[HIGH COURT OF AUSTRALIA.]

GRAYNDLER . . . . . APPELLANT;
INFORMANT,

AND

CUNICH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *July* 25, 26; *Aug.* 16.

MELBOURNE, *Oct.* 17.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

High Court—Appeal from inferior court of State exercising Federal jurisdiction—Appeal not brought in manner prescribed by State law for appeal to Supreme Court—Appeal from Court of Petty Sessions (N.S.W.)—Notice of appeal—Dismissal of information with costs—Statutory prohibition—Judiciary Act 1903-1937 (*No.* 6 *of* 1903—*No.* 5 *of* 1937), *secs.* 27, 39 (2) (*b*), (*c*)—*High Court Procedure Act* 1903-1937 (*No.* 7 *of* 1903—*No.* 5 *of* 1937), *sec.* 37—*Rules of the High Court, Part II., sec. IV., r.* 1—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), secs. 101, 112—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *sec.* 9.

An appeal to the High Court from the decision of an inferior court of a State in the exercise of Federal jurisdiction which is not brought in such manner as is prescribed by the law of the State for bringing appeals from that inferior court to the Supreme Court of the State in like matters is incompetent.

So *held*, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Evatt* J. doubting).

Held, further, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ., that where an information has been dismissed by a Court of Petty Sessions of New South Wales exercising Federal jurisdiction, the informant cannot, by adopting the procedure provided by sec. 112 of the *Justices Act* 1902 (N.S.W.) for an appeal by way of statutory prohibition, appeal to the High Court from the order of dismissal or (*Evatt* J. dissenting), where the information has been dismissed with costs against the informant, from the order for costs.

Ex parte Kirkpatrick, (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15; *Ex parte McPherson*; *Re Moss*, (1932) 50 W.N. (N.S.W.) 25; and *In re O'Lachlan*, (1886) 3 W.N. (N.S.W.) 54, in so far as it was therein held that the

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procedure by way of statutory prohibition under sec. 112 of the *Justices Act* 1902 (N.S.W.) might be applied to prohibit proceedings upon an order for costs where an information had been dismissed, not followed.

Per Evatt J.: Observations on the meaning and effect of sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

Grayndler v. *Broun*, (1928) 27 A.R. (N.S.W.) 46, referred to.

PROHIBITION and APPEAL from a Court of Petty Sessions of New South Wales.

Baldo Cunich was charged before a Court of Petty Sessions constituted by a police magistrate sitting at Young in the State of New South Wales with offences against sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. There were four charges. In two cases Cunich was charged with dismissing two employees by reason of the circumstance that they were members of an organization—the Australian Workers' Union—and in two cases he was charged with dismissing the same two employees by reason of the circumstance that they were entitled to the benefit of an award of the Commonwealth Court of Conciliation and Arbitration. The magistrate dismissed the informations, in one case with costs, and in the others with no order as to costs. In the former case the informant availed himself of the procedure provided by the *Justices Act* 1902 (N.S.W.), sec. 112, and obtained from a justice of the High Court a rule nisi for prohibition to prohibit "further proceedings on or in respect of the adjudication and order . . . dismissing an information that" &c. (setting out the charge) "and ordering the applicant to pay costs amounting to the sum of £6 6s." In all the cases the informant served notices of appeal to the High Court.

Further facts appear in the judgments hereunder.

Miller (with him *McKeon*), for the appellant. In bringing these matters before this court by way of notice of appeal the correct procedure was followed. The right of appeal is given by sec. 73 of the Constitution. The provisions of sec. IV., rule 1, of Part II. of the High Court Rules are directory (*Bell* v. *Stewart* (1)). The matters now before the court do not come within the scope of sec. IV., rule 1. There is not any method prescribed by the law of the State for the

(1) (1920) 28 C.L.R. 419.

bringing of appeals from an inferior court exercising Federal jurisdiction to the Supreme Court of the State. Conditions prescribed by the State law are not binding upon this court: See *Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (1). A matter properly before this court is quite open, and will be dealt with as an ordinary appeal (*Ex parte Gordon* (2); *Bell* v. *Stewart* (3); *Clyde* v. *Bolot* (4)). Even assuming but not admitting that the procedure by way of notice of appeal is incorrect in this case, the matter is properly before this court on the order nisi for a writ of prohibition. The question of the true construction of sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and the obligations thereunder is common to that application and the appeals; therefore the question as to the correct procedure in approaching this court is academic. The findings made by the magistrate did not exculpate the defendant. Upon those findings the defendant should have been convicted. The defendant did not prove reasons for the dismissals such as would bring him within the protection of sub-sec. 4 of sec. 9. He did not show, e.g., that the dismissals were due to the fact that the increased working expenses necessitated a reorganizing of his business and a reduction in the number of his employees (*Grayndler* v. *Broun* (5))—See also *Landon* v. *Diserens Ltd.* (6). The onus of proof was upon the defendant (*O'Reilly* v. *Blue* (7)). Sec. 9 was considered in *Pearce* v. *W. D. Peacock & Co. Ltd.* (8), and similar sections were considered in *Eaton* v. *McKenzie*; *Cowley* v. *Dunn* (9) and *Connington* v. *Todd* (10). Upon the evidence it was open to the magistrate to hold that at the material time there was a subsisting employment from which the employees were dismissed.

Maguire, for the respondent. In a prosecution under sec. 9 (1) (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 the principal question to be determined by the court of summary jurisdiction is: What was the substantial reason of the defendant

(1) (1912) 15 C.L.R. 235.
(2) (1906) 3 C.L.R. 724.
(3) (1920) 28 C.L.R., at p. 424.
(4) (1924) 34 C.L.R. 144, at p. 145.
(5) (1928) 27 A.R. (N.S.W.) 46.
(6) (1924) 23 A.R. (N.S.W.) 143.
(7) (1927) 26 A.R. (N.S.W.) 111, at p. 112.
(8) (1917) 23 C.L.R. 199.
(9) (1916) 12 Tas.L.R. 94.
(10) (1909) 8 A.R. (N.S.W.) 368.

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for the act complained of? An employer who dismisses an employee because he cannot afford to pay the award wages, as was found as a fact in this case, does not come within the scope of sec. 9 (1) (*b*) (*Connington* v. *Council of the Municipality of Kogarah* (1)). If there are a series of reasons leading to the dismissal, the court must determine which was the dominating reason or effective cause. Upon the proper interpretation of his findings of fact, particularly having regard to his reference to *Grayndler* v. *Broun* (2), the magistrate found that the effective reason for the dismissal was a desire to economize. At the material time there was not any subsisting arrangement of employer and employee; even if there were, the evidence shows that the employees declined to work under the existing contract. The onus was upon the informant to prove the terms and conditions of the employment, if any. The employment was from hour to hour, or, at most, from day to day. The appeals were not properly instituted and should be struck out. The correct procedure is by way of case stated.

Miller, in reply. The magistrate found as facts that the men were employed by the defendant and that he had dismissed them because they had lawfully entitled themselves to the benefit of the award. The procedure by way of case stated or prohibition is not an appeal in the full sense as contemplated by sec. 73 of the Constitution.

[EVATT J. referred to *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3).]

[LATHAM C.J. referred to *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4); *Dunlop Perdriau Rubber Co. Ltd.* v. *Federated Rubber Workers' Union of Australia* (5); *R.* v. *Hush*; *Ex parte Devanny* (6).]

The matters are properly before this court, which should either convict and determine the quantum of penalty, or refer the matters back to the magistrate with the intimation that his decision was erroneous.

Aug. 16. The matters came on for further argument on the right of appeal to the High Court.

(1) (1913) 12 A.R. (N.S.W.) 40, at p. 44.
(2) (1928) 27 A.R. (N.S.W.) 46.
(3) (1923) 32 C.L.R. 413.
(4) (1931) 46 C.L.R. 73.
(5) (1931) 46 C.L.R. 329.
(6) (1932) 48 C.L.R. 487.

Miller. The informant is a " person aggrieved " within the meaning of sec. 112 of the *Justices Act* 1902 (N.S.W.), and, therefore, is entitled to apply for a prohibition. This is so where the information has been dismissed and the informant ordered, as here, to pay costs (*In re O'Lachlan* (1) ; *Ex parte Kirkpatrick* (2)). A " person aggrieved " is a person who has suffered a legal grievance (*Ex parte Sidebotham* ; *In re Sidebotham* (3)). Once there is ground laid for prohibition as to any part of an order then the whole matter is open to the appellate court. Sec. IV., rule 1 of the Appeal Rules merely relates to procedure ; it does not operate to prevent an appeal being brought (*Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (4)). An appeal is the appropriate way to challenge on facts and law the dismissal of the information. Alternatively, special leave should be granted as in *Donohoe* v. *Chew Ying* (5). Sec. 9 (1) is an important section. It affects a very great number of people.

Maguire. Sec. 39 of the *Judiciary Act* is a regulation and restriction of the right of appeal conferred by sec. 73 of the Constitution. *Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (6) was wrongly decided. Sec. 39 of the *Judiciary Act* regulates the method in which appeals are to be brought. Sub-sec. 2 (*b*) of that section is superfluous unless it was meant to create some exception to the right of appeal. An appeal does not lie from the decision of the magistrate to the Supreme Court ; therefore there is not any appeal as of right from that decision to this court. The dissenting judgment in *Ex parte Kirkpatrick* (2) should be preferred to the majority judgment. The word " order " in sec. 81 of the *Justices Act* is used in the sense of a successful termination of proceedings instituted by complaint. The informant is not a " person aggrieved " within the meaning of sec. 112 of the *Justices Act* (*R.* v. *Keepers of Peace and Justices of County of London* (7)). The judgment in *Ex parte McPherson* ; *Re Moss* (8) followed the majority judgment in *Ex parte Kirkpatrick* (2) and should fall

(1) (1886) 3 W.N. (N.S.W.) 54.
(2) (1916) 16 S.R. (N.S.W.) 541 ; 34 W.N. (N.S.W.) 15.
(3) (1880) 14 Ch. D. 458, at p. 465.
(4) (1912) 15 C.L.R., at p. 238.
(5) (1913) 16 C.L.R. 364.
(6) (1912) 15 C.L.R. 235.
(7) (1890) 25 Q.B.D. 357, at p. 361.
(8) (1932) 50 W.N. (N.S.W.) 25.

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with it. The informant could have appealed to Quarter Sessions on the facts, or to the Supreme Court by way of stated case on a question of law.

Cur. adv. vult.

Oct. 17.

The following written judgments were delivered :—

LATHAM C.J. The respondent, Baldo Cunich, was charged before a Court of Petty Sessions constituted by a police magistrate sitting at Young in the State of New South Wales with offences against sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. There were four charges. In two cases the defendant was charged with dismissing two employees by reason of the circumstance that they were members of an organization—the Australian Workers' Union—and in two cases he was charged with dismissing the same two employees by reason of the circumstance that they were entitled to the benefit of an award of the Commonwealth Court of Conciliation and Arbitration. The magistrate dismissed the informations, in one case with costs, and in the others with no order as to costs. In the former case the informant availed himself of the procedure provided by the *Justices Act* 1902 (N.S.W.), sec. 112, and obtained from a justice of the High Court a rule nisi for prohibition to prohibit "further proceedings on or in respect of the adjudication and order . . . dismissing an information that" &c. (setting out the charge) "and ordering the applicant to pay costs amounting to the sum of £6 6s." In all the cases the informant served notices of appeal to this court. It is objected that the informant has no right of appeal in the manner which he has chosen. It may be mentioned that it is not disputed that the informant could have appealed to this court by way of case stated under sec. 101 of the *Justices Act* and following sections.

The Court of Petty Sessions, in hearing a charge of an offence against a law made by the Commonwealth Parliament, was exercising Federal jurisdiction (*Judiciary Act* 1903-1937, sec. 39 (2) ; Constitution, sec. 76 (ii.)). That jurisdiction has been conferred upon State courts subject to the provisions contained in the *Judiciary Act*, sec. 39. The provision which is important in this case is sec. 39 (2) (*b*), namely : "Wherever an appeal lies from a decision of

any court or judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court." It is under this provision that the informant claims that he is entitled as of right to appeal to the High Court. The terms of the sub-section show clearly that, notwithstanding what was said in *Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (1), an appeal from an inferior court lies as of right to the High Court under this provision only where an appeal lies from that court to the Supreme Court of the State. Where, in a case to which sec. 39 applies, that is, a case of Federal jurisdiction, there is no appeal to the Supreme Court from the decision of the inferior court, there can be no appeal to the High Court as of right, though sec. 39 (2) (*c*) provides that in such a case the High Court may grant special leave to appeal.

The *High Court Procedure Act* 1903-1937, sec. 37, provides that "appeals to the High Court shall be instituted within such time and in such manner as is prescribed by rules of court." The relevant rule of court in this case is rule 1 of sec. IV. of the Appeal Rules of the High Court. This rule is in the following terms: "Appeals to the High Court from decisions of inferior courts of a State in the exercise of Federal jurisdiction shall be brought in the same manner and within the same times, and subject to the same conditions, if any, as to security or otherwise, as are respectively prescribed by the law of the State for bringing appeals from the same courts to the Supreme Court of the State in like matters." Thus an appeal to which this rule applies must be brought in such manner as is prescribed by the law of the State for bringing appeals from the inferior court to the Supreme Court of the State in like matters. In the present case the informations were dismissed. In what manner may an appeal be brought in such matters (the dismissal of an information) from the Court of Petty Sessions to the Supreme Court? As already stated, the *Justices Act* 1902, secs. 101 et seq., does provide for an appeal in the case of a dismissal of an information by way of case stated, but this manner of appealing has not been adopted in any of the present cases. The State law contains no

(1) (1912) 15 C.L.R., at p. 238.

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provision for appeal by way of notice of appeal. Therefore the four appeals to this court by way of notice of appeal should be struck out as incompetent.

The *Justices Act* 1902, sec. 112, however, provides for an appeal from a Court of Petty Sessions to the Supreme Court by way of statutory prohibition. This section provides that: "(1) Any person aggrieved by any summary conviction or order of any justice or justices may, within twenty-one days after the conviction or order, apply . . . to the Supreme Court or . . . to a judge thereof . . . for a rule or order calling on the justice or justices, and the prosecutor or person interested in maintaining the conviction or order to show cause why a prohibition should not issue to restrain them from proceeding or further proceeding, as the case may be, upon or in respect of such conviction or order."

A prosecutor who has been disappointed by the dismissal of an information laid by him is not "a person aggrieved" within the meaning of such a provision (*R.* v. *Keepers of Peace and Justices of County of London* (1)). It is obvious that when an information has been dismissed it is not possible to prohibit any further proceeding upon the order of dismissal; there is nothing to prohibit: *Ex parte Kirkpatrick* (2), in which a unanimous judgment followed the case last cited and applied it to sec. 112 of the *Justices Act*. It was also unanimously held in that case that an order of dismissal without more was not a "conviction or order" within the meaning of sec. 112.

But it is contended that, when an information is dismissed with costs, there may be an appeal to the Supreme Court by way of statutory prohibition under sec. 112. It was so held by the majority of the court in *Kirkpatrick's Case* (2), and this decision was followed by the Supreme Court of New South Wales in *Ex parte McPherson* (3). The same conclusion had been reached as long ago as 1886 in *In re O'Lachlan* (4). These decisions have been challenged, and it is necessary to consider whether the cases were rightly decided on this point.

(1) (1890) 25 Q.B.D. 357.
(2) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15.
(3) (1932) 50 W.N. (N.S.W.) 25.
(4) (1886) 3 W.N. (N.S.W.) 54.

In the two more recent cases cited the Supreme Court made a rule absolute for a prohibition with respect to so much of the order of dismissal as ordered the payment of costs by the informant. It was recognized that the order dismissing the information could not be set aside or dealt with in any way in proceedings by way of statutory prohibition. But in each of the cases the Supreme Court examined the order for dismissal, held that it was wrong, and, though not dealing with it in any way, prohibited proceedings upon the order for costs. Thus the result was that, though the order for dismissal could not be challenged by the procedure adopted, the order for costs, which depended upon the order for dismissal and was purely incidental to it, was made the subject of prohibition. But, as long as an order for dismissal remains untouched, so that it must be taken that a defendant was rightly acquitted of the charge made, there can be no ground for prohibiting proceedings on a consequential order for costs. Thus, in my opinion, the cases cited were wrong in holding that the procedure by way of statutory prohibition may be applied to prohibit proceedings upon an order for costs where an information had been dismissed. It may be added that the result of the procedure adopted in the cases cited was that, though the order for dismissal was held to have been wrongly made, it still preserved its full force and effect, so that it would be a complete answer to any further proceeding for the same offence.

For the reasons stated I am of opinion that the appeal of the present appellant by way of statutory prohibition is incompetent, and that it also should therefore be struck out.

An application was made for special leave to appeal. It is said that it is desired to obtain an interpretation of sec. 9 of the *Commonwealth Conciliation and Arbitration Act*, which is an important section. But the findings of the magistrate were very ambiguous, and the question of the construction of the section is not raised in a clear and unembarrassed manner. I am also affected to some extent in the exercise of discretion in this case by the fact that the defendant was acquitted of the charges.

In my opinion these are not cases in which special leave to appeal should be granted.

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RICH J. I have had the advantage of reading the judgments of the Chief Justice and of *Starke* J. and I agree in their conclusion that the appeals instituted by notice of appeal are irregular, and that statutory prohibition is not a procedure by which an order of dismissal may be appealed against. While the order of dismissal stands the order for costs must be regarded as right and therefore cannot be effectually appealed against.

What has troubled me in this case was the exercise of discretion to grant or refuse special leave. The magistrate in his findings seems to have borrowed language from the judgment of *Street* J. in *Grayndler* v. *Broun* (1). At the Bar there was a good deal of argument as to the effect of a finding so expressed in relation to the facts appearing in the evidence, and there can be no doubt that the difficulty of interpreting the findings is a preliminary question which must be surmounted before we can give a decision of general application. In considering applications for special leave no one member of the Bench should exercise his discretion without having regard to the views formed by other members of the Bench as to the character of the case and the grounds upon which, if special leave is granted, it is likely to be decided. Having regard to all the considerations on one side and the other arising in this case I am not prepared to dissent from the conclusion that special leave ought to be refused.

I may add to the authorities cited during the argument on the interpretation of sec. 101 and sec. 112 of the *Justices Act* of New South Wales a reference to the judgment of *Pring* J. in *MacLaurin* v. *Hall* (2).

In my opinion all the appeals should be struck out.

STARKE J. Proceedings brought forward as appeals from the orders of a police magistrate sitting as the Court of Petty Sessions at Young in the exercise of Federal jurisdiction. Four of the appeals were launched by notices of appeal and another by what is known as a rule or order nisi for a statutory writ of prohibition granted by a justice of this court. All the appeals were consolidated by order, but the question was reserved whether the appeals were properly instituted by notices of appeal instead of by way of special case.

(1) (1928) 27 A.R. (N.S.W.) 46.
(2) (1913) 13 S.R. (N.S.W.) 114, at p. 124; 30 W.N. (N.S.W.) 26, at p. 28.

The Appeal Rules, sec. IV., of this court provide that appeals to the High Court from decisions of inferior courts of a State in the exercise of Federal jurisdiction shall be brought in the same manner and within the same times and subject to the same conditions, if any, as to security or otherwise as are respectively prescribed by the law of the State for bringing appeals from the same courts to the Supreme Court of the State in like matters.

The right of appeal, however, depends upon the Constitution and the *Judiciary Act*, and the Appeal Rules merely regulate the procedure by which an appeal is brought. " The rule relates to the procedure for bringing appeals before the High Court, and that depends upon the way in which that kind of appeal is brought in the particular State from the particular court to the Supreme Court " (*Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (1) ; *Irving* v. *Munro & Sons Ltd.* (2)). It prescribes the conveyance or vehicle by which appeals may be brought before this court (*Bell* v. *Stewart* (3) ; *Symons* v. *City of Perth* (4) ; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (5)).

The method by which appeals are brought from Courts of Petty Sessions in New South Wales to the Supreme Court of that State is by special case or by rule to show cause why prohibition should not issue (*Justices Act* 1902, secs. 101 et seq., 112). It follows that the notices of appeals above mentioned are irregular, and that appeals purporting to have been brought in that manner are improperly instituted and should be struck out.

The appeal by way of order or rule to show cause why prohibition should not issue remains. The appeal is against an order dismissing an information charging a contravention of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 9, and ordering the informant to pay costs.

It has been held by the Supreme Court of New South Wales that the procedure by way of prohibition under the *Justices Act* is not open to an informant in case of dismissal of an information. The

(1) (1912) 15 C.L.R., at p. 238.
(2) (1931) 46 C.L.R. 279.
(3) (1920) 28 C.L.R. 419.
(4) (1922) 30 C.L.R. 433.
(5) (1931) 46 C.L.R. 73, at p. 87.

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dismissal is not "a conviction or order" within the *Justices Act* (*Ex parte Kirkpatrick* (1))—see also *King* v. *Kirkpatrick* (2). In the case of dismissal of an information the method by which an appeal is brought from order of the justices to the Supreme Court is by case stated, and there are instances in the books of the adoption of that method in bringing appeals to this court in like matters (*Irving* v. *Munro & Sons Ltd.* (3); *Clyde* v. *Bolot* (4)). But the Supreme Court has also held that, if justices in dismissing an information also order costs to be paid, then the order, so far as it relates to costs, may be prohibited (*Ex parte McPherson*; *Re Moss* (5); *Ex parte Kirkpatrick* (1); *Ex parte Elliott*; *Re Mowle* (6)). *Cullen* C.J. dissented in *Kirkpatrick's Case* (1), and *Griffith* C.J. on an application to this court for special leave to appeal thought that the Supreme Court had assumed an entirely novel jurisdiction (*King* v. *Kirkpatrick* (7)), and in that I venture to agree. But even if the procedure for appealing an order of justices exercising Federal jurisdiction in New South Wales to this court may, so far as it relates to costs, be by way of prohibition, still that will not carry an appeal against an order dismissing an information. It is not enough that prohibition is a way of appeal in New South Wales; it must be the way in which an appeal is brought in New South Wales from an order of justices of that State to the Supreme Court in the case of the dismissal of an information. Consequently, so much of the rule or order nisi seeking prohibition against further proceedings on the order dismissing the information is irregular, and the appeal to that extent improperly instituted.

The appeal then becomes an appeal against the order for costs only, which would form an exception to the ordinary rule of the court: See *Judiciary Act* 1903-1937, Part III., sec. 27. The procedure adopted in this case excludes the order for dismissal from the consideration of this court, and, despite the decisions of the Supreme Court, I cannot think that this court should further investigate the matter upon a question of costs. If a magistrate dismisses an information, the jurisdiction and the discretion to award costs is

(1) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15.
(2) (1916) 22 C.L.R. 552.
(3) (1931) 46 C.L.R. 279.
(4) (1924) 34 C.L.R. 144.
(5) (1932) 50 W.N. (N.S.W.) 25.
(6) (1936) 53 W.N. (N.S.W.) 88.
(7) (1916) 22 C.L.R., at p. 555.

vested in him. If the order for dismissal stands, the order for costs is right or at all events is within the discretion of the magistrate and should not be disturbed in this court. In this view the other matters argued before this court do not arise and consequently do not fall for decision.

All the appeals instituted by notices of appeal or by the rule or order nisi for prohibition should be struck out.

Application was also made for special leave to appeal. A prima-facie case showing special circumstances must be made before such an application should be granted (*In re Eather* v. *The King* (1)). But the orders of the magistrate depend upon the interpretation of his findings, which seem fairly plain and will not govern other cases. No substantial question of law or of importance to the public is involved but, in my opinion, only a question peculiar to the cases the subject of the applications.

EVATT J. The respondent Cunich was charged before a stipendiary magistrate at Young, New South Wales, with having committed four separate breaches of sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

Such section, so far as is material, provides as follows: "An employer shall not dismiss an employee . . . by reason of the circumstance that the employee (*a*) is a . . . member of an organization, or . . . (*b*) is entitled to the benefit of . . . an award."

A very important provision contained in sec. 9 (4) is as follows: "In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved, it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge."

The appellant to this court, Edward Grayndler, laid the informations in his capacity as general secretary of the Australian Workers' Union, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. At all material times, the respondent Cunich was a party to, and bound by, a Federal award

(1) (1915) 20 C.L.R. 147.

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as to fruitgrowers, &c., made in settlement of an industrial dispute between the Australian Workers' Union and a very large number of employers whose names are specified in the award. The award related to the employment by the named employers of all members of the Australian Workers' Union in New South Wales and other States working in the fruit-growing industry.

The four separate informations were as follows:—(1) Charging the employer with having dismissed one Fitzgerald by reason of the circumstance that such employee was entitled to the benefit of the award mentioned. (2) Charging the employer with having dismissed the said Fitzgerald by reason of the circumstance that he was a member of the Australian Workers' Union, a registered organization. (3) Charging the employer with having dismissed one Sellers by reason of the circumstance that he was entitled to the benefit of the said award. (4) Charging the employer with having dismissed Sellers by reason of the circumstance that he was a member of the registered organization.

After a lengthy hearing, the magistrate dismissed each of the four informations, but made seven special findings as follows:—1. That Sellers and Fitzgerald were employed by the defendant. 2. That on the date in question Sellers and Fitzgerald were members of the Australian Workers' Union and entitled to the benefit of an award. 3. That the defendant was a person bound by the award in question. 4. That Sellers and Fitzgerald were dismissed by the defendant. 5. That they were not dismissed because they were members of the union. 6. That they were dismissed because they had lawfully entitled themselves to the benefit of the award. 7. That the defendant was saddled with an additional liability by reason of the men having joined the union. The magistrate added: "Following the case of *Grayndler* v. *Broun* (1) I hold the complainant has failed to make out his case and dismiss the information."

Thus the magistrate was satisfied that the two employees were dismissed because they had become entitled to the benefit of the award. But the magistrate also thought, following a decision of *Street* J. when a member of the New South Wales Industrial Commission, that if, as a result of an employee having joined the Australian

(1) (1928) 27 A.R. (N.S.W.) 46.

Workers' Union, and so entitled himself to the higher wage standard provided for in the award, an additional financial burden was cast upon the employer, the latter should not be convicted. In *Grayndler* v. *Broun* (1) a complaint had been laid under sec. 52 of the New South Wales *Industrial Arbitration Act* 1912, the offence alleged being the dismissal of certain employees by reason of the fact that they were members of a trade union. In dismissing the cases, *Street* J. said: "But where you find that an employer is saddled with a heavy additional liability by reason of the men having joined a union and that they by joining the union have imposed upon him an additional burden if he continues to employ them, then I do not think the section was intended to prevent the employer from meeting that position and relieving himself of the burden as far as he could by dismissal of the men concerned" (2).

I have quoted enough to show how important is the legal principle involved both from the point of view of employer and employee. For sec. 9 of the Federal Act is very similar in detail as well as in general effect to the section which was under *Street* J.'s consideration.

It is established by the evidence that when about to enter the employment of Cunich, every worker was required to sign an undertaking in a form similar to the following:—

> I, the undersigned, about to enter the employment of Mr. Baldo Cunich (hereinafter referred to as employer) of Young, hereby declare that:—
>
> 1. I am not a member of the Australian Workers' Union.
>
> 2. I will immediately advise my employer should I later become a member of the Australian Workers' Union and I will not continue and work and permit my employer to remain in ignorance of my decision to become a member of such union.
>
> Dated at Young this day of 19
>
> Signature of Employee:
>
> Usual Address:
>
> Witness:

It is also established that when C. A. Dalton, President of the New South Wales Branch of the Australian Workers' Union and its industrial officer, interviewed Cunich, the latter explained frankly, not to say brutally, his practice and policy in relation to the registered organization and any of its members who might secure the benefit of the award operating in the industry.

> "I" (Dalton) "informed him—I said: 'I am here because I have been informed by members of the A.W.U. that they were not being paid award rates.' He said: 'I have no members of the A.W.U. on my place.' He said: 'I will not have a member of the A.W.U. working for me.' 'I will not pay

(1) (1928) 27 A.R. (N.S.W.) 46. (2) (1928) 27 A.R. (N.S.W.), at pp. 49, 50.

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award rates.' I said there is a Federal fruit award which was made by Chief Judge *Dethridge* and he was represented by Mr. *Derham*.' I referred to an award which I had in my hand. He said again : 'I will not pay award rates.' I asked him could I have a meeting of the men. A meeting of the cherry pickers when they knocked off work. He said : 'They are not working just at present and you can have your bloody meeting.' He called the men around to where we were standing at the packing shed. The men proceeded to what is known as the dining room. When about to enter the room he said : 'You cannot have your meeting in here.' We then went out on to the road in front of his property. He was standing near the packing shed."

In pursuance of this openly stated policy, the employer dismissed the two employees concerned in the present cases so soon as he became aware that they had joined the Australian Workers' Union and so had become entitled to the benefit of the fruitgrowers' award. It is proved that both employees were quite prepared to continue work at the award standards and would have been continued in employment but for the one fact of becoming entitled to such standards. In answer to counsel for the defendant, E. F. Cunich, who had the defendant's authority to employ and dismiss workmen, said that there was no other reason for the termination of the employment of the two men except the fact that they informed him they had joined the union and therefore required award wages to be paid.

Whatever legal conclusions follow, it is obvious that, owing to the conduct of the employer and the fruitgrowers' association of which he was a member, the matter of infringement of sec. 9 of the Federal Act became one of crucial importance to the union. For plainly it was not a case of an employer who was closing down his business or merely decreasing his staff, but a case where, requiring a certain amount of labour power to pick the fruit from his orchard, the employer in the first place systematically excluded members of the Australian Workers' Union from employment, then dismissed each and every one of his employees so soon as they joined the union and became entitled to the benefits of the award.

Before dealing finally with the question whether sec. 9 was infringed by the employer, I must pause to consider the question of procedure which has been injected into these appeals though not as the result of objection by the respondent.

Within twenty-one days after the dismissal of the four informations (the time allowed in relation to appeals to this court from the Supreme Court of a State) the informant filed notices of appeal against the four determinations of the magistrate. Apparently the

informant's legal advisers interpreted rule 1 in sec. IV. of the Appeal Rules as inapplicable, and therefore regarded rule 7 of sec. IV., incorporating the rules of court as to appeals from the Supreme Court, as governing the situation. However, lest the procedure of notice of appeal should subsequently be deemed inappropriate, he also obtained an order nisi for a writ of statutory prohibition so far as concerned one information only—a suitable one for testing the general position. This was the information which alleged the dismissal of Fitzgerald by reason of the circumstance that he became entitled to the benefit of the award.

In adopting this alternative, the informant assumed that rule 1 of sec. IV. of the Appeal Rules was applicable. The procedure he sought to adopt was that contained in the New-South-Wales *Justices Act*, sec. 112, dealing with statutory prohibitions. The particular information had been dismissed. But it has been established practice in New South Wales for at least a generation that appeal by way of statutory prohibition may be availed of after dismissal of an information providing the informant has been ordered to pay costs (*Re O'Lachlan* (1) ; *Ex parte Kirkpatrick* (2) ; *Ex parte Macpherson* ; *Re Moss* (3)). In adopting this view of sec. 112, very experienced judges of the New-South-Wales Supreme Court took it that there is no magic in the phrase " any person aggrieved " (occurring in sec. 112 (1) of the *Justices Act*) and that, in the particular context, a person who, as the direct result of an erroneous adjudication, is ordered to pay costs to a defendant, and may be committed to prison in default of payment thereof, may fairly be said to be a " person aggrieved." In Victoria, the statutory provisions are of course different, but there too it has always been recognized that the interpretation of similar statutory provisions is seldom assisted by reference to English statutes and English procedure. In one case *Williams* J. said :—

> " Now a number of English authorities have been cited to us upon this point. It may be said in reference to those authorities, at the outset, that the court does not derive much assistance from them, because the point raised depends upon the construction of our own Act, and not only upon the construction of sec. 141, but also upon that of other sections of that Act. However,

(1) (1886) 3 W.N. (N.S.W.) 54.
(2) (1916) 16 S.R. (N.S.W.) 541 ; 34 W.N. (N.S.W.) 15.
(3) (1932) 50 W.N. (N.S.W.) 25.

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one or two of those English authorities show that the words 'who feels aggrieved' are capable of including an appeal where a defendant to an information has been acquitted, or where a charge against a defendant has been dismissed. Thus, we get from the English authorities the definite view that these words are capable of including that event" (*Rider* v. *Freebody* (1)).

It thus appears that the informant Grayndler acted reasonably in relying on the New-South-Wales course of decisions and practice if it were held that his action in appealing by notice of appeal was incompetent or inappropriate. Accordingly, within the period prescribed by the New-South-Wales *Justices Act*, a justice of this court (*McTiernan* J.) granted an order nisi for a writ of statutory prohibition. Subsequently, by consent of the parties, another justice (*Rich* J.) made an order consolidating the five appeals, reserving only the one point of procedure—whether the four appeals instituted by notice of appeal should not have been instituted by way of special case, which is a procedure applicable to appeals on points of law only from decisions of inferior courts under sec. 101 of the New-South-Wales *Justices Act*.

The appeals duly came on for hearing before this court. Counsel for the appellant indicated his desire to obtain a ruling only upon the important point of law which had arisen. Therefore, without formally abandoning the appeals instituted by way of notice of appeal, he practically confined himself to the one appeal instituted by way of statutory prohibition in relation to the dismissal of the charge in relation to Fitzgerald. At a very early stage of the argument, I referred counsel to the New-South-Wales practice as decided in *Ex parte Kirkpatrick* (2). Counsel for the appellant stated that he was basing his right of appeal upon it, and counsel for the respondent, while arguing that the four appeals instituted by way of notice of appeal should be struck out, stated that he did not dispute that the one appeal by way of statutory prohibition was properly instituted.

The merits of this appeal were argued at considerable length, the meaning and application of sec. 9 of the *Commonwealth Conciliation and Arbitration Act* was debated, and the court reserved judgment. Subsequently the case was restored to the list for argument on the

(1) (1898) 24 V.L.R. 429, at p. 434; 20 A.L.T. 100, at p. 101.

(2) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15.

point of procedure, when, counsel for the respondent having been invited to attack the decision in *Ex parte Kirkpatrick* (1), counsel for the appellant asked that, in any event, special leave should be granted.

I think it is *pessimi exempli* for this court to overrule a long-established decision of a State Supreme Court on a point of State practice unless on direct appeal from the Supreme Court of the State concerned. I appreciate the force of the reasoning of *Cullen* C.J. in his dissent in *Ex parte Kirkpatrick* (2), reasoning to which further explanation or paraphrase can usefully add nothing. On the other hand, equally learned and experienced judges responsible for the New-South-Wales practice took a different view, and their view is entitled to even greater weight. For the practice has been recognized for so long that it has almost hardened into law.

But the question whether *Ex parte Kirkpatrick* (1) was rightly decided is only a minor feature of the question of procedure and jurisdiction which has been raised. By sec. 39 (2) (*b*) of the *Judiciary Act*, it is provided that wherever " an appeal " lies from a decision of any court of a State to the Supreme Court of that State, " an appeal " from the decision may be brought to this court. Behind this main statutory provision is the mandate of sec. 73 of the Constitution that this court should have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine " appeals " from " all " judgments and orders of any court exercising Federal jurisdiction.

Now it is plain that the appellate jurisdiction thus referred to in sec. 73 extends beyond appeals as to questions of law only. Further, in *R.* v. *Snow* (3) *Gavan Duffy* J. and *Rich* J. said :—" In our opinion the words ' appeal to the High Court ' whenever mentioned in sec. 39 mean the appeal mentioned in sec. 73 of the Constitution as regulated by sec. 35 of the *Judiciary Act* 1903, and nothing else. Sec. 39 does not create a new appellate jurisdiction, but prescribes the conditions under which the existing jurisdiction may be exercised with respect to decisions of courts invested with Federal jurisdiction ".

(1) (1916) 16 S.R. (N.S.W.) 541 ; 34 W.N. (N.S.W.) 15.
(2) (1916) 16 S.R. (N.S.W.), at pp. 547 et seq. ; 34 W.N. (N.S.W.), at pp. 18, 19.
(3) (1915) 20 C.L.R. 315, at pp. 362, 363.

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If the full appeal contemplated by sec. 73 is to be exercised whenever the appellant satisfies the condition that he might have exercised some right of appeal to the Supreme Court of a State, that condition is satisfied here. But what is the position where, as under sec. 101 of the New-South-Wales *Justices Act*, an appeal lies from a Court of Petty Sessions to the Supreme Court, but on questions of law only? Does this carry with it the consequence that sec. 39 (2) (*b*) confines the appeal in the High Court to questions of law only? Again, under sec. 112 of the New-South-Wales *Justices Act*, the procedure of statutory prohibition (which is at least *in the nature* of an appeal) extends beyond mere questions of law, and enables the reviewing court to set aside findings of fact. Must this particular procedure be followed in order to entitle a person convicted by a magistrate exercising Federal jurisdiction to appeal to this court and call into question findings of fact? The more or less accepted theory of the moment is that, so soon as these appeals are properly instituted in this court, they "fall under the ordinary appellate power of the court and are to be determined upon the same grounds and in the same manner as other full appeals" (*R.* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*; *Ex parte Halliday and Sullivan* (1)).

Then again, in *Prentice* v. *Amalgamated Mining Employees' Association of Victoria and Tasmania* (2) *Griffith* C.J., *Barton* and *Isaacs* JJ. regarded an appeal from a magistrate exercising Federal jurisdiction as properly instituted as of right, although, by reason of the amount involved, an appeal to the Supreme Court of the State was not admissible. This court held that the right of appeal was created by the Constitution itself, and that "it does not matter whether an appeal would lie to the Supreme Court or not" (per *Griffith* C.J. (3)). Probably the court was influenced by the fact that the *Judiciary Act* is singularly ill framed if its intention was to provide that unless State law created a right of appeal from the inferior court to the Supreme Court of the State, no appeal as of right could be brought to the High Court, although the inferior court had exercised Federal jurisdiction. These are some of the questions involved in

(1) (1938) 60 C.L.R. 601, at pp. 618, 619.

(2) (1912) 15 C.L.R. 235.

(3) (1912) 15 C.L.R., at p. 238.

the point of procedure, and I think they should be reserved for consideration by the Full Bench as constitutional points are involved.

Putting aside all questions of an appeal as of right, it is admitted on all sides that we certainly have power to grant special leave to appeal from the magistrate's orders which dismissed the four informations before him. Here again, a question will arise if special leave is granted. Can this court hear such an appeal as a full appeal on facts and law, and, for instance, enter a conviction if such is the course warranted by the law and the proved facts ? In the cases of summary jurisdiction, the special constitutional considerations enshrining a jury's verdict of not guilty, which were discussed in *R.* v. *Snow* (1), are not present. On the other hand, a dismissal of an information for a criminal offence should never be lightly interfered with. I think that the decision of this court in *Pearce* v. *W. D. Peacock & Co. Ltd.* (2) would warrant the court in entering a conviction if special leave were granted and the court considered that the magistrate should have convicted. In *Pearce's Case* (2) the information was dismissed, special leave to appeal was granted, and *Isaacs* and *Higgins* JJ. (who dissented) were obviously of opinion that a conviction could (and should) be recorded. *Gavan Duffy* and *Rich* JJ. left open the question as to whether the Appeal Rules fettered the court in its manner of exercising the appellate jurisdiction, but *Barton* J. did not dispute the contention that the court had the jurisdiction to convict if the facts warranted it.

In the present case, the position is quite clear. The question involved is one of law solely. First of all, without reviewing the correctness of the established New-South-Wales practice in relation to statutory prohibition, I think that special leave should be granted because of (*a*) the great importance of the case both as to the law and the public interest, (*b*) the conduct of the parties, (*c*) the fact that the appeal on the merits has been fully and elaborately argued, and (*d*) the fact that only a Full Bench should finally pronounce upon the grave questions of practice which have been raised so belatedly. But special leave should be confined to the single information as to which an order nisi for a statutory prohibition was granted by *McTiernan* J. That particular case raises all the questions of law

(1) (1915) 20 C.L.R., at pp. 362, 363. (2) (1917) 23 C.L.R. 199.

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which are involved in the real controversy between the parties. Counsel for the appellant indicated that, if special leave were so granted, he would not press the four remaining appeals, one of which would, in any case, be identical with the case in which special leave should be granted. Therefore, the four appeals instituted by notice of appeal should be struck out, but this court should pronounce judgment as to the remaining appeal.

What judgment should be pronounced? In my opinion, the magistrate erred in following and applying the case of *Grayndler* v. *Broun* (1). It must be remembered that sec. 9 of the *Commonwealth Conciliation and Arbitration Act* is one of the key sections of the Act. If an employee can be dismissed or prejudiced because, by joining a union, he becomes entitled to better conditions contained in an award of the Federal court, the whole system of industrial arbitration would be threatened with destruction. I also think that the magistrate correctly distinguished between the circumstance of Fitzgerald's membership of the union and of his becoming entitled to the benefit of the award. He found, I think correctly, that Fitzgerald was not dismissed because he was a member of a union, but because he had entitled himself to the benefit of the award by joining the union.

Mere membership of the union was only of indirect concern to the employer. Had the award prescribed conditions which were less favourable than those which obtained on the job, the employer would either have been pleased with those who, by joining the union, obtained worse conditions, or at least would not have intervened. Fitzgerald was dismissed, as finding 7 plainly shows, solely because the defendant had to pay him more wages so soon as he became entitled to the more favourable award conditions.

Moreover, sec. 9 (4) of the Act compelled the defendant to satisfy the magistrate that he was not actuated by the circumstance that such employee had become entitled to the benefit of the award. So far was the defendant from doing this that his evidence showed positively that his one concern was to prevent his employees getting the benefit of the award, and that he was prepared to dismiss any employee who became so entitled. As I have already pointed out,

(1) (1928) 27 A.R. (N.S.W.) 46.

we are not investigating a case where a business or department is being closed down, but a case where an employer has determined (1) that the enterprise as a whole shall be conducted entirely upon conditions of private bargaining which are less favourable to employees than award conditions, and also (2) that every employee who qualifies himself to obtain the better award conditions shall immediately be dismissed. This is one of the obvious cases which sec. 9 was designed to cover.

I do not think it is necessary to make an elaborate examination of the New-South-Wales cases which were referred to in argument. In *Landon* v. *Diserens Ltd.* (1) the question discussed is mainly that of onus of proof. I think that *Beeby* J. deals convincingly with the similar statutory position in New South Wales. He said :—

> " On the facts of this case his Honour Judge *Curlewis* found that the employee Capewell did work certain overtime ; that he had been forbidden to work overtime without sanction of the manager or foreman ; that he did work the overtime with the sanction of the foreman. Further, that he had not been able, on the evidence, to form an opinion whether or not the employer believed the workman had worked the overtime without the sanction of the foreman, and did not know whether the employee was dismissed because the employer believed that he had worked overtime against orders, or whether he was dismissed for claiming money due for the overtime worked. This court is asked to say whether, on such findings of fact, a penalty should be imposed. One of the benefits of the award was the right to payment for overtime. Overtime was worked, was claimed, and was paid for, and the employee was subsequently dismissed because of something arising out of such payment. Under the Act the onus was placed on the employer to satisfy the court, that the dismissal was for some substantial reason other than being entitled to the benefit of an award. Having failed to so satisfy the court, I think a penalty should be imposed " (2).

In *O'Reilly* v. *Blue* (3) Mr. *Piddington*, as sole Industrial Commissioner, said, after citing a similar section :—

> " You are then left with this, practically, that if an employer dismisses an employee or alters his position to his prejudice after he has appeared as a witness or has given evidence in a proceeding in relation to an industrial matter you need not examine the reason of his action unless the defendant proves that he was not actuated by the reason which is forbidden. I do not say that that would apply if the dismissal took place a year or six months afterwards, but where you have a dismissal or an alteration prejudicial to the employee supervening *instanter* after the giving of evidence in relation to an industrial matter, then you have the kind of case that is contemplated. Where there is a very close contemporaneous relation between the act of dismissal or of prejudicially altering the position of an employee and the employee's

(1) (1924) 23 A.R. (N.S.W.) 143. (2) (1924) 23 A.R. (N.S.W.), at p. 154.
(3) (1927) 26 A.R. (N.S.W.) 111, at p. 112.

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act of giving evidence in a proceeding relating to an industrial matter, then those are facts and circumstances constituting the offence other than the reason. Those facts have been proved in this case, and it therefore lies upon the defendant to prove that he was not actuated by the reason alleged in the charge".

In the case of *Pearce* v. *W. D. Peacock & Co. Ltd.* (1) already referred to, *Isaacs* and *Higgins* JJ. also expressed an opinion which conforms to that of *Piddington* J.

In my opinion, the case of *Grayndler* v. *Broun* (2) was wrongly decided so far as it laid down that an employer is entitled to dismiss an employee entitled to an award merely because his reason for doing so is that he does not wish to be saddled with the heavier burden of the award rates. If this general principle were accepted, a vital provision would be completely excised from the statutory scheme. In the Federal sphere, moreover, it is for the Arbitration Court to settle any inter-State dispute between the union and the employers, and to settle it on just terms having regard to all the circumstances of the case. If an employer, who, *ex hypothesi*, is a party to the industrial dispute and is bound by the award, could set the award at nought not merely by differentiating between unionists and non-unionists, but by dismissing unionists in his employ so soon as they became entitled to better conditions under the award, one of the great purposes of the industrial-arbitration system would be defeated. It is true that the Commonwealth Arbitration Court might see fit to counter such evasions by prescribing preference of employment to the unionists, but Parliament itself has seen fit to intervene and to require that, if a worker is in employment, his being or becoming entitled to award benefits should not cause his dismissal or prejudice in his employment, without the employer being subjected to penalty.

Upon the findings of the magistrate which are borne out by the evidence, and which I accept and indorse, he erred in holding that because the employer desired to save himself the expense involved in paying the higher award rate, he could not be guilty of contravening the section. I hold that, on the contrary, this desire is merely corroborative of the undoubted fact that the employer was quite

(1) (1917) 23 C.L.R. 199.

(2) (1928) 27 A.R. (N.S.W.) 46.

ready and willing to retain Fitzgerald in his service so long as he remained disentitled to the award benefits and the employer did not have to pay them. A plain and very bold and daring contravention of sec. 9 has taken place, and this court should itself impose a penalty or remit the matter of penalty to the magistrate.

Special leave should be granted to appeal from the determination of the magistrate dismissing the information charging a contravention of sec. 9 of the Act in that the respondent dismissed J. R. Fitzgerald by reason of the circumstance that he was entitled to the benefit of the award. Such appeal should be allowed, and a conviction recorded in respect of such contravention. Except for such appeal, the appeals purporting to be instituted as of right should be struck out.

McTIERNAN J. These appeals, as they are called, are brought against orders of a court of summary jurisdiction of New South Wales dismissing informations for offences under sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1903-1934. In one case the information was dismissed with costs to be paid by the prosecutor to the defendant. In that case the appeal has been brought by way of statutory prohibition under sec. 112 of the *Justices Act* 1902 of New South Wales. The informations in the other cases were dismissed without costs, and in each of those cases an appeal is brought by notice of appeal to this court. The assumption on which the notice of appeal is filed is that there is an appeal as of right to this court against each of those orders of dismissal.

The court of summary jurisdiction was constituted and exercised the powers and authorities exercisable by courts of Petty Sessions under the *Justices Act* 1902. The orders of dismissal were all made by the court of summary jurisdiction in the exercise of the Federal jurisdiction with which it is invested by sec. 39 (2) of the *Judiciary Act* 1903-1937. The right of appeal from the orders made in the exercise of this Federal jurisdiction depends upon sec. 39 (2) (*b*) of the Act. " In appeals to this court " (the High Court) " by virtue of sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937, the State practice is the basis of the procedure whereby an appeal is brought to this court " (*R.* v. *Poole*; *Ex parte Henry* (1)). Under sec. 112 of the

(1) (1938) 61 C.L.R. 1, at p. 6.

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Justices Act 1902 the proceeding in the nature of an appeal, known as statutory prohibition, may be taken by any person aggrieved by any conviction or order of a justice or justices. In the case of *R.* v. *Keepers of Peace and Justices of County of London* (1), Lord *Coleridge* C.J., speaking with reference to an English statute containing similar words, said :—" Is a person who cannot succeed in getting a conviction against another a person 'aggrieved'? He may be annoyed at finding that what he thought was a breach of law is not a breach of law ; but is he 'aggrieved' because someone is held not to have done wrong ? It is difficult to see that the section meant anything of that kind. The section does not give an appeal to anybody but a person who is by the direct act of the magistrate 'aggrieved'—that is, who has had something done or determined against him by the magistrate." In the case of *Ex parte Fitzpatrick* (2), the Full Court of the Supreme Court decided that where an order dismissing an information has been wrongly made and by such order costs are adjudged to be paid by the informant, he is a person aggrieved within sec. 112 and entitled to a statutory prohibition with respect to so much of the order of dismissal as adjudges the payment of costs. The Chief Justice dissented. All the justices were of the opinion that a prosecutor is not a person aggrieved by an order dismissing an information which imposed no liability on him to pay costs. But the majority were of the opinion that the unsuccessful prosecutor is a person aggrieved by an order of dismissal which specifies an amount for costs adjudged to be paid by him to the defendant. If this case is rightly decided, it follows that the appeal to this court by way of statutory prohibition is competent against the order dismissing the information, at least in so far as it imposes a liability on the prosecutor for costs. We have been invited to say that the opinion of the majority is wrong, and that of the Chief Justice is right.

An application for special leave to appeal to this court against the judgment in *Ex parte Kirkpatrick* (2) was refused by this court. Upon that application *Griffith* C.J., who was in favour of giving special leave to appeal, said that in granting the order for statutory

(1) (1890) 25 Q.B.D., at p. 361.
(2) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15.

prohibition the Supreme Court had assumed an entirely novel jurisdiction (*King* v. *Kirkpatrick* (1)). The majority of the court, however, was of the opinion that the application for special leave to appeal should be refused because it was an attempt to appeal only on a question of costs. The words " any summary conviction or order " in sec. 112 clearly include the case where an information succeeds, but the word " order " cannot refer to the dismissal of an information; for a prosecutor cannot be aggrieved by such an order. The word " order " in the context " any summary conviction or order " refers to an order made upon a complaint. As Lord *Herschell* said in *Boulter* v. *Kent Justices* (2), " what is meant by the summary jurisdiction of magistrates is, of course, perfectly well understood by every lawyer, and in relation to that jurisdiction the words 'conviction' and 'order' have a well-defined meaning. The conviction follows on an information, the order on a complaint." But the view which prevailed in *Ex parte Kirkpatrick* (3) assumes that the word " order " in the context " any summary conviction or order " looks beyond these two categories and extends to any such provision for the payment of costs by an unsuccessful prosecutor as is made under the authority of sec. 81 of the *Justices Act*. The word " order " with which this section ends includes, presumably, an order dismissing an information. The Act, however, as the Chief Justice points out in *Ex parte Kirkpatrick* (3), does not describe the specifying of an amount allowed for costs as an order. In any case the word " order " in the context " any summary conviction or order " in sec. 112 does not, in my opinion, extend to an order dismissing an information with costs. As has been observed, it does not include an order dismissing an information without costs; for the prosecutor cannot be aggrieved by such an order. The word " order " was, in my opinion, used in sec. 112 with the intention of making the remedy of statutory prohibition available to a person aggrieved by an order made upon a complaint as well as to a person convicted upon an information. It does not include an order dismissing an information, whether such order specifies an amount allowed for costs or not. The word " order " is used to mean an order made

(1) (1916) 22 C.L.R., at p. 555.
(2) (1897) A.C. 556, at p. 567.
(3) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. (N.S.W.) 15.

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upon a complaint as distinguished from a conviction which follows on an information. There is much force in the following observations which the Chief Justice made in *Ex parte Kirkpatrick* (1) :—" Now it would be a strange circumstance if a person who has no *locus standi* to call upon the court to inquire into the correctness of a magistrate's dismissal of an information or complaint in order to obtain a reversal of his decision upon the information or complaint itself, should, nevertheless, have the right to insist upon that being done merely as a means of upsetting the adjudication as to costs, which is a purely incidental matter, within the discretion of the magistrate. If an order of acquittal is reversed on appeal by way of special case, its reversal of course gets rid of the incidental order as to costs ". The appeal by way of special case is given by sec. 101 of the *Justices Act* 1902 to " any party . . . if dissatisfied with the determination by any justice or justices in the exercise of their summary jurisdiction of any information or complaint as being erroneous in point of law." The remedy provided by this section is clearly available to a complainant or prosecutor in a case where an order of dismissal is made and specifies an amount of costs adjudged to be paid by him to the defendant. I agree with some considerations which weighed with the Chief Justice in dissenting from the view of the majority in *Ex parte Kirkpatrick* (2). " To accede to the applicant's contention," he said, " would give to an informant or complainant a statutory right of appeal merely upon the question of costs in all cases where the magistrate was wrong in dismissing the information or complaint. This I cannot believe was the meaning of the legislature. To recognize such a right in the case of criminal proceedings would be an encouragement to informants in such cases to neglect the provisions made by the statute, whether by special case, under sec. 101, or by rule in the nature of a mandamus under sec. 134, for securing correction of the errors of magistrates who by a misapplication of the law have left crimes unpunished, and to have recourse to the court merely on the ground that their own pockets have been touched by the erroneous decision. It would require some much clearer pronouncement by

(1) (1916) 16 S.R. (N.S.W.), at p. 549 ; 34 W.N. (N.S.W.), at p. 19.

(2) (1916) 16 S.R. (N.S.W.), at p. 550 ; 34 W.N. (N.S.W.) at p. 19.

the legislature to warrant the court in holding that an investigation into a miscarriage of justice whereby a guilty person may have been acquitted can be insisted on, merely as a step towards setting aside an order to the pecuniary prejudice of the complainant. I think the right interpretation of the words of the Act would debar an unsuccessful complainant from the right to such an inquiry, and that so far as he is concerned, unless he is prepared to take a proceeding which can result in the reversal of the erroneous dismissal, he cannot be heard to complain that the magistrate's discretion regarding costs has been wrongly exercised. So far as he at all events is concerned, the acquittal stands good in such a case and the incidental order for costs must be allowed to stand or fall with it ".

In my opinion, the correct view is that it is not competent for a prosecutor to appeal by way of statutory prohibition under sec. 112 against an order dismissing an information or, if the order of dismissal is made with costs, against that part of the order specifying the amount of costs allowed to the defendant. It follows that it was not competent for the prosecutor in the present case to appeal by way of statutory prohibition against the order of the court of summary jurisdiction dismissing with costs one of the informations laid by him for an alleged offence against sec. 9 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

As to the appeals made by notice of motion against the other orders of dismissal which were made without costs, I agree that in none of these cases is a notice of appeal the proper vehicle for carrying the case to this court. I agree with what the Chief Justice (*Latham* C.J.) has said on this question in the instant case.

There remains the question whether the court should grant special leave to appeal. It has a discretion under sec. 39 (2) (*c*) of the *Judiciary Act* to grant special leave to appeal against each of the orders of dismissal made by the court of summary jurisdiction. In my opinion, special leave should not be granted in any of the cases. Special leave to appeal is sought in order to obtain an interpretation of sec. 9 of the *Commonwealth Conciliation and Arbitration Act*. The question, however, whether the defendant was guilty of an offence

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against that section depends upon the meaning and effect to be attributed to a number of findings of the court of summary jurisdiction. Indeed, one possible interpretation is that the court found in terms that the defendant did the very thing that the section in terms prohibited. If that interpretation is correct, it is obvious that the case could be decided without embarking on an inquiry as to what is the true scope and operation of the section. Upon another possible interpretation of the findings the conduct of the defendant would appear to stand outside the section. Besides, in considering whether special leave to appeal should be granted, it is a circumstance which weighs against the prosecutor that he could have appealed by way of special case, and further that the orders against which it is sought to appeal are acquittals.

In my opinion, the order nisi and the notices of appeal should be struck out and the applications for special leave to appeal refused.

Appeals struck out with costs. Special leave to appeal refused.

Solicitor for the appellant, *O'Dea*.

Solicitors for the respondent, *Gordon, Garling & Guigni*, Young, by *H. C. M. Garling & Garling*.

J. B.