[HIGH COURT OF AUSTRALIA.]

DE VOS . . . . . APPELLANT;
COMPLAINANT,

AND

DALY . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1947.

SYDNEY, *April* 24, *May* 8.

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

Justices—Federal statute—Offence—Conviction by State court of summary jurisdiction—Penalty—Fine and costs—Payment—Default—Mode of enforcement—Procedure prescribed by State statute—Imprisonment—Applicability—Appeal against enforcement only—Case stated—Applicability—Commonwealth Conciliation and Arbitration Act 1904-1946 (*No.* 13 *of* 1904—*No.* 30 *of* 1946), *ss.* 44, 46, 49—*Judiciary Act* 1903-1946 (*No.* 6 *of* 1903—*No.* 10 *of* 1946), *ss.* 39 (2), 68 (2), 79—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *ss.* 41, 43, 44—*Justices Act* 1902-1940 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 6 *of* 1940), *ss.* 82 (2), 101.

A magistrate sitting as a Court of Petty Sessions of New South Wales, convicted a person for an offence against s. 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 and ordered him to pay a fine and certain costs but refused to apply s. 82 (2) of the *Justices Act* 1902-1940 (N.S.W.) which provides that in default of payment of the fine and costs as ordered a person in default shall be imprisoned for a prescribed period.

Held, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*McTiernan* J. dissenting), that notwithstanding s. 46 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946, the refusal of the magistrate to apply the provisions of s. 82 (2) of the *Justices Act* 1902-1940 was erroneous in point of law, and an appeal therefrom would lie by way of case stated under s. 101 of that Act.

CASE STATED.

Upon an information laid by William Edward De Vos, one W. Daly was charged before a Court of Petty Sessions at Sydney, New South Wales, that on 7th October 1946, at Waugoola Station, near Woodstock, New South Wales, he being employed as a shearer by the Graziers' Co-operative Shearing Co. Ltd., an employer party to and

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bound by an award of the Commonwealth Court of Conciliation and Arbitration, to wit the Pastoral Industry Award made on 9th September 1938, as varied, and that he being a person bound by that award, as varied, by reason of membership of the Australian Workers' Union, an organization duly registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1946, a party to the said award as varied, and being then and at all material times a member of that organization did wilfully make default in compliance with the award in that he did on 7th October 1946, wilfully absent himself from work during the hours of work prescribed by the award, contrary to the provisions of the said Act and the award.

Section 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946, under which the information was laid, provides: "No person shall wilfully make default in compliance with any order or award. Penalty: Twenty pounds."

Daly pleaded not guilty but after hearing the parties and the evidence adduced by them the magistrate, on 15th January 1947, convicted Daly of the offence charged and adjudged him to pay a penalty of five pounds (£5) and costs amounting to eleven pounds, eighteen shillings and eight pence (£11 18s. 8d.), on or before 15th February 1947. The magistrate refused to apply the provisions of s. 82 (2) of the *Justices Act* 1902-1940 (N.S.W.) and order that in default of payment of the amount adjudged to be paid Daly should be imprisoned for the period prescribed by the sub-section.

De Vos, being dissatisfied with the determination of the magistrate as being erroneous in point of law, applied to the magistrate pursuant to s. 101 of the *Justices Act* 1902-1940, and Section IV., rule 1 of Part II. of the High Court Rules to state a case setting forth the facts and grounds of his determination and order for the opinion of the High Court.

In the case stated by him, the magistrate said: (*a*) that the allegations contained in the information had been established to his satisfaction by the evidence given before him, and he had thereupon convicted Daly; (*b*) that the complainant being the appellant in the case, the grounds for the conviction were not in issue but he, the magistrate, declined, following the imposition of a penalty and costs on Daly, to order a term of imprisonment in default of payment of the penalty and costs; he held that the *Commonwealth Conciliation and Arbitration Act* 1904-1946 contained a provision for the recovery of the penalty and costs, and that he had no power to order imprisonment in default of payment; and (*c*) that the ground upon which it was contended that his determination was erroneous in point of law was that the conviction and

consequent imposition of a penalty and costs were incomplete in that he did not make an order for imprisonment in default of payment of that penalty and costs.

The question reserved for the opinion of the High Court was whether the magistrate's determination convicting Daly was erroneous in point of law.

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

Ashburner, for the appellant. The magistrate should have applied the provisions of s. 82 (2) of the *Justices Act* 1902-1940 (N.S.W.). There is no inconsistency between s. 46 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 and s. 82 (2) of the *Justices Act* 1902-1940. Section 46, although a law of the Commonwealth, does not " otherwise provide " within the meaning of s. 79 of the *Judiciary Act* 1903-1946. Section 46 merely provides an alternative method for the recovery of the fine, whereas s. 82 (2) provides a sanction. Section 68 (2) of the *Judiciary Act* 1903-1946 confers upon the several courts of the States a " like jurisdiction " in respect of offences against the laws of the Commonwealth as is exercisable in respect of offences against the laws of the State concerned. In the absence of express declaration to the contrary by the Commonwealth legislature the provisions of the State law as to courts of summary jurisdiction prevail (*Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch)* v. *Alexander* (1)). The magistrate, sitting as a court of summary jurisdiction, had jurisdiction to award costs (*R.* v. *Archdall*; *Ex parte Carrigan* (2)), and he had power to award, and should have awarded, imprisonment in default of payment of the fine and costs (*Mathews* v. *Burns* (3); *Ex parte Mathews* (4)). Section 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 is an additional provision and is not inconsistent with the other provisions.

Miller K.C. (with him *Stevens*), for the respondent. This appeal is not competent (*Grayndler* v. *Cunich* (5)). Under s. 101 of the *Justices Act* 1902-1940 (N.S.W.), a case can be stated only on the question of whether the magistrate's determination was erroneous in point of law. In these proceedings the determination of the magistrate was to convict the respondent. It is not suggested by the appellant that that conviction was erroneous in point of law. An order to pay a fine and costs consequent upon such conviction

(1) (1912) 15 C.L.R. 308, at pp. 312, 313.
(2) (1928) 41 C.L.R. 128, at p. 147.
(3) (1918) 25 C.L.R. 322.
(4) (1918) 18 S.R. (N.S.W.) 316, at p. 319.
(5) (1939) 62 C.L.R. 573.

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and the method of enforcing payment of that order were matters ancillary to the conviction and were not matters which come within the meaning of the word " determination " as used in s. 101. The only question at issue on a case stated under s. 101 is : " guilty " or " not guilty." If the appellant is dissatisfied with the magistrate's refusal to apply the provisions of s. 82 (2) of the *Justices Act* 1902-1940 by ordering imprisonment in default of payment of the fine and costs, he can bring that matter before this Court only by way of mandamus or certiorari.

[McTIERNAN J. referred to *Kench* v. *Bailey* (1).]

That case is not applicable because in this case the appellant has not complained of the magistrate's decision but of the failure of the magistrate to add something as ancillary to the penalty and providing a particular method of enforcement. Part IV., comprising s. 44 to s. 50B inclusive, of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 provides an exhaustive code for the enforcement of awards and orders of the Commonwealth Court of Conciliation and Arbitration, and it cannot be that by choosing the curia a complainant should be able to obtain or pursue a different remedy. The appellant is not entitled to have recourse to s. 82 (2) of the *Justices Act* 1902-1940. The question in *Mathews* v. *Burns* (2) and *Ex parte Mathews* (3) was purely a question of what was meant by a court of summary jurisdiction.

Ashburner, in reply. This appeal is competent and was properly brought by way of case stated under s. 101 of the *Justices Act* 1902-1940.

LATHAM C.J. The Court does not desire to hear you on the point of procedure or as to whether the determination was a good determination.

Ashburner. The word " determined " has a meaning wider than that of the word " conviction." In *Byrne* v. *McLeod* (4) the right of appeal by way of case stated was not challenged.

LATHAM C.J. The Court does not desire to hear you further on that point.

Ashburner. In considering the applicability of the provisions of s. 82 (2) of the *Justices Act* 1902-1940, the Court should have regard not to the absence from the *Commonwealth Conciliation and Arbitration Act* 1904-1946 of express words as to imprisonment in default

(1) (1926) 37 C.L.R. 375.
(2) (1918) 25 C.L.R. 322.
(3) (1918) 18 S.R. (N.S.W.) 316.
(4) (1934) 52 C.L.R. 1.

of payment of fine and costs, but to s. 49 of that Act and *R.* v. *Archdall*; *Ex parte Carrigan* (1). In New South Wales a court of summary jurisdiction is not limited to criminal jurisdiction (*Ex parte Mathews* (2)).

Cur. adv. vult.

May 8.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by way of case stated from an order of a magistrate convicting the respondent for an offence under s. 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. Section 49 provides :—" No person shall wilfully make default in compliance with any order or award. Penalty : Twenty pounds."

The respondent was convicted and was fined £5 and ordered to pay £11 18s. 8d. costs. The magistrate was asked to apply the provisions of s. 82 (2) of the New South Wales *Justices Act* 1902-1940, which provides that where, by any conviction or order, it is adjudged that any fine, penalty or sum of money or costs shall be paid, the justice or justices making the conviction or order shall, except where the conviction or order is made against a corporate body, adjudge that, in default of payment of the amount adjudged to be paid, the person against whom the conviction or order is made shall be imprisoned for the period prescribed by subsequent provisions of the section. Where the amount exceeds 20s. the period is one day for each 10s. of the amount. In the present case the period of imprisonment to be ordered, if s. 82 is applicable, would be thirty-three days. The magistrate refused to apply this provision and the question was whether he was right in so refusing.

It was argued for the respondent that the procedure by way of case stated under the *Justices Act*, s. 101, was not applicable in a case where the conviction itself, that is, the part of the order determining that a person was guilty of an offence, was not challenged. Section 101, however, affords the remedy provided in the section to any party to proceedings, if dissatisfied with a determination by a justice in the exercise of summary jurisdiction of any information or complaint " as being erroneous in point of law." In this case it is contended that the determination of the justice is erroneous in that it did not, in addition to fining the respondent, proceed to order that in default of payment he should be imprisoned for the period prescribed by s. 82 (2). This is plainly an allegation that the determination of the justice was erroneous in point of law and it falls within s. 101 of the *Justices Act*.

(1) (1928) 41 C.L.R. 128.

(2) (1918) 18 S.R. (N.S.W.) at p. 318.

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Section 49 of the *Commonwealth Conciliation and Arbitration Act* creates the offence. Section 44 of the *Acts Interpretation Act* 1901-1941 provides that all pecuniary penalties for any offence against any Act may, unless the contrary intention appears, be recovered in any court of summary jurisdiction. This section therefore authorized proceedings against the respondent for the offence in a court of summary jurisdiction. When the court of summary jurisdiction dealt with the matter it was controlled by the *Judiciary Act* 1903-1946, s. 68 (2), which provides, *inter alia*, that the several courts of a State exercising jurisdiction with respect to the summary conviction "of offenders or persons charged with offences against the laws of the State . . . shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State." Under this provision the court of summary jurisdiction had the same jurisdiction with respect to the respondent, who was charged with an offence against a Commonwealth law, as it would have had against a person who was charged with an offence against the laws of the State. In the case of an offender charged with an offence against the laws of the State, the court had jurisdiction not only to fine but also to order imprisonment. Therefore, under this provision there is, it was contended, no doubt as to the jurisdiction of the court to order imprisonment by virtue of s. 82 of the *Justices Act*, and s. 82 not only gives that jurisdiction, but requires the court to exercise that jurisdiction.

This argument is supported also by the *Judiciary Act*, s. 79, which provides that :—"The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising Federal jurisdiction in that State in all cases to which they are applicable." In this case the magistrate was exercising Federal jurisdiction as a court in the State of New South Wales. Therefore, except as otherwise provided by the Constitution or the laws of the Commonwealth, he was bound to apply the laws of the State of New South Wales. The laws of the State of New South Wales included s. 82 (2) of the *Justices Act* and he was therefore bound to apply that provision and, accordingly, to order imprisonment in default of payment of the fine and costs.

It has been held in this Court that where the Commonwealth Parliament vests Federal jurisdiction in a State court it takes the State court as it exists. In *Federated Sawmill, Timberyard and*

General Woodworkers' Employees' Association (Adelaide Branch) v. *Alexander* (1) it was held that the court was taken with such limitations as it possessed. In *Ex parte Mathews* (2) the Full Court of the Supreme Court of New South Wales acted upon the assumption that when a court of summary jurisdiction was dealing with a charge of an offence against s. 68 of the *Commonwealth Conciliation and Arbitration Act* it must " couple its decisions with an order for imprisonment in default of payment " (3). In *R.* v. *Archdall*; *Ex parte Carrigan* (4) there was a prosecution under the Commonwealth *Crimes Act*, and the magistrate ordered payment of costs. The power to order payment of costs was derived entirely from State law, but the objection that there was no power to order costs was met by reference to the provisions of the *Judiciary Act*, ss. 68 and 79, coupled with the provisions of *The Justices Act of* 1886 (Q.) : See (5).

As against this argument the respondent contended that Part IV. of the *Commonwealth Conciliation and Arbitration Act* contained a complete code dealing with offences against the Act and that a provision contained in s. 46 was the only means of enforcing a fine imposed for an offence under s. 49. Section 46 is, so far as relevant, in the following terms :—" Where a Court has imposed a penalty for an offence against this Act or the regulations thereunder or for a breach or non-observance of any term of an order or award, or has ordered the payment of any costs or expenses, a certificate under the hand of the Registrar, specifying the amount payable and the organizations and persons by and to whom respectively it is payable, may be filed in any Federal or State Court having civil jurisdiction to the extent of that amount, and shall thereupon be enforceable in all respects as a final judgment of that Court."

This provision makes it possible to obtain a certificate from the Industrial Registrar and, upon filing the certificate in a court of civil jurisdiction, to enforce the order imposing a penalty as a final judgment of that court. This provision relates, however, only to courts having civil jurisdiction and provides a means of obtaining execution in a civil jurisdiction. It does not deal with such a criminal remedy as imprisonment and cannot be regarded as in any way inconsistent with the application of s. 82 of the *Justices Act*.

A further argument was based upon s. 44 of the *Commonwealth Conciliation and Arbitration Act*. This section provides that where any organization or person bound by an order or award has committed any breach or non-observance of any term of the order or award

(1) (1912) 15 C.L.R. 308.
(2) (1918) 18 S.R. (N.S.W.) 316.
(3) (1918) 18 S.R. (N.S.W.), at p. 319.
(4) (1928) 41 C.L.R. 128.
(5) (1928) 41 C.L.R., at p. 147.

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a penalty not exceeding certain maximum amounts may be imposed by the Commonwealth Court of Conciliation and Arbitration or by any District, County or Local Court or Court of summary jurisdiction which is constituted by a judge or a police, stipendiary or special magistrate or by an industrial magistrate appointed under any State Act who is also a police, stipendiary or special magistrate. It was argued that if s. 82 of the *Justices Act* was applicable in New South Wales in the case of conviction before a court of summary jurisdiction the result would be that a person so convicted would be subject to imprisonment in default and would not or might not be subject to imprisonment in the case of conviction before any of the other courts mentioned. In my opinion there are two answers to this argument. In the first place, the provisions of the *Judiciary Act* to which reference has been made will necessarily sometimes bring about different results, according to the State in which proceedings are taken. In the second place, s. 44 refers to " any breach or non-observance of any term of the order or award " and prescribes the maximum penalties for such a breach or non-observance. On the other hand, s. 49 deals with wilful default in compliance with an order or award and prescribes a maximum penalty of £20. Thus s. 44 has no application in the case of a prosecution under s. 49.

In my opinion, therefore, the contention of the appellant is correct. The magistrate should have applied s. 82 of the *Justices Act* 1902-1940. The question submitted in the case should be answered accordingly, the appeal being allowed and the case remitted to the magistrate.

RICH J. The respondent was convicted in a Court of Petty Sessions at Sydney of an offence against s. 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. He was fined but the magistrate " declined, following the imposition of a penalty and costs, to order a term of imprisonment in default of payment of the penalty and costs," holding that, as the *Commonwealth Conciliation and Arbitration Act* contained a provision for the recovery of the penalty and costs, he had no power to order imprisonment. On appeal to this Court by way of case stated, it was first contended that this procedure was not applicable to a case such as the present where the conviction itself was not called in question. There is no substance in this contention, as the omission to adjudge imprisonment in default of payment is an erroneous determination in point of law: s. 101 of the *Justices Act* 1902-1940 (N.S.W.). Mr. *Miller*, however, raised a more substantial objection in contending that the *Commonwealth Conciliation and Arbitration Act*, Part IV., which created the offence, also

provided a code for the enforcement of orders and awards. He relied upon s. 46 as providing the exclusive method of enforcement of the penalty imposed by s. 49. But the remedies provided in s. 46 are limited to those obtainable in a civil jurisdiction and do not clash with those procurable in a criminal jurisdiction. And as the matter was heard in New South Wales the presiding magistrate was exercising summary jurisdiction: *Acts Interpretation Act* 1901-1941, s. 44, and *Judiciary Act* 1903-1946, s. 68 (2) (*a*). Under this latter section he had the like jurisdiction with respect to the respondent who was charged with an offence against a law of the Commonwealth committed within the State as he would have had if the offence had been committed against the law of the State. And as s. 82 of the *Justices Act* 1902-1940 provides imprisonment as the method of enforcing the fine, the magistrate should have adjudged that, in default of payment, the respondent should be imprisoned in accordance with the section.

In my opinion the appeal should be allowed.

STARKE J. Case stated by way of appeal to this Court from the determination of a stipendiary magistrate in Petty Sessions in the matter of an information charging the respondent that, in New South Wales, being a member of the Australian Workers' Union, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1946, he did wilfully make default in compliance with an award of the Commonwealth Court of Conciliation and Arbitration in contravention of the provisions of s. 49 of the *Commonwealth Conciliation and Arbitration Act*: See *Grayndler* v. *Cunich* (1).

The respondent was convicted of the offence and adjudged to pay a penalty of £5 (*Commonwealth Conciliation and Arbitration Act*, s. 49; *Acts Interpretation Act* 1901-1941, s. 41) and costs. But the magistrate refused to order a term of imprisonment in default of payment of the penalty and costs in accordance with the provisions of the *Justices Act* 1902-1940, s. 82 (2) of the State of New South Wales.

The question is whether he was required to order a term of imprisonment by reason of the *Justices Act*.

The magistrate was exercising Federal jurisdiction invested in Petty Sessions by force of the *Commonwealth Conciliation and Arbitration Act*, s. 44, the *Judiciary Act* 1903-1946, s. 39 (2) and the *Acts Interpretation Act* 1901-1941, ss. 43, 44. And by the *Judiciary Act* 1903-1946, ss. 68, 79 the courts of a State exercising jurisdiction with respect to the summary conviction of offenders or

(1) (1939) 62 C.L.R. 573.

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persons charged with offences against the laws of the State have the like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth committed within the State, and the laws of the State relating to procedure shall except as otherwise provided by the Constitution or the laws of the Commonwealth be binding on all courts exercising Federal jurisdiction in that State.

None of these provisions enables the State or State tribunals to alter or increase the penalty imposed by Federal law. But the mode of enforcing the penalty—the execution of the judgment—is remitted to the provisions of the State law except as otherwise provided.

The critical question in the present case is whether the effect of the *Justices Act* of New South Wales in s. 82 (2) is to alter or increase the penalty imposed by the Federal law or merely to enforce that penalty. Formerly, moneys adjudged to be paid by conviction or order might in New South Wales be levied by distress and in default of distress by imprisonment (See *Justices* (*Fines*) *Act* 1899 (N.S.W.)). But now recovery of fines by distress except in the case of a corporate body is abolished and it is provided that whenever by any conviction it is adjudged that any fine or penalty shall be paid the justice making the conviction shall (except where the conviction is against a corporate body) adjudge that in default of payment the person against whom the conviction is made shall be imprisoned unless the amount and, if to such justice it seems fit, the costs and charges of conveying him to prison be sooner paid. In my opinion, that provision is imperative but it is not the imposition of a substantive or new penalty but a mode of execution—the enforcement of payment of a penalty adjudged to be paid. The order for imprisonment is only in default of payment of the penalty and unless the amount be paid.

It was contended, however, that the *Commonwealth Conciliation and Arbitration Act* in s. 46 otherwise provided. But that section is merely permissive and enables civil proceedings to be taken for the enforcement of a penalty which has been imposed. The provisions of the *Justices Act*, s. 82 (2) are in no wise inconsistent with these provisions.

The question stated by the magistrate should be answered that his determination was erroneous and that he should have adjudged a term of imprisonment in accordance with the provisions of the *Justices Act*, s. 82 (2).

McTIERNAN J. The respondent, a shearer, was charged before a New South Wales stipendiary magistrate with an offence against s. 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946.

This section provides that no person shall wilfully make default in compliance with an award or order made under the Act. The words " Penalty : Twenty pounds " are set out at the foot of the section. The information alleged that the respondent had wilfully made default in compliance with the Pastoral Industry Award by which he was bound. The magistrate tried the respondent summarily upon the information and convicted him. In the case the magistrate exercised Federal jurisdiction with respect to the respondent under s. 68 (2) (*a*) of the *Judiciary Act* 1903-1946. Section 41 of the Federal *Acts Interpretation Act* 1901-1941 ascribes to the words set out at the end of s. 49 of the *Commonwealth Conciliation and Arbitration Act* the meaning that any contravention of the section shall be an offence against the *Commonwealth Conciliation and Arbitration Act*, punishable upon conviction by a penalty not exceeding the penalty mentioned at the end of the section, that is, twenty pounds.

The magistrate imposed a penalty of £5 upon the respondent and ordered him to pay the prosecution's costs, which amounted to £11 18s. 8d. The conviction was made on 15th January 1947 and the magistrate ordered the respondent to pay the penalty and costs on or before 15th February 1947. The magistrate made no further order. If the prosecution had been for an offence, triable summarily under the New South Wales *Justices Act* 1902-1940, for an offence against a State Act, s. 82 (2) of the former Act would have applied to the case. Omitting a proviso which is not now material, this sub-section is in these terms :—" Whenever by any conviction or order it is adjudged that any fine or penalty, or any sum of money, or costs, shall be paid, the justice or justices making the conviction or order shall, except where the conviction or order is made against a corporate body, therein and thereby adjudge that, in default of payment, in accordance with the terms of the conviction or order, of the amount thereby adjudged to be paid as ascertained thereby, the person against whom the conviction or order is made shall be imprisoned and so kept for a period calculated in accordance with the provisions of this sub-section, unless the said amount and, if to such justice or justices it seems fit, the costs and charges of conveying him to prison be sooner paid : . . . Where the said amount does not exceed ten shillings such period shall not exceed twenty-four hours. Where the said amount exceeds ten shillings but does not exceed twenty shillings such period shall be forty-eight hours. Where the said amount exceeds twenty shillings such period shall be one day for each ten shillings of such amount or part thereof, but in no case shall such period exceed twelve months. Such imprisonment shall

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be with either hard labour or light labour, as the justice or justices in and by the conviction or order adjudge."

If this sub-section applied to the present case the magistrate would have been bound to adjudge by the conviction and order that in default of payment of the penalty and costs the respondent be imprisoned and kept in prison for a period within the limits prescribed by the sub-section. The question which arises is whether the magistrate was bound to carry out the provisions of this sub-section in the present case. It has already been stated that he was exercising Federal jurisdiction. The provisions of s. 82 (2) of the New South Wales *Justices Act* would not apply to the case unless they were made applicable by a Federal law. It was argued for the appellant that these provisions applied by virtue of s. 79 of the *Judiciary Act*. This section would make s. 82 (2) of the *Justices Act* 1902-1940 applicable to the present case unless the Constitution or the laws of the Commonwealth otherwise provided. It was argued for the respondent that s. 46 of the *Commonwealth Conciliation and Arbitration Act* provided for the enforcement of the order imposing the penalty of £5 upon the respondent and the order for the payment of the costs otherwise than by an adjudication, under s. 82, that in default of payment of either sum the respondent be imprisoned.

Section 46 is in these terms :—" Where a Court has imposed a penalty for an offence against this Act or the regulations thereunder or for a breach or non-observance of any term of an order or award, or has ordered the payment of any costs or expenses, a certificate under the hand of the Registrar, specifying the amount payable and the organizations and persons by and to whom respectively it is payable, may be filed in any Federal or State Court having civil jurisdiction to the extent of that amount, and shall thereupon be enforceable in all respects as a final judgment of that Court." The words " a Court " in this section include the court of summary jurisdiction which convicted the respondent. The words " the Court " are used in the Act to refer to the Commonwealth Court of Conciliation and Arbitration. See definition of " The Court " in s. 4.

In the present case a court has imposed a penalty for an offence against the *Commonwealth Conciliation and Arbitration Act*, that is to say for a contravention of s. 49 : a court also has ordered the payment of costs. The conditions precedent to the operation of s. 46 have been fulfilled. The case is one in which a certificate of the Registrar of the Court of Conciliation and Arbitration may be filed in any Federal or State Court having civil jurisdiction to the extent of the penalty and costs which the respondent has been adjudged to pay. When the certificate is filed there may be execution

upon it as if it were a final judgment of the Court of civil jurisdiction in which it is filed.

According to the terms of s. 82 (2) of the *Justices Act* 1902-1940, the justice is bound at the time he convicts, that is then and there, to order that the defendant should be imprisoned for a period if the defendant makes default in the payment of the penalty imposed by the justice or the costs which he orders the defendant to pay. If these provisions apply to a penalty to which s. 46 of the Federal Act applies, the result would be that the intention of the legislature is that the civil remedy in s. 46 should be cumulative upon an order, already made by a justice, for imprisonment, if the penalty is not paid. In the absence of clear words, I should not impute that intention to the legislature. In my opinion s. 46 provides a special and exclusive means of enforcing any penalty or order for payment of costs to which the section applies. The intention of s. 46 is to make the recovery of any penalty to which it applies a matter of civil jurisdiction. It is not compatible with that intention to hold that the penalty to which the legislature refers in s. 46 is a penalty in respect of which the justice, who imposed it, was bound under s. 82 (2) to make an adjudication at the time of its imposition, that if the penalty was not paid the defendant would be imprisoned and had made such an adjudication.

At common law a writ of *fieri facias* could not be sued out against the lands or goods of the judgment debtor when he had been taken in execution under a writ of *capias ad satisfaciendum*. A proceeding under s. 46 is comparable with suing out a writ of *fieri facias*. An adjudication under s. 82 (2) is comparable, except that it is a matter of criminal jurisdiction, with a writ of *ca. sa.* It is harmonious with the common law which was against taking the property of the debtor in execution after having taken his body in execution to hold that both s. 46 and s. 82 (2) do not apply to the enforcement of any penalty which is within the scope of s. 46 : and that s. 46 is a code prescribing how such a penalty may be enforced. It is to be presumed that the legislature did not intend to subvert the common law unless it exhibits the intention of doing so.

In my opinion the magistrate was right in deciding that he had no power under Federal law to order that the respondent be imprisoned in default of payment of the penalty and costs which the magistrate adjudged him to pay. I should dismiss the appeal.

WILLIAMS J. I have read and agree substantially with the reasons of the Chief Justice, and I shall therefore confine myself to stating shortly my reasons for thinking that the stipendiary magistrate

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erred in refusing to order that the respondent, upon conviction, should be imprisoned in default of payment of the penalty and costs within the specified time.

The magistrate convicted the respondent for an offence under s. 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. This sections contains in a footnote the words: "Penalty: Twenty pounds." Section 41 of the *Acts Interpretation Act* 1901-1941 provides that these words "shall indicate that any contravention of the section . . . shall be an offence . . . punishable upon conviction by a penalty not exceeding" twenty pounds. The words "punishable upon conviction" make it clear that the penalty cannot be recovered in a civil court, but must be enforced in criminal proceedings. The present proceedings were brought in a Court of Petty Sessions holden at Sydney. This Court had jurisdiction to try the respondent summarily by virtue of s. 44 of the *Acts Interpretation Act* and s. 68 (2) of the *Judiciary Act* 1903-1946. Section 68 (2) of the *Judiciary Act* gave the stipendiary magistrate the like jurisdiction over the respondent as he would have had if the respondent had been charged with an offence against the laws of the State. Section 79 of the *Judiciary Act* provides that "The laws of each State . . . shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable."

If these sections of the *Acts Interpretation Act* and the *Judiciary Act* had stood alone, there could be no doubt that the magistrate could have ordered the respondent to be imprisoned in accordance with s. 82 (2) of the *Justices Act* 1902-1940 (N.S.W.). This would have been the only method of enforcing the payment of the penalty and costs.

But s. 46 of the *Commonwealth Conciliation and Arbitration Act* provides that "Where a Court has imposed a penalty for an offence against this Act . . . or has ordered the payment of any costs or expenses, a certificate under the hand of the Registrar, specifying the amount payable and the . . . persons by and to whom respectively it is payable, may be filed in any Federal or State Court having civil jurisdiction to the extent of that amount, and shall thereupon be enforceable in all respects as a final judgment of that Court".

The language of s. 49 of the *Commonwealth Conciliation and Arbitration Act* has always remained the same, but the language of s. 46 has been amended on several occasions. The only amendment that is material is the amendment of the first three words. Prior to the

Commonwealth Conciliation and Arbitration Act 1918, these words were "Where the Court." Section 5 of that Act amended s. 46 by omitting the words "the Court," and inserting in their stead the words "a Court." Until this amendment, therefore, s. 46 only applied to the Commonwealth Court of Conciliation and Arbitration. When s. 46 was amended to apply to any court, no express provision was inserted that the means of recovering a penalty and costs provided by s. 46 were to be exclusive of the means provided by State law, and there is nothing in the amendment which raises a necessary implication to that effect. The amendment merely added a new means of enforcing orders for the payment of penalties and costs by the process of a civil court to those existing under State laws.

I would allow the appeal.

Appeal allowed with costs. Answer question by declaring that the determination of the stipendiary magistrate was erroneous and that he should have adjudged that in default of payment of the fine imposed and costs ordered to be paid the defendant should be imprisoned in accordance with the provisions of the Justices Act 1902-1940, *s.* 82 (2). *Case remitted to magistrate.*

Solicitors for the appellant, *A. J. McLachlan, Hoare & Co.*
Solicitor for the respondent, *Cecil O'Dea.*

J. B.