were proposing to do. The criminal law as administered in British Courts is not, in my opinion, so unreasonable, or, indeed, so tyrannous, as to subject men to imprisonment with hard labour unless they are successful in

(1) (1862) 5 L.T. (N.S.) 605; 26 J.P. 244.
(2) (1898) 19 Cox C.C. 135; 78 L.T. 716.
(3) (1917) 25 Cox C.C., at p. 738.
(4) (1892) 2 Q.B. 25.

accomplishing such an unheard-of task. All the necessary knowledge of the circumstances was in the sole possession of the employers and employees said to be intimidated, and within reach of the prosecution.

Best on *Evidence* (12th ed., p. 373) says, with reference to "the serious question of the guilt or innocence of persons charged with crime," that "Numerous rules have from time to time been suggested for the guidance of tribunals in this respect, among which the following are the soundest in principle, and most generally recognized in practice:—1. The onus of proving *everything* essential to the establishment of the charge against the accused, lies on the prosecutor. 2. The evidence must be such as to *exclude, to a moral certainty, every reasonable doubt* of the guilt of the accused. 3. In matters of doubt it is not only safer to acquit than to condemn, since it is better that several guilty persons should escape than that one innocent person should suffer, but the accused is entitled to acquittal *as a matter of right.*" This is in accord with *Russell* on *Crimes* (8th ed., at p. 1896). Then says *Best*, at the place quoted, as to 1: "*There must be clear and unequivocal proof of the corpus delicti.*" That certainly includes proof of the alleged "unlawful assembly," membership of which each accused is charged with continuing. In *Peacock* v. *The King* (1) *Griffith* C.J. says (2): "It is the practice of Judges, whether they are bound to give such a direction or not, to tell the jury that, if there is any reasonable hypothesis consistent with the innocence of the prisoner, *it is their duty to acquit.*" *O'Connor* J. said (3): "The circumstances must be such that the jury may reasonably draw from them an inference of the prisoner's guilt, *and can reasonably draw no other inference.*" And the learned Justice states what is very apposite to this case: "It is, I think, necessary for the purposes of this case to add that an inference to be reasonable must rest upon something more than mere conjecture."

What is there more than conjecture to support the necessary element of the intimidated persons having a legal right to do what the assembly's object was to prevent them doing? Who were "the persons" who were to be intimidated or injured? No one knows whether they were unionists or non-unionists. When I say

(1) (1911) 13 C.L.R. 619. (2) (1911) 13 C.L.R., at p. 630.
(3) (1911) 13 C.L.R., at p. 661.

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"no one knows," I mean, of course, from the evidence of this case. A jury would be told to exclude rigidly from their minds all they had heard or read outside the trial and on other occasions when the accused were not present or represented, and a Court must not itself fall short of that duty. To fail in that respect would be infinitely worse than hearing two cases together in the presence of the accused. There is not a single word in the evidence of this case to indicate who the employers were, or the employees, except that some at least of the latter were former employees at the mine, and therefore unionists in all probability and bound as much as the employers', respondents to the award, to observe its provisions. It goes almost without saying that employees bound by an award cannot claim the legal right to aid and abet their employers to commit a breach of Commonwealth law or State law by infringing provisions of an award.

The facts necessary to establish criminality must bring the case within both the words and the spirit of the enactment constituting the crime (*Dyke* v. *Elliott*; *The Gauntlet* (1)). To me it is inconceivable that any person can be "legally entitled," either in words or in spirit, to engage with another in an act which when done is a clear and penalized contravention of a public statute.

To say that a unionist bound by an award may legally work for an employer also bound by it, on terms which contravene the award, means, of course, that he may legally *contract* so to work. Men do not work in a mine for an employer except on contractual terms expressed or implied. Here, confessedly the terms were expressed, though we are not told what they were, except that they were inconsistent with the award. How can such a contract be legal? It is in direct breach of the public policy embodied in the Act, forbidding such contracts and enforced by penalties, and it is in plain fraud of the Act. Neither party suing on such a contract could maintain an action for its breach, and yet that is the only suggested right in the parties alleged to be intimidated. The authorities for what I have said are numerous, and I shall refer to two only, namely, *Farmers' Mart Ltd.* v. *Milne* (2) and *Salford Guardians* v. *Dewhurst* (3).

(1) (1872) L.R. 4 P.C. 184, at p. 191.
(2) (1915) A.C. 106.
(3) (1926) A.C. 619.

Then, how is it shown that the persons intimidated had the necessary legal right? Mr. Thomas, the mine manager, said as to the intended employees:—"I saw men outside the colliery. I understand that the terms of employment in which they were to be engaged were not in accordance with the *award governing the industry*." He also said: "Some of them worked in the mine at rates lower than those specified in the award." So far as affirmative evidence goes, therefore, it appears there was an "award governing the industry," that its terms were departed from or to be departed from. No evidence of identity of employer or employed. How can it be said that the prosecutor had complied with the very first rule above quoted from *Best* on *Evidence*? At best for the prosecution the facts are equivocal, and in the oft quoted words of Lord *Stowell* in *Evans* v. *Evans* (1): "If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti* . . . but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature; and would, I take it, be an entire misapplication of the doctrine of presumptions." If the unlawfulness of the assembly were affirmatively proved, then the presence of the accused in certain circumstances might lead to a rebuttable presumption of fact as to the consciousness of its object, or the part of those who participated. But the unlawfulness of the assembly, as the Act requires it, remains wholly unproved. It is impossible to apply the second rule quoted and say it is satisfied. Even in a case not criminal in any real sense, this Court absolved the defendant on a ground very shortly stated. In *Houston* v. *Wittner's Pty. Ltd.* (2) it was said by the majority of the Court (*Knox* C.J. and *Gavan Duffy* and *Starke* JJ.): "*The evidence is consistent with different conclusions* and 'if anyone is to suffer from deficiency in evidence . . . at the trial it must be the person on whom the burden of proof lay.'" But if the principle there enunciated be sound so as to entitle to acquittal a company milk-vendor liable only to a comparatively small fine, notwithstanding

(1) (1790) 1 Hag. Con. 35, at p. 105; 161 E.R. 466, at p. 491.
(2) (1928) 41 C.L.R. 107, at p. 112.

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the magistrate's adverse finding of fact, I am unable to see why it should not be equally potent to safeguard the liberty of persons charged with a real crime, and liable to imprisonment with hard labour. It appears to me impossible to deny that at least "the evidence is consistent with different conclusions," one of those being that the award would have been infringed by the employment of the persons said to be intimidated or injured, whoever they might have been, on conditions inconsistent with the prescription of the award, or that the proposed employer or employers had no legal right to work the mine, and therefore no power to authorize miners to work therein, unless it be assumed the owners of the mine, presumably parties to the "award governing the industry," were to be the employers. Professor *Kenny*, in the work quoted (at p. 471), says that in accusations of crime the presumption of innocence throws back upon the accuser the burden of proving even negative averments of guilt, and quotes *R.* v. *Hazy and Collins* (1), which is, in my opinion, much in point.

6. *Continuance with Knowledge.*—Assuming the other objections to the convictions fail, I am of opinion that there was sufficient evidence in each case to sustain the finding.

GAVAN DUFFY AND STARKE JJ. Informations were laid in January 1930 against nineteen persons for knowingly continuing in an unlawful assembly contrary to the provisions of the *Crimes* (*Intimidation and Molestation*) *Act* 1929 of New South Wales.—See sec. 2 (sec. 545C (1)). Informations were also laid against two persons, Mitchison and Patterson, for that, being armed with something which, used as a weapon of offence, was likely to cause death or grievous bodily harm, each was a member of an unlawful assembly, contrary to the provisions of the same Act.—See sec. 2 (sec. 545C (2)).

These offences were triable summarily, before a Police or a Stipendiary Magistrate. They came on for hearing before a Police Magistrate, and the case of one Aubin, charged with knowingly continuing in an unlawful assembly, was taken first. Some suggestion, we understand, was made that all the cases be taken

(1) (1826) 2 C. & P. 458; 172 E.R. 207.

together, but the defendants objected, and the magistrate proceeded with the information against Aubin. He was convicted. The other informations remained for hearing, but, instead of each being heard separately, counsel for the defendants now consented to the several informations being tried together, and they were accordingly so heard—" in the lump " as has been said. During this hearing the depositions of two police officers, who had given evidence in Aubin's case, were, by consent, read over to them, and they adhered to them. These depositions were then admitted in evidence in the lumped cases being heard. Further, the evidence of two witnesses given in Aubin's case was tendered, and, by consent of counsel for all parties, admitted as evidence. And, at the request of counsel for the defendants, the magistrate stated that the whole of the evidence given in the lumped cases was taken into consideration in respect of each defendant for the purpose of determining whether there was an unlawful assembly. All the defendants on these lumped informations were convicted, and all except Mitchison and Patterson applied for and obtained, from a Judge of the Supreme Court of New South Wales, an order nisi for a statutory writ of prohibition. (*Justices Act* 1902 (No. 27), sec. 112 ; *Peck* v. *Adelaide Steamship Co.* (1).) The grounds were as follows : (1) That the conviction was against the evidence and the weight of evidence ; (2) that the evidence did not support the charge made ; (3) that the verdict and conviction and sentence were wrong in law ; and (4) that there was wrongful admission and rejection of evidence. The order nisi came on for hearing before the Supreme Court of New South Wales in Full Court. It was made absolute, and an order made that a writ of prohibition issue, directed to the prosecutor, an officer of police, and the Police Magistrate, restraining them from further proceeding on or in respect of the convictions. An appeal by special leave has been brought to this Court from the judgment, by the prosecutor, and it now falls for determination.

The learned Judges of the Supreme Court, following *R.* v. *Crane* (2) and *R.* v. *Dennis* (3), held that the simultaneous trial of several informations for several offences in a Court of summary jurisdiction

(1) (1914) 18 C.L.R. 167.
(2) (1920) 3 K.B. 236 ; (1921) 2 A.C. 299.
(3) (1924) 1 K.B. 867.

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was, whether with or without the consent of the accused persons, without jurisdiction, and a nullity. (See *Russell* v. *Bates* (1).) But the cases of *R.* v. *Crane* (2) and *R.* v. *Dennis* (3), and also that of *R.* v. *McDonnell* (4), were all charges tried upon indictment. And in a trial upon indictment the jury is, and can only be, impanelled and sworn to try the issues of the particular indictment—to find whether the accused be guilty or not guilty upon that indictment and no other. Therefore the simultaneous trial of several indictments is impossible, and the decision of the House of Lords that such a trial was a nullity and without jurisdiction inevitably follows. But the summary jurisdiction or authority of justices—whether Stipendiary or Police Magistrates, or not—is not confined to any particular information: within the limits of their jurisdiction, authority is conferred upon justices to hear and deal with all informations for offences, whether indictable or triable summarily, in the manner provided by the *Justices Act* 1902 (No. 27), secs. 21-51, 52-100. If the charge in respect of which the information is laid before the justices be triable summarily, their jurisdiction attaches, and it is difficult to follow how that jurisdiction is ousted by some irregularity in the hearing of the matter. Thus, in the present case, separate informations were laid against each defendant and they were severally present in the Court. The jurisdiction of the Police Magistrate thereby attached both over the subject matter and over the defendants in respect of that subject matter. There is weighty authority in favour of this view.

In *R.* v. *Justices of Staffordshire* (5) separate informations were laid against two persons for having used nets contrary to the Act 1 & 2 Wm. IV. c. 32, sec. 23. That Act provided: "If any person shall . . . use any . . . net . . . for the purpose of . . . taking game such person not being authorized to do so for want of a game certificate he shall, on conviction thereof, . . . forfeit and pay," &c., a fine. The defendants were out together at one and the same time, and each was using a net. The cases were heard as one and each defendant was convicted. A rule nisi for a certiorari was obtained

(1) (1927) 27 S.R. (N.S.W.) 257.
(2) (1920) 3 K.B. 236; (1921) 2 A.C. 299.
(3) (1924) 1 K.B. 867.
(4) (1928) 20 Cr. App. R. 163.
(5) (1858) 32 L.T. (O.S.) 105; 23 J.P. 486.

from the Court of Queen's Bench. Though, by sec. 45 of the Act it was provided that no summary conviction in pursuance of the Act should be quashed for want of form or be removed by certiorari or otherwise into any of Her Majesty's Courts of Record, this privative clause did not deprive the Court of Queen's Bench of jurisdiction to grant certiorari for a manifest want of jurisdiction. (See *Colonial Bank of Australasia* v. *Willan* (1).) Two objections were made upon the rule nisi. One, that the offence being joint the justices had no jurisdiction to convict severally. But Lord *Campbell* C.J. said that "that would not be an excess of jurisdiction but a misconstruction of the law." The justices had jurisdiction to hear the case, and, asked Lord *Campbell*, when did their jurisdiction cease? The other, that the justices exceeded their jurisdiction in trying both informations at the same time, there being in fact two separate informations, one against each. To this the Chief Justice answered that that may have been an irregularity but it was not a nullity. The rule nisi was accordingly discharged. In *Biggins's Case* (2) the defendants had been arrested on warrant and lodged in the lock-up house, taken together before the magistrate, and then charged with absenting themselves from service before the term of their contracts was completed, without the consent of their master. The Act on which the information was founded was 4 Geo. IV. c. 34, sec. 3, which enacted that "if any . . . handicraftsman," &c., "shall contract with any person . . . to serve him . . . for any time or times whatsoever . . . or having entered into such service, shall absent himself . . . before the term of his . . . contract shall be completed . . . it shall be lawful for" the "justice to commit every such person" &c. The evidence established that no separate charge was gone into or made against any or either of the defendants, nor was either tried separately or singly, but they were all tried together in the lump. Each defendant was convicted separately and fined. Motion was made to the Court of Queen's Bench for a rule nisi for certiorari. One of the grounds was that the justices had no jurisdiction to try all the parties together in a lump. But the Court—*Cockburn* C.J., *Crompton* and *Blackburn*

(1) (1874) L.R. 5 P.C. 417, at p. 442.
(2) (1862) 5 L.T. (N.S.) 605; 26 J.P. 244.

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JJ.—refused to grant a rule on this ground, though it was granted on another, immaterial to the cases now before us. As reported in the *Law Times*, *Cockburn* C.J. said (1):—"I think, also, that there should be no rule upon the ground of all the parties being tried at once. That proceeding was not intended to deprive each of the testimony of the others, but was thought to be a convenient method of disposing of the whole matter; and it does not appear that it was objected to." *Crompton* J. said (1):—"This Court does not interfere with every irregularity of justices. We quash their proceedings where they have acted without jurisdiction, but we do not interfere when they have exercised a discretion. As regards the trying of all these people together, that does not show a want of jurisdiction. It was thought to be more convenient to do so, and there was no application that each should be taken separately." In *Wells* v. *Cheyney* (2) the information charged that nine persons were severally disorderly in a house licensed for the sale of beer, and did severally refuse to quit such house upon being requested so to do by a constable, contrary to the statute in such case made and provided. The statute was 23 Vict. c. 27, sec. 41. The defendants severally desired that the charge against each of them be taken separately, but, on being informed by the justices that they would be at liberty to examine any of their number in defence of any other or others, they consented that the charge against all of them should be heard together. All but one were severally convicted and fined. A case was stated pursuant to 20 & 21 Vict. c. 43. One of the objections made to the convictions was that the offence was several, and could not be the subject of one information. The conviction was upheld. *Cockburn* C.J. said (3):—"If the objection had been persisted in, it might have been a good objection, but the only consequence would have been that a separate information would have issued against each of the persons. It was at most an irregularity that could be waived, and was so waived." In *Larkin* v. *Penfold* (4) a number of persons were severally charged on information that, each being a seaman lawfully engaged in the service of a ship, the defendant

(1) (1862) 5 L.T. (N.S.), at p. 607.
(2) (1862) 5 L.T. (N.S.), at p. 198.
(3) (1871) 36 J.P. 198.
(4) (1906) V.L.R. 535; 28 A.L.T. 42.

absented himself from his ship without leave, contrary to the *Merchant Shipping Act* 1894. *Cussen* J., of the Supreme Court of Victoria, expressed the opinion (1) that if the defendants consented to be tried together and to be absent from the Court during the whole or part of the proceedings, they would be bound by the result, notwithstanding such absence.

Apart from the case at present under appeal, the only decisions which are inconsistent with this line of authority are the Canadian cases *R.* v. *McDonald* (2), *R.* v. *Theirlyock* (3) and *R.* v. *Hart* (4), but the judgments in these cases are founded upon *R.* v. *Crane* (5) and *R.* v. *Dennis* (6), without observing any distinction between trials of offences on indictment and hearings of charges laid before justices in their summary jurisdiction.

Assuming that the simultaneous hearing of the informations in the cases now under appeal did not oust the jurisdiction of the justices, still it has been argued that the proceeding was so irregular and constituted such a serious defect in the mode of conducting a criminal matter that the convictions should not be allowed to stand, and that a writ of prohibition should issue pursuant to the statute. In support of this argument, we have been referred to *R.* v. *Bertrand* (7), *Abdul Rahman* v. *The King-Emperor* (8), *Hamilton* v. *Walker* (9) and other cases.

Undoubtedly Courts having appellate jurisdiction have frequently interfered and set aside convictions so obtained. This Court held in *Russell* v. *Bates* (10) that it was irregular in law for justices to proceed simultaneously with the trial of persons charged with several offences in the face of objection by the accused to such a course. The Victorian case *Davidson* v. *Darlington* (11) is inconsistent, we think, with this decision, and also with *R.* v. *Muir* (12). But it was founded upon *R.* v. *Sturt*; *Ex parte Ah Tack* (13), in which, as *Hood* J. observed in *Turner* v. *Mangan* (14), a joint offence was charged. Again, it is but a truism that every case must be decided on evidence

(1) (1906) V.L.R., at pp. 545-546; 28 A.L.T., at pp. 44, 45.
(2) (1928) 50 Can. C.C. 65.
(3) (1928) 50 Can. C.C. 296.
(4) (1929) 51 Can. C.C. 145.
(5) (1920) 3 K.B. 236; (1921) 2 A.C. 299.
(6) (1924) 1 K.B. 867.
(7) (1867) L.R. 1 P.C. 520.
(8) (1926) L.R. 54 Ind. App. 96.
(9) (1892) 2 Q.B. 25.
(10) (1927) 40 C.L.R. 209.
(11) (1899) 24 V.L.R. 667.
(12) (1896) 2 A.L.R. (C.N.) 322.
(13) (1876) 2 V.L.R. (L.) 103.
(14) (1904) 29 V.L.R. 789; 25 A.L.T. 253.

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given in relation to the particular charge ; therefore it is irregular to intermix trials, or to interject, as has been said, one trial into another (*Hamilton* v. *Walker* (1) ; *McBerny's Case* (2) ; *Parker* v. *Sutherland* (3)) ; yet if the Court be satisfied, even in cases which have been heard together, that the evidence relevant to a particular charge and none other, has been applied to that charge, the decision of the justices will be supported (*R.* v. *Fry* (4) ; *Ah Kan* v. *Cox* (5) ; *Loasby* v. *Main* (6) ; *R.* v. *Bullock* (7)). Further, it is irregular in proceedings in the nature of a criminal hearing to dispense with evidence and act upon admissions made by counsel (*Rattray* v. *Roach* (8)) ; yet the irregularity may be slight and unattended by any unfair consequences to the accused and not such a failure or miscarriage of justice as to constitute a mistrial (*Gleeson* v. *Yee Kee and Mow Sang* (9)). Again, on the retrial of an indictment for murder, after disagreement of the jury on the first trial, the Judicial Committee regarded it as gravely irregular to reswear some of the witnesses at the first trial and merely read over their evidence to them, though giving liberty to the prosecution and to the prisoner to examine and cross-examine (see *R.* v. *Bertrand* (10), cf. *Ex parte Bottomley* (11), *R.* v. *Lee Kun* (12)) ; yet, if a juror be incapacitated, the English practice is to swear " a fresh juror in place of the one incapacitated, but to offer the prisoner in case of felony his full right of challenge to the whole panel. The trial must begin *de novo*, and the witnesses must be resworn and examined afresh " (*Archbold's Criminal Pleading, Evidence and Practice*, 25th ed., p. 202). In many cases, however, the evidence already given has been read over to the witnesses, and upon their adhering to their evidence the trial has proceeded (*R.* v. *Beere* (13) ; *R.* v. *Foster* (14) ; *R.* v. *Thornhill* (15) ; *The Veronica Case* (murder) (16) ; and *R.* v. *Lawrence* (17)). No definite principle can be extracted from these cases. In some instances, the irregularity is so serious that the consent of the

(1) (1892) 2 Q.B. 25.
(2) (1897) 3 Can. C.C. 339.
(3) (1917) 25 Cox. C.C. 734.
(4) (1898) 19 Cox C.C. 135.
(5) (1902) 21 N.Z.L.R. 645.
(6) (1914) 33 N.Z.L.R. 974.
(7) (1903) 8 Can. C.C. 8.
(8) (1890) 16 V.L.R. 165 ; 11 A.L.T. 188.
(9) (1892) 18 V.L.R. 698 ; 14 A.L.T. 130.
(10) (1867) L.R. 1 P.C. 520.
(11) (1909) 2 K.B. 14.
(12) (1916) 1 K.B. 337.
(13) (1843) 2 Mood. & R. 472 ; 174 E.R. 353.
(14) (1836) 7 C. & P. 495 ; 173 E.R. 219.
(15) (1838) 8 C. & P. 575 ; 173 E.R. 624.
(16) (1902) 76 J.P. 267.
(17) (1909) 25 T.L.R. 374.

accused will not cure it ; in others, consent overcomes the irregularity ; whilst in yet others, it is very slight and unattended by any serious consequence to the accused, so that no substantial miscarriage of justice takes place and the Courts refuse to interfere. Much must therefore depend upon the nature of the charge, the character of the irregularity, and the conduct of the parties at the hearing. The fact that the accused person has consented to the irregular procedure is weighty, and one that is often decisive ; but it is not conclusive of itself and the Court must consider the whole of the circumstances.

Let us now turn to the present cases. Subject to a point as to the admissibility of evidence, to which we shall refer later, the evidence of the unlawful assembly was the same in each case, and all that remained was the identification of each accused with that assembly in the circumstances charged in the various informations. The magistrate was alive to the necessity of this identification, and the accused persons, either for convenience or for some other reason, assented to the course pursued. In these circumstances, we are satisfied that the course pursued was unattended by any prejudice to the accused, and we agree with the learned Chief Justice of the Supreme Court of New South Wales that " it shocks one's sense of fitness and of propriety that parties who . . . have consented to their cases being heard together . . . should afterwards be allowed to go behind that consent."

In our opinion, for the reasons already stated, the proceedings before the Police Magistrate were not such a failure and miscarriage of justice as to constitute a mistrial, and the law does not compel us so to declare.

Finally, it was contended that the convictions should be set aside because they were against evidence and the weight of evidence, and also because evidence was wrongly admitted. It is here important to remember that on statutory prohibition the function of the Court, so far as the evidence is concerned, is to say whether it is such that a reasonable man might, upon that evidence, properly come to the conclusion to which the tribunal sought to be prohibited has come (*Peck* v. *Adelaide Steamship Co.* (1)). Ample evidence was adduced to sustain the conviction. An assembly of five or

(1) (1914) 18 C.L.R., at p. 188.

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more persons, whose common object is, by means of intimidation or injury, to compel any person to do what he is not legally bound to do, or to abstain from doing what he is legally entitled to do, shall be deemed an unlawful assembly. A considerable body of men—estimated at from five thousand to ten thousand—assembled near the Rothbury Colliery during the night of 15th December 1929—or the early morning of the 16th—and at dawn moved on the colliery. Their object, as some of the accused said, was to " get " the " scabs " in the colliery—by which they meant the men who had been employed and were preparing to work the colliery. There was evidence that some few of the men in the assembly had firearms in their possession, and that others were armed with sticks, stones or bottles, and particularly that the defendant Mitchison had a stick some three feet long in his possession, and Patterson a bottle. Prima facie, a man is legally entitled to exercise his ordinary calling and to work when, where and for whom he pleases, and the men employed at the Rothbury Colliery were simply attempting to exercise their right to work. It was argued that they were not legally entitled so to do because they were engaged at less than the rates fixed by some arbitral tribunal or award, but the evidence fails to establish the precise terms of the award, and whether the employers or the employees at the Rothbury mine were covered or bound by it. The object of the assembly, on this evidence, was by means of intimidation and injury to prevent the men employed at Rothbury from working the colliery. And, but for the steady courage of the police officers there present, one cannot doubt, on the evidence, that that object would have been achieved. The presence of each accused in this assembly was proved, and that they all travelled considerable distances throughout the night to reach the place of meeting. Some stated that they had so travelled to attend an aggregate meeting of miners' lodges at Rothbury which was never held; this statement sounds incredible, in the circumstances, and it is, in any case, one wholly for the consideration of the magistrate.

The objection that evidence was wrongly admitted was thus stated: (1) " That the evidence relating to the assembly was applied to the defendants indiscriminately after some of the defendants had retired from it." No doubt the magistrate stated that the whole

of the evidence was taken into consideration in respect of each defendant, for the purpose of determining whether there was an unlawful assembly. But in order to ascertain the object of the assembly the acts or doings of those forming it during the whole course of its existence are properly admissible in evidence. The objection proceeded : (2) " That the evidence of the connection of each individual defendant with the assembly was used indiscriminately against all the defendants." But the statement of the magistrate, just referred to, negatives this contention : that statement makes it clear that the whole of the evidence was only taken into consideration for the purpose of determining whether there was an unlawful assembly, and that otherwise the case of each defendant was considered separately. That is the course one would expect from the experienced Police Magistrate who heard these cases, and there is no rule of law forbidding such a course, nor any presumption of fact that he acted wrongly, when every circumstance points to the conclusion that he acted properly and in accordance with law. Further, the evidence or depositions of Richard Thomas and Archibald Gilmour Virtue Wood, in *Aubin's Case*, were tendered, and, by consent, admitted as evidence in the cases now before us. Apparently these witnesses were not sworn nor their evidence read over to them : we do not remember that this objection was raised at the Bar, but the course taken regarding such depositions was, in our opinion, quite irregular, and ought not to have been pursued. There is, however, ample evidence without these depositions to support the convictions. And it has been laid down in New South Wales that the Court must look at the whole of the evidence before the magistrate and if, after rejecting all the improper evidence and giving effect to every other legal objection, enough remains which is unobjectionable, the conviction must be sustained (*Ex parte Ward* (1) ; *Ex parte Damsiell* (2) ; *Peck* v. *Adelaide Steamship Co.* (3)).

One other matter remains for consideration. The defendants collectively obtained an order nisi for prohibition instead of separate orders nisi as to each conviction, and the appellant insisted that this procedure is not permitted under the *Justices Act* 1902 of New

(1) (1855) 2 Legge 872. (2) (1901) 18 N.S.W.W.N. 245.
(3) (1914) 18 C.L.R. 167.

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South Wales. Such an objection, however, ought not to be considered at this late stage of the proceedings: if it had been taken at the proper time and in proper form, no doubt the irregularity, if it be one, could have been cured and separate orders obtained in each case. The result is that this appeal should be allowed, the judgment of the Supreme Court of New South Wales reversed, the order nisi discharged, and the conviction of the parties obtaining the order nisi thereby sustained.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and, as I agree with his reasons and conclusion, have nothing to add. The appeal should be allowed.

DIXON J. This is an appeal by special leave from an order of the Supreme Court of New South Wales making absolute an order nisi for statutory prohibition in respect of eighteen summary convictions. The convictions were made upon separate informations laid by the appellant against each of eighteen respondents severally. In the case of each of sixteen respondents the charge was that he knowingly continued in an unlawful assembly. In the case of each of two respondents the charge was that, being armed with something which, used as a weapon of offence, was likely to cause death or grievous bodily harm, he was a member of an unlawful assembly. The offences with which the respondents were thus charged are created by the *Crimes (Intimidation and Molestation) Act* 1929 (N.S.W.), which defines an unlawful assembly to be an assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do, or to abstain from doing what he is legally entitled to do. The prosecutions were all in respect of the same assembly, a gathering of between six and ten thousand coal-miners which, on 16th December 1929, moved upon the Rothbury coal-mine. The informant's case was that the common object of the assembly was by means of injury or intimidation to compel men who were working or about to work at the Rothbury coal-mine to abstain from so doing. Before these charges were heard, the question whether the assembly was unlawful was fought out before the magistrate in

another prosecution against some other defendant and the magistrate found that it was unlawful. Counsel for the informant and counsel for all eighteen defendants in the present case, who appeared also in that prosecution, thereupon agreed that the eighteen informations should all be heard together and that the depositions of some of the witnesses in the earlier case should be read in evidence. Accordingly, the defendants pleaded to the informations, witnesses were examined for the prosecution and cross-examined for the defence, and two depositions were read without calling the deponents. At the close of the case for the prosecution the magistrate, at the request of defendants' counsel, " stated that the whole of the evidence given in these cases is taken into consideration in respect of each defendant for the purposes of determining whether there was an unlawful assembly." Counsel for the defence then called nine of his clients and stated " that he did not wish to tender any more witnesses," and that " there was no conflict with the evidence of the police in respect of the other defendants who state that they withdrew the moment they realized it was an unlawful assembly." The defendants were all severally convicted, but they applied for and obtained a single order nisi for statutory prohibition to restrain further proceedings on or in respect of " the conviction . . . wherein the " defendants " were each convicted."

It may well be doubted whether sec. 112 of the *Justices Act* 1902-1918 authorizes the grant of a single order nisi in respect of several defendants convicted severally upon separate informations. But apparently, when the order nisi was made, the defendants had no intention of departing from the agreement by which their cases had been heard together, and they continued to deal with them collectively.

On the return of the order nisi, however, the point was taken that the convictions could not be supported because the informations had been heard together. In *Russell* v. *Bates* (1) the Supreme Court had held that a magistrate had no jurisdiction to hear together several informations against different defendants even by consent. The judgment of the Supreme Court in that case was reversed in this Court but for a reason which did not affect this ground (2),

(1) (1927) 27 S.R. (N.S.W.) 257. (2) (1927) 40 C.L.R. 209.

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and the Supreme Court followed its former judgment and made absolute the order nisi for statutory prohibition in respect of all eighteen convictions.

In deciding *Russell* v. *Bates* (1) the Supreme Court applied to proceedings before justices the authorities which establish that two indictments cannot be tried at once, and it appears from the cases which the learned Chief Justice of this Court has found that in some of the Provinces of Canada a like use has been made of these authorities.

There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or *ex officio* information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society. In the one the prisoner is brought to the bar of the Court " in his own proper person and being demanded concerning the premises in the indictment specified and charged upon him how he will acquit himself thereof he saith that he is not guilty thereof and thereof for good and evil he puts himself upon the Country and he who prosecutes for our Lord the King doth the like." In the other the defendant is given a sufficient opportunity to appear which (unless he be in custody because it is considered that he will abscond) he may exercise or not at his choice, and, whether he avails himself or not of his right to be present, he is dealt with by those assigned to keep the peace, who judge both law and fact. " There is," says *Blackstone*, " no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice " (4 *Comm.* 280). The tribunal is fixed and remains the

(1) (1927) 27 S.R. (N.S.W.) 257.

same whether the cases are dealt with successively or simultaneously. But upon a criminal inquest the jurors are summoned particularly to pass between their Sovereign Lord the King and the prisoner at the bar. The prisoner standing upon his deliverance may challenge them or any of them. At common law in treason and in felony he is entitled to a number of peremptory challenges, a right which in Australia has been extended to misdemeanours. When prisoners are jointly indicted they may sever or they may join in their challenges, and the consequences which ensue are prescribed by law. But there is no way allowed by law of putting in charge of one jury at one time two or more prisoners arraigned upon separate indictments. The jurors are specially chosen for the single purpose of trying one indictment or such of the prisoners arraigned on one indictment as they may have in charge. It is, therefore, not surprising that the Court of Criminal Appeal decided that it was not competent for a Court holding criminal inquests to depart from this method of trial and try by one jury simultaneously prisoners separately indicted (*R.* v. *Crane* (1); *R.* v. *Dennis* (2); and *R.* v. *McDonnell* (3)). Moreover, upon trials for treason and felony the prisoner has not been allowed to consent to variations of the procedure prescribed for his protection, although in the past there has been a difference in this respect in the case of misdemeanours (*R.* v. *Foster* (4) and *R.* v. *Thornhill* (5)). This, no doubt, is the basis of the observation made by Lord *Phillimore*, in relation to the administration of criminal justice in India, in delivering the judgment of the Judicial Committee in *Abdul Rahman* v. *The King-Emperor* (6), that "their Lordships . . . wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified . . . by the consent of the advocate of the accused." The requirement that prisoners arraigned on separate indictments should be tried separately did not depend on the character of the tribunal, but even if this were not so and it depended merely upon a right conferred upon the prisoners for their benefit, it might well be that, apart from the traditional rule in the case of treason and

(1) (1920) 3 K.B. 236 (cf. (1921) 2 A.C. 299).
(2) (1924) 1 K.B. 867.
(3) (1928) 20 Cr. App. R. 163.
(4) (1836) 7 C. & P. 495; 173 E.R. 219.
(5) (1838) 8 C. & P. 575; 173 E.R. 624.
(6) (1926) L.R. 54 Ind. App., at p. 104.

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felony, an attempt by a Court to try simultaneously more than one case before one jury would involve too serious an irregularity to admit of waiver.

But an entirely different view has long been taken of the right to a separate hearing in summary proceedings for statutory offences. In *R.* v. *Justices of Staffordshire* (1) two persons were charged on separate informations and separately convicted but the charges were heard simultaneously. By statute the proceedings were not removable by certiorari unless for excess of jurisdiction. The Court of Queen's Bench held that if the offences were joint, nevertheless in convicting severally the justices did not exceed their jurisdiction; whereupon it was objected that it was beyond their jurisdiction to hear two informations as one. Lord *Campbell* said:—"They had jurisdiction to hear each information. Is this more than an irregularity?" Counsel answered that it was a nullity. But Lord *Campbell* said:—"We must assume the justices applied to each case the evidence which was given in support of it. The proceedings were irregular, but not null." *Erle* J. concurred. In *Ex parte Biggins*; *R.* v. *Lipscombe* (2), several charges were heard together against several defendants who were severally convicted. The Court of Queen's Bench, in granting a rule nisi upon another point, refused to include the ground that the charges should have been heard separately. *Cockburn* C.J. said: "That proceeding was not intended to deprive each of the testimony of the others, but was thought to be a convenient method of disposing of the whole matter; and it does not appear that it was objected to." *Crompton* J. said: "As regards the trying of all these people together, that does not show a want of jurisdiction. It was thought to be more convenient to do so, and there was no application that each should be taken separately." *Blackburn* J. concurred. In *Wells* v. *Cheyney* (3) several persons were charged in one information with committing an offence severally. They took no objection and their cases were heard together, but they were convicted severally. Upon a case stated the convictions were upheld. The question in the special case was whether the objection was good "that the offences, if any, were

(1) (1858) 32 L.T. (O.S.) 105; 23 J.P. 486.
(2) (1862) 5 L.T. (N.S.) 605; 26 J.P. 244.
(3) (1871) 36 J.P. 198.

several, and could not be the subject of one information." Upon this question the propriety of hearing the defendants' cases together depended. *Cockburn* C.J. said that "it might have been a good objection, but the only consequence would have been that a separate information would have issued against each of the persons. It was at most an irregularity that could be waived, and was so waived." In *R.* v. *Sturt* (1) the Supreme Court of Victoria (*Stawell* C.J., *Fellows* and *Stephen* JJ.) refused to quash convictions upon separate informations because the charges were heard together. The offence charged appears to have been joint (see per *Hood* J. in *Turner* v. *Mangan* (2)); but in *Davidson* v. *Darlington* (3) *Holroyd* J. upheld convictions upon separate informations which were heard together, although the offences were several, when the guilt or innocence of the accused turned upon the same facts. In these cases the accused do not appear in any way to have waived the objection that they should not be tried together. In *R.* v. *Muir* (4), however, *Hood* J. set aside convictions for separate and apparently quite distinct offences charged against separate defendants because the justices had heard them together. The defendants do not appear to have waived the objection. In *Larkin* v. *Penfold* (5) *Cussen* J. observed that it followed from *Davidson* v. *Darlington* and other cases that if the defendants who were charged with separate offences consented to be tried together they would be bound by the result. See also *Johnson* v. *Kennedy* (6). In New Zealand *Stout* C.J. upheld separate convictions upon several charges although heard together (*Ah Kan* v. *Cox* (7)). In *Brown* v. *Bowden* (8) the argument and judgment are based upon the assumption that such a proceeding is binding.

It may be conceded that defendants charged upon different informations for summary offences are entitled to separate hearings, but these cases show that in England, Victoria and New Zealand it has long been considered that failure to give effect to this right does not go to the jurisdiction of the justices, nor to the validity of

(1) (1876) 2 V.L.R. (L.) 103.
(2) (1904) 29 V.L.R. 789; 25 A.L.T. 253.
(3) (1899) 24 V.L.R. 667; 5 A.L.R. (C.N.) 54.
(4) (1896) 2 A.L.R. (C.N.) 322.
(5) (1906) V.L.R. 535; 28 A.L.T. 42.
(6) (1922) V.L.R. 481; 43 A.L.T. 195.
(7) (1902) 21 N.Z.L.R. 645.
(8) (1900) 19 N.Z.L.R. 98.

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the conviction, but is an irregularity only which the defendants may waive. This view is in accordance with principle as well as with justice and convenience. The statutory requirement that an information shall be confined to one offence does not appear to affect the question whether a defendant may waive his right to a separate hearing of every information.

Of course when parties consent to several charges being heard together they do not lose or impair their right to the exclusion of all evidence not lawfully admissible against them in the consideration of the charge against them. If, however, acting upon the consent of the parties, the justices do hear separate charges together, there seems to be no reason for presuming until the contrary is shown that the justices have infringed upon this right, and confused the evidence and applied that admissible only upon one information to the others. Such a case differs widely from that in which the justices, having heard an information, reserve their decision for the very purpose of sophisticating their judgment by hearing another. In so doing they intimate an intention of informing their minds improperly. This is the ground upon which *Pollock* B. seems to have proceeded in *Hamilton* v. *Walker*, which is best reported in the *Justice of the Peace Reports* (1). Compare *R.* v. *Fry* (2); and *Parker* v. *Sutherland* (3); *Ah Kan* v. *Cox* (4); *Loasby* v. *Main* (5).

The statement made in the present cases at the close of the prosecution, while it shows that the magistrate did consider all the evidence for the purpose of deciding whether there was an unlawful assembly, implies that he did not do so for the purpose of deciding whether the defendants knowingly continued therein or were armed and were members thereof.

In point of fact the evidence given for the prosecution was all relevant to the issue of unlawful assembly. It is true that some of the defendants appear to have retired shortly after the first rush, and that the evidence describes the doings of the assembly for some time afterwards. But upon the issue what the purpose and object of the assembly was the evidence of the whole incident, which was

(1) (1892) 56 J.P. 583.
(2) (1898) 78 L.T. 716; 19 Cox C.C. 135.
(3) (1917) 25 Cox C.C. 734; 116 L.T. 820.
(4) (1902) 21 N.Z.L.R., at p. 652.
(5) (1914) 33 N.Z.L.R. 974.

entire and inseparable, was strictly admissible. Doubtless proof of what took place after the first rush was superfluous in the case of these defendants, because the intention of the assembly, by injury and intimidation, to compel the men working or about to work at Rothbury to abstain from so doing had then been vociferously declared in unmistakable, if sanguinary, terms. But evidence is not irrelevant because it is unnecessary.

Upon the issue whether the defendants knowingly participated in the unlawful assembly the evidence was pointedly directed to each individual, and there was no likelihood of confusion.

Whether the remedy of statutory prohibition would be available to correct such an error if it appeared that the magistrate did take into consideration inadmissible evidence, if there was admissible evidence which justified his decision, it is unnecessary to decide; for there is no reason to think that he did so. But this point should not be passed by without referring to the terms of sec. 115 and *Ex parte Ward* (1); *Ex parte Elliott* (2); *Ex parte McCallum* (3); *Ex parte Damsiell* (4); *Ex parte Moy Shing* (5); and compare *Smith* v. *Hennessey* (6): see also *Peck* v. *Adelaide Steamship Co.* (7).

Another objection relied upon is that depositions taken in the earlier case were, by consent, read in evidence. In *R.* v. *Bertrand* (8) the Privy Council expressed their Lordships' "anxious wish to discourage generally the mode of laying the evidence before the jury which was adopted" in that case on a second trial for murder, and consisted of swearing witnesses who had already given evidence on the former trial and reading to them the Judge's notes of the evidence they had then given. But their Lordships were careful to say, even in that case, that they did "not pronounce that anything amounting in law to a mistrial can fairly be charged on the course pursued"; and it appears that a similar course has been adopted both before and since in England at trials upon indictment. See *R.* v. *Foster* (9); *R.* v. *Beere* (10); *R.* v. *Lawrence* (11);

(1) (1855) 2 Legge 872.
(2) (1881) 2 N.S.W.L.R. 97.
(3) (1885) 1 N.S.W.W.N. 136.
(4) (1901) 18 N.S.W.W.N. 245.
(5) (1904) 21 N.S.W.W.N. 189.
(6) (1902) 19 N.S.W.W.N. 23.
(7) (1914) 18 C.L.R. 167.
(8) (1867) L.R. 1 P.C., at p. 535.
(9) (1836) 7 C. & P. 495; 174 E.R. 353.
(10) (1843) 2 Mood. & R. 472; 173 E.R. 219.
(11) (1909) 25 T.L.R. 374.

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and the discussion of *R.* v. *Monson* (1), and per *Phillimore* J. in *Ex parte Bottomley* (2). Moreover, the considerations which prompted their Lordships' observations are not present in the case of a magistrate who has seen and heard the witnesses give the evidence which the depositions record. But in any case, as the judgments in *Ex parte Bottomley* show, to read depositions before a magistrate by consent is not contrary to law. See also *Gleeson* v. *Yee Kee and Mow Sang* (3).

It is said, however, that the evidence did not establish an unlawful assembly because it did not prove that the men working or about to work at Rothbury were legally entitled to do so. This contention rests upon the fact that during his cross-examination a witness said these men were employed at less than rates fixed by the "award governing the industry." The award was not put in evidence, and no reliance was placed upon the point before the justices where it might have been met by evidence that these men were not entitled to the benefit of any award, nor employed by a person bound by it.

Of course the burden rested upon the informant of proving every ingredient in the offence charged, including the lawfulness of the acts from which those intimidated were compelled to abstain. The informant did prove that, by intimidation, men were compelled to abstain from ordinary work at a coal-mine. It might be thought that, prima facie, ordinary work should be considered lawful. The work is of a description which neither statute nor common law directly makes illegal, but however improbable, it may be perhaps possible that its legality is affected by some award which the Court cannot notice without proof. In these circumstances the evidence might seem enough to warrant the conclusion that the work was lawful unless and until some instrument is produced which makes that conclusion less probable.

The only suggestion made is that an award exists prescribing a minimum wage. No proof is adduced that it affected the men in question or their employer. If we were to speculate as to the contents of the award to which the witness referred we might remember that an award prescribing a minimum wage does not

(1) (1903) 67 J.P. 267.
(2) (1909) 2 K.B., at p 20.
(3) (1892) 18 V.L.R. 698; 14 A.L.T. 130.

usually make it unlawful for the employee to work. It makes it unlawful for the employer to pay less for the work than the prescribed rate. Moreover, when the object of penal provisions is to safeguard and protect persons of some particular description, it generally follows that those who are to be advantaged do not themselves commit an illegality if they connive at the benefits being withheld. It may well be that this is so in the case of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, which secures to persons entitled to the benefit of an award its observance by those bound by it. But it is enough to say that prima facie evidence was given of the lawfulness of what the persons intimidated were compelled to refrain from doing.

A further contention was raised to the effect that the evidence in the case of some of the defendants was insufficient to support the conclusion that they knowingly continued in the unlawful assembly or being armed were members thereof. The evidence upon examination appears quite sufficient in each case.

The appeal should be allowed, and the order of the Full Court discharged and in lieu thereof the order nisi should be discharged.

Appeal allowed without costs. Order of the Supreme Court discharged. In lieu thereof order nisi discharged with costs. Convictions restored.

Solicitor for the appellant, *J. E. Clark*, Assistant Crown Solicitor for New South Wales.

Solicitors for the respondents, *C. Jollie Smith & Co.*

J. B.