[HIGH COURT OF AUSTRALIA.]

PLATZ . . . . . APPELLANT;
COMPLAINANT,

AND

OSBORNE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Justices—Conviction—Quashed on appeal—Power to remit matter to justices—Justices Acts 1886 *to* 1942 (*Q.*) (50 *Vict. No.* 17—6 *Geo. VI. No.* 7), *ss.* 209, 210, 231.

Held, by *Rich*, *McTiernan* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting), that s. 210 of the *Justices Acts* 1886 *to* 1942 (Q.) does not confer power on the Court to remit a matter to the justices for rehearing.

Decision of the Supreme Court of Queensland (Full Court) by majority, affirmed.

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SYDNEY, *Nov.* 24; *Dec.* 13.

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

APPEAL from the Supreme Court of Queensland.

Frederick Vincent Osborne was charged before a stipendiary magistrate upon the complaint of Louis Joseph Platz, a constable of police, that on 9th February 1943, at Ipswich, in the Petty Sessions District of Ipswich in the State of Queensland, he, the said Frederick Vincent Osborne, had in his possession one Good Year heavy duty 650-16 motor tyre, one Good Year heavy duty 600-16 motor tyre, four Good Year 650-16 motor tubes, three Dunlop Perdriau 750-17 motor tubes, and four Good Year 750-17 motor tubes, suspected of having been unlawfully obtained.

Osborne was convicted and ordered to be imprisoned for a period of two months with hard labour.

An order nisi to quash the conviction was obtained under s. 209 of the *Justices Acts* 1886 *to* 1942 (Q.) and upon the return of the

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order nisi an order quashing the conviction was made by the Full Court of the Supreme Court of Queensland upon the ground that though upon the evidence there were reasonable grounds for finding that the police constable did in fact suspect that the two tyres had been unlawfully obtained, there were no grounds for finding that he suspected that the tubes had been unlawfully obtained. The Full Court accordingly held that Osborne was wrongfully convicted in respect of the nine tubes and said that although that Court may have certain powers of amendment, this was not one of the cases in which the power to amend should be exercised. The Court had no power to alter any sentence, the appropriate sentence to be imposed was the function of the stipendiary magistrate at the time of the conviction, and it was impossible to determine what sentence the stipendiary magistrate would have imposed if Osborne had been convicted in respect of the two tyres only. The Full Court further decided that it was beyond the power of that Court to remit the matter to the stipendiary magistrate to determine what sentence should be imposed for a conviction in respect of the two tyres as the stipendiary magistrate was then *functus officio*.

Special leave to appeal from that decision was granted to Platz by the High Court limited to the question of the interpretation of s. 210 of the *Justices Acts* 1886 *to* 1942 (Q.) in relation to the power of the Court to make orders other than orders quashing convictions or orders, and more particularly the power of the Court to remit matters to justices.

The relevant statutory provisions are set forth in the judgments hereunder.

Sugerman K.C. (with him *E. J. Hooke*), for the appellant. The words used in s. 210 of the *Justices Acts* 1886 *to* 1942 (Q.) are general words, and, notwithstanding the decisions in *Metropolitan Transit Commissioners* v. *Muir* ; *Ex parte Muir* (1) and *Laughlin* v. *Power* ; *Ex parte Power* (2) and the observations in *Bale* v. *Sorlie* (3), have a meaning wide enough to include the conferring of power upon the Court of Appeal or judge to remit the particular matter to the magistrate concerned. The view expressed in *Ex parte Kirkpatrick* (4) upon somewhat similar words in s. 115 of the *Justices Act* 1902 (N.S.W.) is incorrect. The words should not be read down because of the express power conferred by s. 231. The express power so conferred by s. 231 appears in a different collocation of words taken from a different statute. *Crane* v. *Director of Public Prosecutions* (5)

(1) (1903) Q.S.R. 326.
(2) (1925) Q.S.R. 202.
(3) (1936) Q.S.R. 259, at p. 269.
(4) (1916) 16 S.R. (N.S.W.) 541, at p. 557.
(5) (1921) 2 A.C. 299.

deals with the power of the English Court of Criminal Appeal to direct a *venire de novo* where there has been a mistrial. In this case there is not any need for a new trial. All that a quashing order does is to quash the conviction. Upon the words of s. 210 it was competent for the Court below to remit the matter to the magistrate and for him, upon the evidence already taken and having regard to the opinion thereon expressed by the Court below, to make such order as he deemed fit. The matter should be remitted to the magistrate to continue the hearing and make such order as he thinks fit.

Moynihan, for the respondent. Upon the plain meaning of s. 210 the only course open to the Court below was to have discharged the order nisi or to have quashed the conviction. The words " in the premises " as they appear in s. 210 do not appear in the corresponding provision of the *Justices Act* 1902 (N.S.W.). Those words relate back to the word " quashed." The decision of the Court below is in accordance with decisions of that Court given during a period of many years in *Metropolitan Transit Commissioners* v. *Muir* ; *Ex parte Muir* (1), *Laughlin* v. *Power* ; *Ex parte Power* (2) and *Bale* v. *Sorlie* (3). Those decisions should be followed by this Court (*Bond* v. *The Commonwealth* (4)). Although subsequent to those decisions the Act has from time to time been amended, and s. 210 itself has been amended, the legislature has not seen fit to amend or in any way affect the words now receiving the consideration of the Court. It follows, therefore, that the legislature has accepted those decisions as not only correctly interpreting those words, but also as being in accordance with its intention. The subject words were also considered in *Michel* v. *Medical Board of Queensland* (5)—See also *R.* v. *Walsh and Bunting* (6), *R.* v. *Mellor* (7) and *Crane* v. *Director of Public Prosecutions* (8). The words now under consideration do not occur in the English Act. The fact that the power given in express terms in s. 231 is not mentioned in s. 210 shows that it was deliberately excluded from s. 210. The Court below was correct in quashing the conviction.

Sugerman K.C., in reply.

Cur. adv. vult.

(1) (1903) Q.S.R. 326.
(2) (1925) Q.S.R. 202.
(3) (1936) Q.S.R. 259.
(4) (1903) 1 C.L.R. 13, at p. 23.
(5) (1942) Q.S.R. 1, at p. 38.
(6) (1902) Q.S.R. 6.
(7) (1858) Dears. & Bell 468, at pp. 485, 486, 502 [169 E.R. 1084, at pp. 1091, 1097].
(8) (1921) 2 A.C. 299.

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The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of Queensland quashing a conviction of the respondent Osborne upon a charge on the complaint of the appellant, a constable of police, that he, the said Osborne, on 9th February 1943, had in his possession two motor tyres and nine motor tubes suspected of having been unlawfully obtained. The respondent was tried by a magistrate and was convicted and ordered to be imprisoned for a period of two months. An order nisi to quash the conviction was obtained under s. 209 of the *Justices Acts* 1886 *to* 1942 (Q.) and upon the return of the order nisi an order quashing the conviction was made. The conviction was quashed upon the ground that though upon the evidence there were reasonable grounds for finding that the constable did in fact suspect that the two tyres had been unlawfully obtained, there was no ground for finding that he suspected that the tubes had been unlawfully obtained. Accordingly, it was held that Osborne was wrongly convicted in respect of the nine tubes. The Court thought it not proper to exercise its power of amendment by removing the variance between the evidence and the conviction (See *Justices Acts*, s. 214), because the Court had no power to alter the sentence imposed by the magistrate, and the Court was not prepared to substitute its own opinion for the opinion of the magistrate as to what would have been a proper sentence if Osborne had been convicted in respect of the two tyres only. It was further decided that : " It is in addition beyond the power of this Court to remit the matter to the stipendiary magistrate to determine what sentence should be imposed for a conviction in respect of the two tyres as the stipendiary magistrate is now *functus officio*."

Section 209 provides that, if any person feels aggrieved by a conviction or order of justices, he may apply to the Supreme Court or a judge thereof, for an order calling on the justices and the prosecutor or other party interested in maintaining the conviction or order, to show cause why such conviction or order should not be quashed. Section 210 is in the following terms :—" If, whether cause is then shown or not, the Court, after inquiry into the matter and consideration of the evidence adduced before the justices, thinks that the conviction or order cannot be supported, the Court may direct it to be quashed, and may make such further order in the premises as is just and the circumstances require."

When application for special leave to appeal was made to this Court leave was granted limited to the question of the interpretation of s. 210 of the *Justices Acts* in relation to the power of the Court

under that section to make orders other than quashing orders, and more particularly in relation to the power of the Court to remit matters to justices.

There are three decisions of the Full Court of the Supreme Court of Queensland in which it has been held that no such power exists. The cases are: *Metropolitan Transit Commissioners* v. *Muir* (1); *Laughlin* v. *Power* (2); *Bale* v. *Sorlie* (3). No reasons were given in any of the cases for the decision upon this point, though in one case reference was made by way of contrast to the terms of s. 231 of the Act.

It has been urged that this Court should not disturb long-standing decisions of a State court upon a State statute. Where the construction of a statute is a matter of doubt the fact that it has been interpreted during a long period by courts of a State in a particular manner is certainly a matter to be taken into consideration in determining whether this Court should adopt a different construction, and this is more particularly the case where rights have been acquired or disposed of upon the faith of such decisions. The position, however, is different where the statute relates to procedure, and in any case such a rule should not be applied as of course if in the view of this Court the prior decisions are wrong.

It has been argued for the respondent that the words "in the premises" in s. 210 relate only to the act of quashing an order and that they should be limited in some way to orders which may be required in order to give full effect to a quashing order. Some difficulty was found in suggesting what further orders would be or might be required in such a case. The word "premises" should be regarded as referring back to the words "the matter" at the beginning of the section.

Attention was called to the fact that the section provides that the Court may direct a conviction to be quashed *and* may make such further order, &c. It was suggested that the presence of "and" instead of "or" suggested that the latter words of the section did not extend the power of the Court beyond a quashing order where such an order was made. There is no substance in this argument. The section plainly says that the Court may make a quashing order *and* may make such further order as is just and the circumstances require.

The words "may make such further order," &c., are very wide in their terms, and no reason depending upon the ordinary meaning of the words has been suggested which would require them to be

(1) (1903) Q.S.R. 326. (2) (1925) Q.S.R. 202.
(3) (1936) Q.S.R. 259.

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interpreted in other than their natural sense. Section 210 was derived from New South Wales legislation—14 Vict. No. 43, s. 12—while s. 231, which relates to appeal by way of special case, is derived from the *Summary Jurisdiction Act* 1857 (20 & 21 Vict. c. 43), s. 6, of England. The provisions relating to appeal by way of special case provide for such an appeal on the ground that a decision is erroneous in point of law or as in excess of jurisdiction. The power of the Court upon the hearing of the special case is defined by s. 231, which enables the Court to hear and determine any question of law arising and to affirm, reverse or amend the decision appealed from, or to remit the matter to the justices with the opinion of the Court, or to make such further order in relation to the matter, and as to costs, as to the Court may seem fit. In s. 231 there is therefore an express power to remit a matter to justices. There are no terms in s. 210 expressly conferring such a power, and it is argued that s. 210 should not be interpreted as including such a power.

The words of s. 210 are very general, and construed according to their natural meaning they give power, when a quashing order is made, to make any order that the Court may think to be just and required by the circumstances. In the present case, if the point which was taken before the Supreme Court were raised before the stipendiary magistrate, he should have amended the complaint to remove the variance between it and the evidence (*Justices Acts*, s. 48). Such an order would have been an order in accordance with justice. Can the Supreme Court make an order remitting the case so that the stipendiary magistrate may make such an order or may rehear the whole case ?

It may be observed that an appeal by way of special case is available only in cases of error in law or excess of jurisdiction. The grounds for a quashing order under s. 210 are not limited in this manner, and a quashing order may be made, not only upon the same grounds as those which justify the statement of a special case, but also upon grounds depending entirely upon the facts of a case. It would be strange if the limited procedure by way of special case permitted the making of an order remitting, while the more general procedure by way of application for a quashing order did not permit such an order to be made.

According to the law of New South Wales at the time when 14 Vict. No. 43 was passed there was no power to order a new trial in cases of felony, though a new trial could be directed in cases of misdemeanour (*Attorney-General for New South Wales* v. *Bertrand* (1)). But if the proceedings, even in a trial for felony, were a nullity

(1) (1867) L.R. 1 P.C. 520.

the issue of a writ of *venire de novo* could be ordered (*R.* v. *Mellor* (1)), as explained by Lord *Sumner* in *Crane* v. *Director of Public Prosecutions* (2). In the latter case the House of Lords interpreted words very similar to those appearing in s. 210. The *Crown Cases Act* 1848 (11 & 12 Vict. c. 78) authorized the Court for Crown Cases Reserved to determine questions of law reserved and s. 2 provided, *inter alia*, that the Court might " make such other order as justice may require." The *Criminal Appeal Act* 1907, s. 20 (1), abolished writs of error and the powers and practice then existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, and substituted a criminal appeal. The Act contained no provision giving power to grant a new trial. But s. 20 (4) of the Act transferred to the Court of Criminal Appeal the jurisdiction and authority of the Court for Crown Cases Reserved, including the power under s. 2 of the *Crown Cases Act* 1848 to " make such other order as justice may require." *Mellor's Case* (1) had been interpreted as deciding that the Court had no power to order a new trial or a *venire de novo*, which brought about a continuance before a new jury of a trial which had not been a real trial, but a nullity. But this view of *Mellor's Case* (1) was not accepted in *Crane's Case* (3). Only a question of law could be dealt with by the Court for Crown Cases Reserved, and in such a case a *venire de novo* as distinct from a new trial was the appropriate remedy. This is the real significance of Lord *Sumner's* observation in *Crane's Case* (4) that he is not to be regarded as thinking that the Court of Criminal Appeal has power to grant new trials " independently of such mistrials as the case illustrates "—i.e., cases in which a *venire de novo* could properly have been granted by the Court for Crown Cases Reserved.

In this case there is no suggestion that the magistrate of his own motion can rehear the case in which he has convicted the respondent. In the sense that he has completely exercised his functions in determining the case it can be said that he is *functus officio*. But strictly, where a court has made an order, the court is not *functus officio* until the order has been fully obeyed—see *R.* v. *Hibble* (5)—though this proposition of course does not mean that a court may without express statutory authority, of its own motion, rehear and redetermine a case which it has already heard and determined. Neither is the magistrate *functus officio* in the sense in which it was said of a military tribunal that it was *functus officio* because it had been

(1) (1858) Dears. & Bell 468 [169 E.R. 1084].
(2) (1921) 2 A.C. 299, at pp. 333, 334.
(3) (1921) 2 A.C., at pp. 325 et seq., 334.
(4) (1921) 2 A.C., at p. 335.
(5) (1920) 28 C.L.R. 456, at pp. 467, 475.

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dispersed so that it no longer existed as a judicial authority (*In re Clifford and O'Sullivan* (1))—See also *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2). The question which arises in the present case is not a question of the continuance of alleged judicial authority in the lower tribunal as in *In re Clifford and O'Sullivan* (3). It is a question of the power of a superior court to make an order under statutory authority remitting a case to a lower court. If the words of the statute confer such power, it is beside the point to say, in any sense, that the lower court is *functus officio*.

Mellor's Case (4) and *Crane's Case* (5), which were relied upon by the respondent, provide little assistance in interpreting s. 210 of the *Justices Acts*. Those Acts, and the New South Wales Act from which it was derived, dealt with the review of the proceedings of justices. In this branch of the law there were none of the technical difficulties associated with the distinction between felonies and misdemeanours, with writs of error and writs of *venire de novo*, and with the almost conclusive effect of the verdict of a jury. There are, in my opinion, no reasons for limiting the natural meaning of the words used in s. 210, and they are wide enough to empower the Supreme Court to remit a matter to justices for rehearing. This is obviously a case in which, if the power exists, it should be exercised.

In my opinion the appeal should be allowed and the order of the Supreme Court should be varied by adding a direction that the case be remitted to the stipendiary magistrate. The majority of the Court is of opinion that the appeal should be dismissed. The order will therefore be that the appeal is dismissed with costs.

RICH J. The facts have been fully set out by the Chief Justice, and it is unnecessary for me to restate them. The only question raised by the present appeal is whether, a conviction by a magistrate having been quashed by the Supreme Court of Queensland by virtue of s. 210 of the *Justices Acts* 1886 *to* 1942 for a reason other than that the trial was a nullity, it was competent to the Court to remit the case to the magistrate for retrial in whole or in part.

Section 210 enables an appeal from a conviction. This indicates an intention on the part of the legislature that the conviction may be to some extent interfered with by the appellate court in a proper case, but it does not of itself indicate anything more. The section provides in terms that the Court may quash the conviction " and may make such further order in the premises as is just and the

(1) (1921) 2 A.C. 570, at p. 591.
(2) (1924) 34 C.L.R. 482, at p. 497.
(3) (1921) 2 A.C. 570.
(4) (1858) Dears. & Bell 468 [169 E.R. 1084].
(5) (1921) 2 A.C. 299.

circumstances require." The quashing of the conviction involves a determination by the Court that the appellant was wrongly convicted. It is an elementary principle of criminal justice that, in the absence of clear statutory provision in that behalf, a man shall not be twice put in jeopardy in respect of the same charge (*R.* v. *Miles* (1); *R.* v. *Dyson* (2); *R.* v. *Simpson* (3); *Haynes* v. *Davis* (4); *R.* v. *Sheridan* (5)). There is, in my opinion, nothing in the phrase " and may make such further order in the premises as is just and the circumstances require " which indicates an intention on the part of the legislature that a man who has been tried once, has been wrongly convicted, and has succeeded in having that wrongful conviction quashed, should be again put in peril by being subjected to the risks of a second prosecution. There is nothing to suggest that the phrase was intended to do more than enable the Court to make such ancillary and consequential orders as are necessary to make its order to quash properly effective. No doubt if the conviction were quashed on the ground that the trial had been a nullity there would be nothing to prevent a further trial, but that would be because there had so far been no trial at all and the appellant had therefore never been in peril. In such a case an order for a new trial would be harmless but otiose. No trial having in law occurred a trial should be proceeded with whether any order be made in that behalf or not (*Crane* v. *Director of Public Prosecutions* (6); *Ex parte Malouf*; *Re Gee* (7); *R.* v. *Cronin* (8); *Halsbury's Laws of England*, 2nd ed., vol. 9, par. 407, pp. 278, 279). This applies to summary convictions as well as to convictions on indictment (*R.* v. *Marsham* (9); *Bannister* v. *Clarke* (10)). But if there has already been one trial there cannot be a second however bad the mistakes in the conduct of the first.

It is to be noted that there have been five decisions of the Supreme Court of Queensland in which the view has been taken that the phrase in s. 210 does not invest the Court with the power to direct a retrial which is now sought to be attributed to it. The section has been amended as recently as 1941 by the Act 5 Geo. VI. No. 9 (Q.), but the legislature has not thought fit to introduce anything to override those decisions: Cf. *Concrete Constructions Pty. Ltd.* v. *Barnes* (11).

In my opinion they were correctly decided, and this appeal should be dismissed.

(1) (1890) 24 Q.B.D. 423, at p. 438.
(2) (1908) 2 K.B. 454, at p. 458.
(3) (1914) 1 K.B. 66.
(4) (1915) 1 K.B. 332.
(5) (1937) 1 K.B. 223.
(6) (1921) 2 A.C., at pp. 332, 333.
(7) (1943) 43 S.R. (N.S.W.) 195, at p. 200; 60 W.N. 134, at p. 138.
(8) (1940) 1 All E.R. 618.
(9) (1912) 2 K.B. 362.
(10) (1920) 3 K.B. 598, at p. 606.
(11) (1938) 61 C.L.R. 209, at p. 226.

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STARKE J. I agree with the conclusion reached by the Chief Justice. But I desire to state shortly the reasons which appear to me to justify that conclusion :—

1. The *Justices Acts* 1886 *to* 1942 (Q.), ss. 209-217, provides a statutory method of reviewing the decisions of justices.

2. Those sections contain the only jurisdiction and authority that the Supreme Court has in relation to the matter the subject of such review.

3. Unless the sections confer expressly or by necessary implication jurisdiction and authority upon the Supreme Court to remit the matter to the justices for hearing, rehearing or further hearing the Supreme Court has no such jurisdiction or authority.

4. And the question therefore is whether s. 210 of the Act confers any such authority. It is as follows :—"If . . . the Court, after inquiry into the matter and consideration of the evidence adduced before the justices, thinks that the conviction or order cannot be supported, the Court may direct it to be quashed, and may make such further order in the premises as is just and the circumstances require."

5. The discretion thus given to the Court is expressed in the widest terms and, unless some overriding consideration appears, the words of the section should be given their plain and ordinary signification.

6. No such overriding consideration appears. Thus if we turn to another form of appeal in the Act from justices to the Supreme Court by way of special case, s. 231, which is taken from 20 & 21 Vict. c. 43, s. 6, the authority to remit or to make such other order in relation to the matter as to the Court may seem fit is plain enough (See *Follit* v. *Koetzow* (1)), even in the case of an acquittal (*Davys* v. *Douglas* (2) ; *R.* v. *Haden Corser* (3))—Cf. *Rider* v. *Freebody* (4). Again, under provisions such as are contained in s. 147 of the *Justices Act* 1928 of Victoria authorizing the Court of General Sessions in any case of appeal heard and determined before it to state the facts specially for the determination of the Supreme Court, "in which case that Court may determine the same," this Court held that the Supreme Court had power to remit in case of a mistrial or a denial of jurisdiction (*Davies* v. *Davies* (5) ; *Jones* v. *Donovan* (6)). Again, upon a Crown case reserved under the power con-

(1) (1860) 2 E. & E. 730, at pp. 738, 741, 742 [121 E.R. 274, at pp. 277, 278].
(2) (1859) 4 H. & N. 180, at pp. 183, 184 [157 E.R. 806, at pp. 807, 808].
(3) (1892) 6 T.L.R. 563.
(4) (1898) 24 V.L.R. 429.
(5) (1919) 26 C.L.R. 348.
(6) (1927) V.L.R. 322.

tained in the Act 11 & 12 Vict. c. 78 to " make such other order as justice may require," it was held that a *venire de novo*, which was a form of new trial, for error appearing on the record might issue (*R.* v. *Mellor* (1); *Crane* v. *Director of Public Prosecutions* (2)). The observation of Lord *Sumner* in the latter case (3), that it was not to be supposed that he thought either s. 1, sub-s. 7, or s. 20, sub-s. 4, of the *Criminal Appeal Act* 1907 invested the Court with power to grant new trials independently of mistrials, depends upon the express provision in s. 20 (1), abolishing the practice in respect of motions for new trials or the granting thereof in criminal cases. And s. 20 (4) was a special provision which preserved to the Court of Criminal Appeal the powers and authorities of the Court for Crown Cases Reserved. Otherwise criminal appeals were regulated by the Act.

7. There is no " universally recognized constitutional right " against new trials in criminal cases, whether tried summarily or upon indictment, such as is illustrated in *Secretary of State for Home Affairs* v. *O'Brien* (4) and in *R.* v. *Snow* (5) (the case of an acquittal on a criminal charge tried before a jury): See *Archbold's Criminal Pleading, Evidence and Practice*, 12th ed. (1886), p. 265.

8. The respondent was charged with having in his possession certain goods suspected of having been unlawfully obtained, and he was convicted of that charge and ordered to be imprisoned. But the Supreme Court held that the evidence did not support the charge in respect of portion of the goods, but supported it in respect of the remainder. Consequently the learned judges held that the conviction was wholly bad and must be quashed. And they also held that they had no power under s. 210 to remit the matter to the justices for reconsideration. If the question on an appeal brought pursuant to ss. 209-217 of the *Justices Acts* were that material evidence tendered on behalf of an accused person had been wrongly rejected and the Supreme Court so held, then any conviction obtained in such circumstances must be quashed, but the authority conferred by s. 210 enables the Court to make such further order as is just and the circumstances require. And why not an order remitting the case for further consideration? And if the justices convicted a person, as in this case, of having in his possession certain goods unlawfully obtained and there is no evidence to support the conviction as to portion of the goods, the conviction may be quashed, but a further order is required to do justice, and why not an order remitting pursuant to s. 210? A mistake in either case has been made

(1) (1858) Dears. & Bell 468 [169 E.R. 1084].
(2) (1921) 2 A.C. 299.
(3) (1921) 2 A.C., at p. 335.
(4) (1923) A.C. 603, at p. 610.
(5) (1915) 20 C.L.R. 315.

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in the conduct of the proceedings. The words of the section give, as I have said, the widest discretion, and in their plain and ordinary signification warrant such an order.

Consequently in my opinion the Supreme Court was in error in holding that it had no power to remit the case to the justices for reconsideration and rehearing pursuant to the powers contained in s. 210. But the Court has a discretion and it would not remit a case for rehearing and a new adjudication upon the merits, but only for the purpose of preventing a mistrial or to correct mistakes in the conduct of the proceedings.

McTIERNAN J. In my opinion the appeal should be dismissed.

This is an appeal by special leave from an order which was made by the Full Court of the Supreme Court of Queensland under s. 210 of the *Justices Acts* 1886 *to* 1942 of that State. The order made absolute an order nisi which was granted under s. 209 of the Act. It is a condition of the order granting special leave to appeal that it be limited to the question of the interpretation of s. 210, and more particularly the powers of the Court to remit matters to justices. It is unnecessary to repeat the facts of the case.

The cases cited in argument show that for many years the Supreme Court of Queensland has acted upon the view that s. 210 does not authorize the Court to remit a matter to justices, and in the present case the Full Court of the State very properly acted consistently with that interpretation of the section.

An order nisi to show cause why a conviction or order of justices should not be quashed is granted under s. 209 upon prima facie proof of mistake or error on the part of the justices (s. 213). A " conviction " means a conviction for an offence (indictable or not) punishable, on summary conviction before justices, by fine, imprisonment or otherwise : and an " order " means an order which is made upon a complaint of a " breach of duty " for the payment of money or for doing or refraining from doing any other act (s. 4). The proceedings which are begun by the above-mentioned order nisi are described as an appeal to the Supreme Court. Section 210 provides that upon the return of the order nisi the Court should make an inquiry into the matter and take into consideration the evidence adduced before the justices. The Court is required to make this inquiry and give this consideration to the evidence to determine whether the conviction or order can be supported. The section provides that if after such inquiry and consideration the Court thinks that the conviction cannot be supported, " the Court may direct " the conviction or order " to be quashed, and may make

such further order in the premises as is just and the circumstances require."

Having regard to the wide jurisdiction which s. 210 gives to the Court, I think that the intention which the section exhibits is that if the Court thinks the conviction or order cannot be supported, the order quashing it should dispose of the complaint and terminate the question whether the appellant is guilty of the offence or breach of duty alleged in the complaint; and that the further order should be one which is supplementary or ancillary to the quashing of the conviction or order. Having regard to the meaning of the words "conviction" or "order" respectively, there may be cases in which it would be just and the circumstances require a further order.

It is to be observed that s. 231 gives a specific power to the Court to remit the matter to justices. Section 226 provides for an appeal to the Supreme Court by way of special case from a decision of justices on limited grounds. Where an appeal is brought to the Court by special case it is required to hear and determine the question of law arising thereon, and thereupon to affirm, reverse or amend the decision appealed from, or to remit the matter to the justices with the opinion of the Court thereon, or make such other order in relation to the matter as to the Court may seem fit. It is usual to find in Acts which give an appeal of this nature that power is given specially to the Court to remit the matter to the justices. The legislature evidently did not contemplate that the words "to make such other order in relation to the matter . . . as the Court may see fit," which appear in s. 231, include the power to remit the matter to the justices, and for this reason presumably the power to remit was specially given to the Court.

Section 7 of the *Justices Acts Amendment Act of* 1941 added a proviso to s. 210. The proviso is in these terms: "Provided that if after such inquiry and consideration the Court considers that no substantial miscarriage of justice has actually occurred, it may refuse to direct the conviction or order to be quashed." It is to be presumed that the legislature was aware that the Supreme Court had been acting on the view that s. 210 did not give power to the Court to remit the matter.

It is entirely consistent with the language of s. 210 which, as has been shown, gives the Court wide jurisdiction in respect of questions of fact and law and to determine whether the conviction or order can be supported, that the true legislative intention is that the Court should make a decisive determination of the guilt or innocence of the defendant of the matters alleged in the complaint. The Court should be slow to reverse the interpretation of this section, which

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has stood for so many years. It should not do so unless it were convinced that the interpretation was clearly erroneous. I am not so convinced. Besides, Parliament may fairly be presumed to have adopted this interpretation in enacting the proviso to s. 210.

WILLIAMS J. Part IX. of the *Justices Acts* 1886 *to* 1942 (Q.), ss. 209-217, gives a right of appeal by an order to show cause to the Supreme Court of Queensland by any person who feels aggrieved by a conviction or order made by justices. Sections 209 and 210 are in the following terms :—" 209. If any person feels aggrieved by a conviction or order of justices, he may apply to the Supreme Court or a Judge thereof, in Chambers or on circuit, for an order calling on the justices and the prosecutor or other party interested in maintaining the conviction or order, to show cause why such conviction or order should not be quashed, which order may be made returnable on any day on which the Full Court is appointed to sit. 210. If, whether cause is then shown or not, the Court, after inquiry into the matter and consideration of the evidence adduced before the justices, thinks that the conviction or order cannot be supported, the Court may direct it to be quashed, and may make such further order in the premises as is just and the circumstances require."

Section 210 therefore authorizes the Supreme Court of Queensland, when it directs a conviction or order to be quashed, to " make such further order in the premises as is just and the circumstances require."

The question that arises upon this appeal is whether the Supreme Court can by force of these words remit the matter to the justices for a new trial. On at least five occasions the Full Court of Queensland has held that they are not sufficient for this purpose (*Metropolitan Transit Commissioners* v. *Muir* (1); *Laughlin* v. *Power* (2), and *Bale* v. *Sorlie* (3); *Dawson* v. *Zammit* (4); *Michel* v. *Medical Board of Queensland* (5)). After four of these decisions had been given s. 210 was amended by s. 7 of the *Justices Acts Amendment Act of* 1941, which added a proviso that if after inquiry and consideration the Court considered that no substantial miscarriage of justice had actually occurred it might refuse to direct the conviction or order to be quashed.

Not only, therefore, has the section been administered in Queensland for forty years in accordance with the construction first placed upon it by the Full Court of Queensland in 1903, but the legislature when it was specifically dealing with an amendment of the section

(1) (1903) Q.S.R. 326.
(2) (1925) Q.S.R. 202.
(3) (1936) Q.S.R. 259.
(4) (1936) Q.S.R. 322.
(5) (1942) Q.S.R. 1.

did not see fit to include any express power for the Supreme Court to order a new trial.

Under these circumstances this Court should be slow to overrule a construction which has been placed upon the section for so many years, which gives full effect to the general principle of law that a person shall not be placed in peril twice for the same offence except by a statute the words of which are clear, express and free from ambiguity (*Crane* v. *Director of Public Prosecutions* (1); *Benson* v. *Northern Ireland Road Transport Board* (2)), and which is neither embarrassing nor unjust (*Robinson Brothers (Brewers) Ltd.* v. *Durham County Assessment Committee* (3)).

I am not satisfied that this construction is wrong. On the contrary I consider that it is right.

The Queensland *Justices Acts* is a consolidating enactment founded principally upon three Imperial measures passed in 1848 known collectively as *Jervis's Act*, that is to say, the *Indictable Offences Act*, the *Summary Jurisdiction Act* and the *Justices' Protection Act*, which were adopted in New South Wales by the New South Wales *Justices Act* 1850 (14 Vict. No. 43) while Queensland was still a part of New South Wales.

The remedies open to a person aggrieved by any summary conviction by justices in New South Wales before and after this Act came into force are fully discussed in *Kinchler* v. *Cowper* (4).

The words in s. 210 to which I have referred are taken from s. 12 of 14 Vict. No. 43, which provided that a person aggrieved by a summary conviction or order of justices could apply to the Supreme Court of New South Wales for a statutory prohibition and that if the Court after inquiry into the matter and consideration of the evidence adduced thought that the conviction or order could not be supported it could order the writ to issue and could make "such further order in the premises as shall be just and the circumstances appear to require." This section has now become s. 115 of the *Justices Act* 1902 (N.S.W.), and under this section the appeal to the Supreme Court of New South Wales is still by way of statutory prohibition.

In New South Wales as in Queensland it has always been held that the power to make such further order as is just does not authorize the Court to direct a new trial (*Kinchler* v. *Cowper* (4); *Ex parte Kirkpatrick* (5); *Ex parte Lovell*; *Re Buckley* (6); *Ex parte Reid*; *Re Lynch* (7)).

(1) (1921) 2 A.C., at p. 336.
(2) (1942) A.C. 520, at pp. 527, 528.
(3) (1938) A.C. 321.
(4) (1863) 2 S.C.R. (N.S.W.) 142.
(5) (1916) 16 S.R. (N.S.W.) 541; 34 W.N. 15.
(6) (1938) 38 S.R. (N.S.W.) 153, at pp. 174, 175; 59 W.N. 63, at p. 67.
(7) (1943) 43 S.R. (N.S.W.) 207, at p. 216; 60 W.N. 148, at p. 152.

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In New Zealand *The Justices of the Peace Act* 1882, s. 259, authorized the Supreme Court of New Zealand on appeals from justices to hear and determine the matter and make such order in relation thereto, as to the Court should seem fit. It was held in *Searl* v. *McArdle* (1) and in *Taylor* v. *Marsack* (2) that this section did not authorize the Court to mitigate or increase the penalty imposed by the conviction, but only to confirm or quash it. In England in *Evans* v. *Hemingway* (3) it was held by *Stephen* J. and *Charles* J. in the Queen's Bench Division that 20 & 21 Vict. c. 43, s. 6, which authorized the Court to reverse, affirm or amend the determination of a magistrate and to make such other order in relation to the matter as to the Court should seem fit, did not authorize the Court to interfere with the amount of the penalty. It would appear, therefore, that an express power to modify the penalty is necessary for this purpose. *A fortiori* it would appear that under these New Zealand and Imperial Acts it would have been held that the general words would not have been sufficient to empower the court to order a new trial.

At common law, when an inferior court acquitted or convicted an accused person, subject to a case stated which was then removed into a superior court upon certiorari, the superior court could only quash the acquittal or conviction upon the hearing of the case, and could not remit the matter for a rehearing. This was because a decision of an inferior court on the merits, though quashed, exhausts the powers and jurisdiction of that court. It is *functus officio* (*R.* v. *Bourne* (4); *R.* v. *Justices of Antrim* (5)). It was no doubt to overcome such defects that express powers to remit upon a case stated and to modify a decision of a court of summary jurisdiction were conferred upon a superior court by s. 6 of the Imperial *Summary Jurisdiction Act* 1857, and by s. 33 of the Imperial *Summary Jurisdiction Act* 1879; but in England the superior court will refuse to exercise the power to remit except at the request of the justices who stated the case (*Taylor* v. *Wilson* (6)). In Queensland, where the appeal succeeds the person aggrieved is entitled to have the conviction or order quashed instead of, as in New South Wales, to have the proceedings stayed, but I am quite unable to see how this distinction can be sufficient to give to the power to make such further order as is just a greater effect in Queensland than in New South Wales. But since in New South Wales the conviction or order stands and is not quashed it is clear that there

(1) (1897) 15 N.Z.L.R. 613.
(2) (1898) 17 N.Z.L.R. 153.
(3) (1887) 52 J.P. 134.
(4) (1837) 7 A. & E. 58 [112 E.R. 393].
(5) (1906) 2 I.R. 298.
(6) (1911) 106 L.T. 44.

cannot be a second conviction for the same offence. The position in both States is, in my opinion, the same. If there are mistakes made by the justices which are amendable the Supreme Court of Queensland can exercise the power conferred upon it by s. 214 of the Queensland Act and allow the conviction or order to be amended, just as the Supreme Court of New South Wales can exercise similar powers conferred upon it by s. 115 of the New South Wales Act. But if either Court considers that the conviction or order cannot be amended it must direct it to be quashed or stayed.

The power to make such further order in the premises as is just contained in s. 210 is, in my opinion, a power to make such ancillary order, as for instance for the return of goods that have been ordered to be forfeited, for the discharge of a convicted person from custody, or for costs, as may be necessary to give full effect to the order to quash.

It is true that where the appeal to the Supreme Court of Queensland is by way of special case under ss. 226-236 of the Act on the ground that a decision of justices is erroneous in point of law or is in excess of jurisdiction, the Court may, *inter alia*, remit the matter to the justices ; but on such an appeal any party to the proceedings who desires to appeal may apply to the justices to state a case, the justices as they have to state a case are not *functi officio*, and s. 231 confers an express power upon the Supreme Court to remit the matter to the justices. The fact that there is an express power for this purpose in s. 231 in addition to a general power to make such other order in relation to the matter as to the Court shall seem fit assists the conclusion that where the legislature intended to give power to remit it was careful to do so in express terms.

We were referred by the appellant to the decision of the House of Lords in *Crane* v. *Director of Public Prosecutions* (1). In that case the House of Lords held that where all the proceedings upon a trial before a jury had been void *ab initio* the Court of Criminal Appeal in England in quashing the conviction had power under the Imperial *Criminal Appeal Act* 1907 to order a *venire de novo* : See also *R.* v. *Cronin* (2). There are statements in the speech of Lord *Atkinson* in *Crane's Case* (3) tending to show that power to order a new trial where the previous trial was a nullity was conferred upon the appeal court by s. 20, sub-s. 4, of the Imperial *Criminal Appeal Act* 1907 transferring to the Court of Criminal Appeal the jurisdiction which the Court for Crown Cases Reserved had under the *Crown Cases Act* 1848 " to make such other order as justice may require " : See also

(1) (1921) 2 A.C. 299.
(2) (1940) 1 All E.R. 618.
(3) (1921) 2 A.C., at pp. 324, 325.

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Ex parte Malouf; *Re Gee* (1). But, as *Philp* J. pointed out in *Michel* v. *Medical Board of Queensland* (2), the full title of the writ is *venire de novo juratores*, so that the writ only applies to trial by jury and there is no corresponding process in relation to a summary trial. It would not be consistent with justice that a person should be prosecuted a second time for the same offence before the same justice. It is possible, however, that where the proceedings before the justices are a complete nullity, so that there has been no trial on the merits, the justices have not exhausted their jurisdiction (*Halsbury's Laws of England*, 2nd ed. vol. 21, p. 610, note *a*), and that the Supreme Court of Queensland in quashing the conviction could order a new trial; but this question does not arise for decision on this appeal.

For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *W. G. Hamilton*, Crown Solicitor for Queensland, by *A. H. O'Connor*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Dale & Fallu.*

J. B.

(1) (1943) 43 S.R. (N.S.W.), at pp. 198-200; 60 W.N., at p. 139.
(2) (1942) Q.S.R., at p. 37.