[HIGH COURT OF AUSTRALIA.]

WARD . . . . . APPELLANT;

DEFENDANT,

AND

WILLIAMS . . . . . RESPONDENT.

COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 22, 23;

MELBOURNE, *March* 2.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Nuisance—Notice to abate—Cottage—Dilapidated condition—Tenant in possession—Demolition—Discretion of magistrate—Grounds for exercise—Public Health Act 1902-1952, *ss.* 64, 65, 66.

Statutes—Construction—"Shall"—"May"—Interpretation Act of 1897, *s.* 23.

Quarter Sessions—Stating case for Supreme Court—Reference of question of law—Appeal already dismissed—Justices Act 1902-1951, *s.* 131A—*Power of Supreme Court.*

Evidence—Rejection—Tribunal exercising discretion—When question of law.

The *Public Health Act* 1902-1952, s. 66, provides that where a person on whom a notice to abate a nuisance has been served by a local authority makes default in complying with any of the requisitions thereof, the local authority shall make complaint to a justice, who shall issue a summons requiring the person to appear before a magistrate or justices. The said magistrate or justices may, if satisfied that the alleged nuisance exists, by order require the said person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance.

Held, that the magistrate has a discretion, which must be exercised judicially and upon grounds which do not go beyond the scope and object of Pt. VII of the *Public Health Act* 1902-1952.

Prima facie, permissive or facultative expressions in a statute operate according to their ordinary natural meaning. In construing a statute conferring a power by permissive or facultative expressions, it is important not to mistake indications or evidences, found in the context or subject matter, of an intention that a right to call for the exercise of the discretion should exist, for indications or evidences of an intention that the officer in whom the

power is reposed should be under a duty, upon request and upon fulfilment of the necessary conditions, to do the thing authorized.

Once an appeal to Quarter Sessions has been heard and determined, so that that court has disposed of it by a judicial decision, the opportunity of stating a case under s. 131A of the *Justices Act* 1902-1951 has passed (*Roberts* v. *Jones* (1928) 28 S.R. (N.S.W.) 543; 45 W.N. 156, applied). Quarter Sessions, under that section, may pronounce a judgment or decision conditionally subject to the reservation of a special case and a decision thereon by the Supreme Court.

Where evidence is tendered to a tribunal exercising a statutory discretion, the question whether the evidence ought to be received does not depend on its relevance to some distinct issue of fact. It depends on the bearing of the facts it was proposed to prove upon the exercise of the tribunal's discretion. A refusal to receive evidence because the tribunal is of the opinion that particular facts could not affect the exercise of its discretion involves no question of law unless it exhibits some misconception of the scope of the discretion, or the grounds upon which its exercise should proceed.

Decision of the Supreme Court of New South Wales (Full Court), *Williams* v. *Ward* (1953) 19 L.G.R. 190, reversed.

APPEAL from the Supreme Court of New South Wales.

The appellant, the owner of premises occupied by a tenant, was served with a notice by the Council of the Municipality of Leichhardt, which recited that the council "being the local authority under the provisions of the *Public Health Act* 1902-1944 being satisfied that the premises . . . of which you are the owner are in such a state as to be a nuisance liable to be dealt with summarily under the said Act by reason of the following:—1. Roof over front verandah, front bedroom, lounge room and kitchen is leaking. 2. Wall of kitchen is damp. 3. The premises are in a state of disrepair as: (a) front porch is incorrectly graded and drained. (b) ceilings in hall, second bedroom are fractured. (c) Awning over rear door is insecure." The notice then required the appellant "to abate the said nuisance within twenty-eight days . . . and to execute such works and do such things as may be necessary for that purpose." The appellant failed to abate the nuisance and the respondent, the chief health inspector of the council, laid an information against her. The magistrate found that the nuisance complained of existed, and ordered "that the nuisance be abated by compliance with paragraphs 1, 2 and 3 (a) in the notice above referred to . . ." The appellant was convicted and fined. She appealed to quarter sessions, where the chairman dismissed the appeal and confirmed the order and conviction of the magistrate. The appellant produced evidence of a valuer and an architect to the effect that the building was in

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such a state that the only practical remedy from a point of sale or letting was demolition and rebuilding, and that necessary repairs would cost £200. Counsel for the appellant sought to lead further evidence of repairs which were necessary to make the premises reasonably habitable, with proper standards of health and sanitation, such matters not being covered by the notice. The chairman rejected the evidence. In stating a case for the opinion of the Supreme Court, as requested by the appellant, the chairman said :— "I held that the repair, not renovation, of the premises was sufficient to meet the requirements of the notice, and further that the notice of the council and the order of the magistrate were not unreasonable under the circumstances, and I dismissed the appeal." The question submitted for the opinion of the Supreme Court was whether the chairman's determination upholding the conviction of the appellant was erroneous in point of law. The Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) answered the question in the negative and dismissed the appeal with costs (1). From this decision the appellant appealed, by special leave, to the High Court. Further facts and statutory provisions appear in the judgment of the Court.

C. J. Bannon, for the appellant. The appellant contended, in the lower courts, that the proper order was for the demolition of the premises. The Supreme Court held that the only discretion conferred by s. 66 of the *Public Health Act* 1902-1952 was in the terms of the orders which could be made under the section. The object of the Act is the protection of public health. The appellant desires to abate the nuisance by demolition. The Act is based on the *Public Health Act* 1896 (N.S.W.) No. 38, which in turn is based on two English Acts—the *Housing of the Working Classes Act* 1890 (53 & 54 Vict. c. 70) and the *Public Health (London) Act* 1891 (54 & 55 Vict. c. 76). Section 39 of the *Public Health Act* 1896 is similar to s. 61 of the present Act, and ss. 4 and 5 of the *Public Health (London) Act* 1891 are similar to ss. 64 to 66 of the present Act. In s. 96 of the *Public Health Act* 1875 (Imp.), it is provided that the court "shall make an order" if satisfied that the alleged nuisance exists. The order of the magistrate in this case is an order to comply with statutory nuisances. The order can be construed from the judgment to mean that compliance by repair is ordered. Otherwise the order is meaningless. The chairman of quarter sessions rejected evidence of other things relating to the premises which amount to nuisances, bringing the premises within ss. 57 and 61 of the Act. If the

(1) (1953) 19 L.G.R. 190.

evidence had been admitted and accepted, the question would have arisen whether it was reasonable to spend £1,000 to make the premises reasonably habitable. Under s. 131A of the *Justices Act* 1902-1951 it would have been open to the Supreme Court to direct the quarter sessions to re-open the case and admit the evidence. The chairman failed to take into account matters he should have considered. Under s. 66 (2) the magistrate has a discretion whether he will order compliance or not. The chairman failed to exercise that discretion. The proper method of demolition is under s. 61. Even if the magistrate has power to order demolition, this order was the result of insufficient evidence. [He referred to the *Public Health Act* 1875 (Imp.), ss. 91, 94, 96; *Public Health (London) Act* 1891, ss. 4, 5; *Gebhardt* v. *Saunders* (1); *Housing of the Working Classes Act* (Imp.), 1890.] The English Act of 1875 gives no discretion to the court. The New South Wales Act is in almost precisely the same terms, except that it substituted " may " for " shall ". [He referred to the *Rivers Pollution Prevention Act* (Imp.), 1876; *Public Health Act* (N.S.W.) 1902-1952, ss. 57, 61, 64A.] Discretion is given to the magistrate so that he can leave it to the council under ss. 57 and 61 to order demolition. The magistrate has no power under s. 66 to order demolition; if he had, the situation which s. 61 envisages would never arise. The conflict of duty in relation to dangerous premises can be resolved only if the magistrate's discretion is unfettered in s. 66 (2). [He referred to *Ex parte Whitchurch* (2); *Ex parte Saunders* (3).] Each of the heads of nuisance in s. 64 limits each of the others. Some premises are subject to both parts of the Act. Section 64 was never intended to deal with the class of case requiring demolition. Even if the council has given consideration to the question, the magistrate has an independent discretion: *Kirkheaton District Local Board* v. *Ainley, Sons & Co.* (4). If the evidence had been admitted, it would have shown that there was a remedy under ss. 57 and 61.

[DIXON C.J. Would the rejected evidence affect the conclusion that the notice was not unreasonable?]

Yes. It is unreasonable, for example, to direct that a wall be repaired if the rest of the house is falling apart. The evidence also went to the efficacy of the suggested repairs. [He referred to *Kirwin* v. *Arthur* (5); *D. D. Fraser & Co. Ltd.* v. *Minister of National Revenue* (6); *House* v. *The King* (7); *Sydney Corporation* v. *Harris* (8).] If the owner is prepared to have the premises

(1) (1892) 2 Q.B. 452.
(2) (1881) 6 Q.B.D. 545.
(3) (1883) 11 Q.B.D. 191.
(4) (1892) 2 Q.B. 274, at pp. 282, 283, 288.
(5) (1948) 16 L.G.R. 189, at p. 190.
(6) (1949) A.C. 24, at p. 32.
(7) (1936) 55 C.L.R. 499, at pp. 504-505.
(8) (1912) 14 C.L.R. 1, at pp. 5, 9.

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demolished, there is no point in using the *Public Health Act* 1902-1952 to make her repair them for the tenant. The Act relates to public health, not to bringing sub-standard houses into repair.

B. P. Macfarlan Q.C. (with him *A. F. Rath*), for the respondent. The word " may " in s. 66 (2) is imperative, for the reasons given by the Supreme Court. The word empowers, and, when the facts are found to exist, it becomes the duty of the magistrate to exercise the power. The discretion is as to the form of the order. The last part of s. 66 (2) empowers the magistrate to specify particular works, which may be in disagreement with the methods considered satisfactory by the council. If the nuisance found to exist could be abated only by demolition, then he would have the power to make that order. The section includes all the matters the magistrate has to consider. The only question before him is how the nuisances specified can be abated. [He referred to *Julius* v. *Bishop of Oxford* (1); *Cook* v. *Cook* (2).] The relevant circumstance is the object and known purpose of the legislation in which the word " may " appears: *Rhymney Iron Co.* v. *Gelligaer District Council* (3). There is every reason why, when a nuisance is found to exist, the order should be made. The only matter which must be proved is that the nuisances in the notice exist. The general objects of the Act show that the word " may " is imperative. The only thing the defendant can show is that there is no nuisance, or that there is a better and cheaper way of abating those nuisances. Section 66 (2) is aimed at abating the nuisance, and the order should do so. In regard to the particular nuisance, the order may involve demolition. If the nuisance were a pool of water supported by banks, an order could be made that the banks be removed. The subject of the inquiry is the method of abatement of the particular nuisance. The appellant has not sought to tender evidence on the basis that it is relevant to the abatement of these nuisances. [He referred to *Salisbury Corporation* v. *Roles* (4).] General economic considerations are not relevant. If the appellant is right as to the existence of the discretion, then it was exercised. On any view the proffered evidence was irrelevant. The order is inartistic. Reading it as a whole, and particularly the concluding words of the notice, it is a possible construction that it is an order to abate the nuisances, and to do whatever works are necessary.

[DIXON C.J. Have we power under s. 131A of the *Justices Act* 1902-1952 to do anything about the order ?]

(1) (1880) 5 App. Cas. 214.
(2) (1923) 33 C.L.R. 369.
(3) (1917) 1 K.B. 589, at pp. 594, 595, 597.
(4) (1948) W.N. (E.) 412.

The chairman of quarter sessions had power to state the case. He made a finding on the facts. Section 131A comprehends both cases before determination, and cases as appeals. If the case stated was not permissible under the section, the Court should rescind special leave. [He referred to *McGillivray* v. *Stephenson* (1); *Interpretation Act* of 1897, s. 23; *Smith* v. *Watson* (2).]

C. J. Bannon, in reply, referred to *Kennedy* v. *Donnelly* (3); *Metropolitan Coal Co. of Sydney Ltd.* v. *Australian Coal & Shale Employees' Federation* (4); *R.* v. *Mitchell*; *Ex parte Livesey* (5); *Re Fettell* (6).

Cur. adv. vult.

1955, Mar. 2.

THE COURT delivered the following written judgment:—

The appellant is the owner of a small semi-detached cottage in Annandale occupied by a tenant. A magistrate, under s. 66 of the *Public Health Act* 1902-1952 (N.S.W.), made an order treating certain defects in the condition of the premises as a nuisance the abatement of which is required. The appellant invoked the authority of quarter sessions but in vain. Quarter sessions stated a case for the Supreme Court of New South Wales, but that court upheld the conclusion of quarter sessions. The magistrate's order thus stands. The Supreme Court held that the magistrate, once he was satisfied that there existed a state of affairs which the statute called a nuisance, had no discretion to refuse to make an order in one or other of the forms authorized by s. 66 for the abatement of the nuisance; his discretion went no further than adopting one of the alternative forms of order. The appellant's case had been that, having regard to the age, character and dilapidated condition of the cottage, she ought not in reason to be required to rehabilitate it at great expense but should be permitted to pull it down as she desired, notwithstanding that in the meantime the tenant might be deprived of his habitation.

On an application to this Court for special leave to appeal the interpretation of the provisions of the *Public Health Act* which allowed the magistrate no discretion seemed open to doubt and the question appeared to be one of sufficient importance, in prevailing conditions, to make it proper to permit an appeal for the purpose of raising it. The examination which the case underwent at the

(1) (1950) 1 All E.R. 942.
(2) (1906) 4 C.L.R. 802, at pp. 811, 819, 827.
(3) (1933) 34 S.R. (N.S.W.) 61; 51 W.N. 22.
(4) (1917) 24 C.L.R. 85, at pp. 96, 97.
(5) (1913) 1 K.B. 561, at p. 566.
(6) (1952) 52 S.R. (N.S.W.) 221; 69 W.N. 186.

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hearing of the appeal occasioned more than a little doubt as to the wisdom of this exercise of our discretion to grant special leave. For the manner in which the question we thought of importance arises is not by any means as neat and definite as might be desired and the case is embarrassed by not a few procedural difficulties. But the appeal is here and unless we rescind special leave, a course for which there is no ground in anything done by the appellant, its fate must depend upon what, as we may conceive it, is the proper application of the statutory provisions to the facts and proceedings as they appear from the materials before us.

It is convenient to go first to Pt. VII of the *Public Health Act* 1902-1952; for under the provisions of that Part the magistrate's order was made of which the appellant complains. The Part is headed "Nuisances" and begins with a long catalogue of what are to be "nuisances liable to be dealt with summarily under this Act". The catalogue, which forms s. 64, has been rewritten by Act No. 16 of 1944 and at the same time much extended. It is par. (h) of s. 64 that is relevant to the present case. It places under the head of nuisances liable to be dealt with summarily under the Act any premises or part thereof which are damp or in a state of disrepair or in which adequate means of permanent ventilation are not provided or of which the roof, guttering, spouting or down-piping or drainage is defective or insufficient. As will appear, it was a leaking roof, a damp kitchen wall and a badly graded and drained front porch that formed the basis of the magistrate's order for the abatement of a nuisance. Section 65 (1) enables the local authority or its health inspector, if satisfied of the existence of the nuisance, to serve a notice on the person who caused it, or, if he cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice and to execute such works and do such things as may be necessary for that purpose. The notice may, if the local authority thinks it desirable (but not otherwise) specify any works to be executed. It was under sub-s. (1) of s. 65 that the notice was served upon the appellant as the owner. At more than one place in Pt. VII distinctions are drawn between abating a nuisance and preventing the recurrence of a nuisance and between nuisances arising from a want or defect of a structural character and other nuisances. Sub-section (2) of s. 65 authorizes a notice requiring the doing of what is necessary to prevent the recurrence of a nuisance and a proviso to the whole section says that where the nuisance arises from any want or defect of a structural character the notice shall be served on the owner. Section 66 follows,

enacting in effect that if there is a default in complying with the requisitions of the notice a complaint may be made to a justice, who may issue a summons : sub-s. (1). The magistrate before whom the proceeding comes may, if he is satisfied that the nuisance exists or that though abated it is likely to recur, by order require the person to comply with all or any of the requisitions of the notice or otherwise to abate the nuisance within the time specified in the order, and may, if thought desirable, specify the works to be executed by the person for the purpose of abating, or preventing the recurrence of, the nuisance : sub-s. (2). Failure to comply with the order involves liability to a daily penalty and enables the local authority itself to enter the premises, abate the nuisance and do whatever is necessary in execution of the order : sub-s. (3). An appeal from an order of a magistrate to quarter sessions is given by s. 69, but not from every order a magistrate may make under s. 66 (2). The same distinctions are taken again and the appeal is confined to orders " prohibiting the recurrence of a nuisance or requiring the execution of structural works ".

The provisions of the *Justices Act* 1902-1951 (N.S.W.) relating to appeals to quarter sessions from summary convictions apply with the necessary modifications as if such an order were a summary conviction : s. 69 (1).

Sections 64 to 69 came into the *Public Health Act* 1902 from Pt. VI of the *Public Health Act* 1896 (60 Vict. No. 38). The marginal note to the sections of that Part refer to ss. 2 to 6 of the *Public Health (London) Act* 1891 (54 & 55 Vict. c. 76), as the source of the provisions, but the sections are not exactly transcribed, and it would seem that the form the New South Wales sections take is not uninfluenced by the analogous provisions of ss. 91 to 99 of the *Public Health Act* 1875 (38 & 39 Vict. c. 55). Under the provisions of s. 94 of the *Public Health Act* 1875, which corresponds with s. 65 of the present New South Wales Act, there has been some variation of judicial opinion upon the question whether the notice to abate the nuisance need specify the works required to be executed, at all events if the nuisance is of a kind capable of abatement without specific directions, and the same kind of question has arisen about the contents of an order made by a magistrate under s. 96, corresponding with s. 66 (2) of the New South Wales Act : see *Reg.* v. *Wheatley* ; *Ex parte Cowburn* (1) ; *Millard* v. *Wastall* (2) ; *Central London Railway Co.* v. *Hammersmith Borough Council* (3) ; *Whatling* v. *Rees* (4) ; *McGillivray* v. *Stephenson* (5). But this question

(1) (1885) 16 Q.B.D. 34.
(2) (1898) 1 Q.B. 342.
(3) (1904) 90 L.T. 645 ; 73 L.J. K.B. 623.
(4) (1914) 112 L.T. 512 ; 84 L.J.K.B. 1122.
(5) (1950) 1 All E.R. 942.

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cannot arise under s. 4 and s. 5 (5) of the *Public Health* (*London*) *Act* 1891, which correspond respectively with ss. 65 and 66 (2) of the New South Wales Act, because the necessity of specifying the works to be executed is distinctly negatived by the inclusion of the express condition that the authority in the one case, and in the other the court, should think it desirable to do so. In this the New South Wales provisions follow the *Public Health* (*London*) *Act* 1891 and not the *Public Health Act* 1875.

A matter of much greater importance in which these two parallel Acts of the Parliament of the United Kingdom differ from one another is the framing of the provision under which a magistrate makes an order enforcing the notice. The *Public Health Act* 1875, s. 96, enacts that if the court is satisfied that the nuisance exists or is likely to recur " the court *shall* make an order on such person requiring him to comply with all or any of the requisitions of the notice or otherwise to abate the nuisance within a time specified in the order." The section goes on to make references to necessary works and to preventing the recurrence of a nuisance which are not presently material. It will be seen that the imperative " shall " is employed. Section 5 of the *Public Health* (*London*) *Act* 1891 is broken up into short sub-sections covering much the same ground but the words, which occur in sub-s. (1), investing the court with authority to make an order, are markedly different. They use, not the imperative " shall ", but the facultative " may "—" the petty sessional court hearing the complaint *may* make on such person a summary order (in this Act referred to as a nuisance order) ". Sub-section (2) provides that a nuisance order may be an abatement order or a closing order or a combination of such orders. If one turns to the language of s. 66 (2) of the New South Wales Act, the substance of which has already been set out, it will be seen that, apart from the significant change of " shall " to " may ", it follows rather the form of s. 96 of the *Public Health Act* 1875 than that of s. 5 of the *Public Health* (*London*) *Act* 1891, notwithstanding that it is the latter provision that is cited in the margin to s. 44 of 60 Vict. No. 38, whence s. 66 comes.

In the Supreme Court the case was decided by the interpretation which was placed upon the phrase " may, if satisfied etc., by order require the said person to comply with all or any of the requisitions of the notice or otherwise to abate the nuisance ". These words were interpreted as imposing upon the magistrate a duty, when satisfied of the occurrence of a statutory nuisance, to exercise his authority by making an order of one or other of the kinds described, and as arming him with a discretion only to select the kind of order

appropriate to the case. *Street* C.J. said :—" It is true that he is given a discretion in one sense, but once the nuisance is proved, then it seems to me that under the section the magistrate must make an order. He is given a discretion as to the form which that order may take and evidence may be directed to that issue for the purpose of informing the magistrate so that he may decide whether he will or will not direct specific work to be done, and if so, what the nature of that work should be " (1). *Owen* J. stated the same conclusion thus :—" The only discretion vested in a magistrate under s. 66 (2), if he is satisfied that a nuisance exists, is as to the form of the order which he shall make. He is, in my opinion, bound to make an order where he is satisfied that the nuisance exists, but it may take any one of three forms " (1). *Herron* J. said :—" The magistrate's jurisdiction is, by s. 66 (2), limited to determining whether the alleged nuisance exists, and if so, how it is to be eradicated or abated having regard to the health of the occupants of the building " (2).

In considering the correctness of this interpretation it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning. " The authorities clearly indicate that it lies on those who assert that the word ' may ' has a compulsory meaning to show, as a matter of construction of the Act, taken as a whole, that the word was intended to have such a meaning "—per *Cussen* J.: *Re Gleeson* (3). " The meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power "—per Lord *Selborne*: *Julius* v. *Bishop of Oxford* (4). One situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the officer on whom it is conferred is described by Lord *Cairns* in his speech in the same case. His Lordship spoke of certain cases and said of them " [they] appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of

(1) (1953) 19 L.G.R. 190, at p. 192.
(2) (1953) 19 L.G.R., at p. 193.
(3) (1907) V.L.R. 368, at p. 373.
(4) (1880) L.R. 5 A.C. 214, at p. 235.

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being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised" (1).

In New South Wales the legislature intervened as early as 1858 to restrain the development of the notion that permissive words may have a compulsive effect and, by 22 Vict. No. 12, s. 8, declared that wherever in an Act a power is conferred on any officer or person by the word "may" or the words "it shall be lawful" or "it shall and may be lawful" such words shall mean that the power may be exercised or not at discretion, a provision now contained in s. 23 of the *Interpretation Act* of 1897 but restricted to the word "may": see *Smith* v. *Watson* (2) and *Re Fettell* (3). The words "at discretion" are strong and, though it may readily be conceded that the section lays down a rule of construction which like other rules of construction will give way to clear indications of a contrary intention, there must be reasons which satisfy the mind that a statute to be construed does not intend that the power it confers should be exercised or not at discretion before it can be held that the power must be exercised on demand, assuming of course the fulfilment of any conditions precedent the statute may lay down. A distinction obviously exists between the possession by a person interested, on the one hand, of a right to call upon the officer upon whom a power is conferred to exercise his discretion and, on the other hand, of a right to call upon him to exercise the power. The former means no more than that, when called upon, the officer is under a duty to exercise his discretion according to law, the latter that he is under a duty to take whatever active measures may be authorized by the power. In construing a statute conferring a power by permissive or facultative expressions, it is important not to mistake indications or evidences, found in the context or subject matter, of an intention that a right to call for the exercise of the discretion should exist, for indications or evidences of an intention that the officer in whom the power is reposed should be under a duty, upon request and upon fulfilment of the necessary conditions, to do the thing authorized. In the subject matter and context of s. 66 (2) there are few positive considerations to be found in support of the interpretation which makes it obligatory upon the magistrate, once he is satisfied that the statutory nuisance exists, to make an order of one description or

(1) (1880) L.R. 5 A.C., at p. 225.
(2) (1906) 4 C.L.R. 802, at pp. 811, 819, 827.
(3) (1952) 52 S.R. (N.S.W.) 221, at p. 226; 69 W.N. 186.

another. But there is one consideration which is usually accounted very strong. It is that the power is conferred upon a judicial tribunal and to be invoked by a judicial proceeding. Jurisdiction and powers are conferred on judicial bodies, usually for the enforcement of rights and the protection of interests, and permissive language will often in such a case be used not because it is intended to give the tribunal a discretion to grant or refuse the remedy, but because, although it is intended or contemplated that persons interested will be entitled to the remedy the tribunal is empowered to give, it is also intended, or at all events taken for granted, that the existence of the interest and the validity of the claim to the remedy of a person seeking it will be for the tribunal to determine. It is no more than an instinctive recognition of the truth of *Ulpian's* dictum—*nemo qui condemnare potest, absolvere non potest* (Dig. 50 : 17 : 37). No doubt in the construction of s. 66 (2) the fact that it is a magistrate or justices who are empowered and that the proceeding is by complaint is a consideration of weight. To this may be added the fact that by an amendment made by Act No. 16 of 1944 the magistrate may in addition to making an order impose a penalty.

But there are other considerations some of which tend to lessen the cogency of these two and others of which positively suggest that a discretionary power was really intended. It is only the authority giving the notice that can complain to the magistrate. The magistrate is interposed between that authority and the owner, occupier or other person to whom the notice is given, and almost certainly he is interposed for the protection of the latter : the decision of the authority is not to be conclusive upon the owner, occupier or other person notified. But that decision goes not only to the existence of a statutory nuisance ; it goes also to the propriety or reasonableness of requiring the person notified to abate it. Why should not the magistrate's authority cover the whole area of the preliminary decision upon which the authority has resolved ? An examination of the catalogue in s. 64 of statutory nuisances will show that sets of facts may fall literally within one or other head although varying infinitely in degree and substantiality. Yet to abate or remove a relatively minor, unimportant or trivial defect may be so costly or difficult as to make it harsh or unreasonable to require it. Although the magistrate may, under the amendment, impose a penalty, disobedience to the notice is not *ipso facto* an offence, and whether he does or does not impose a penalty is a matter clearly left to his discretion. The proceeding is not for the protection or enforcement of private rights. It is not a case falling within the class described by Lord *Cairns* in the passage

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already cited: it is not a power deposited with the magistrate "for the purpose of being used for the benefit of persons specifically pointed out": the conditions are not defined upon which any such persons are entitled to call for its exercise. The interests which the provisions are designed to safeguard or serve are those enjoyed in the locality by the public at large. There is no reason why the judgment of the magistrate should not extend over all the factors which govern such a question.

When the foregoing considerations have been weighed together and balanced one with another there does not seem to remain any sufficient ground for an affirmative conclusion that the permissive words of s. 66 (2) do not bear the meaning which the rule of construction demands in the absence of satisfactory evidence of a contrary intention. But when there is added the considerations which arise from a comparison of the New South Wales provision with its English sources, it becomes almost certain that the draftsman adverted to the question and desired by the permissive words he adopted to insure that the magistrate's authority was of a discretionary kind. For that would explain why in following in some respects the form of s. 96 of the *Public Health Act* 1875, he substituted the facultative and permissive "may" for the imperative "shall" in accordance with the later s. 5 of the *Public Health (London) Act* 1891, which he noted in the margin.

It follows from what has been said that under s. 66 (2) the magistrate possesses a discretion. It is, however, a discretion which must be exercised judicially and upon grounds which do not go beyond the scope and object of Pt. VII of the *Public Health Act* 1902-1952. Plainly the purpose of the provisions contained in Pt. VII is, by a summary remedy, to secure the abatement or removal of the various causes of public inconvenience or offence which s. 64 enumerates as nuisances, and the prevention of the recurrence of those likely to arise again. Prima facie, therefore, proof of the existence of such a nuisance should lead a magistrate to make an order when a complaint comes before him. But he may consider that to make an order of a kind which lies within his power would be unreasonable because, for example, the so-called nuisance is unsubstantial, though technically within one of the paragraphs of s. 64, or the operation of the order would be harsh and oppressive or otherwise unjust or unreasonable, having regard to its effect upon the owner or occupier or other defendant and comparing that with the end to be attained, or that the removal of the cause of inconvenience or offence by other and more suitable means could be ensured or relied upon and that it is the course

justice or fairness demands. Any of these considerations (and doubtless the enumeration is not exhaustive) would afford the magistrate sufficient ground for an exercise of his discretion to refuse or defer the making of an order under s. 66 (2).

Having dealt in the abstract with the interpretation of s. 66, because it appears to be of some general importance, it is now necessary to turn to the particular facts and circumstances of this proceeding which, though they add to the difficulty of the case, do anything but increase its importance, except in so far as they incidentally bring out the imperfections of the provisions authorizing a resort from the magistrate's order to quarter sessions and from quarter sessions to the Supreme Court.

The semi-detached cottage in Annandale, which the appellant owns, is occupied by a tenant paying twenty-five shillings per week. It is identified as No. 11 Nelson Street and stands on a small frontage, but next to it is a vacant piece of land. The appellant owns both properties, the total frontage of which is thirty-six feet. The building is of brick and cement and contains two rooms, a kitchen and offices. It has a slate and iron roof. By a valuation made in May 1951 the Valuer-General assessed the improved value of the whole as £700 and the unimproved value as £256, which means that he valued the building at £444.

On 1st June 1951 the Council of the Municipality of Leichhardt, which is the local authority under the provisions of the *Public Health Act* 1902-1952 (N.S.W.), gave a notice to the appellant under s. 65 (1) of that Act. The notice recited that the council was satisfied that the premises known as No. 11 Nelson Street were in such a state as to be a nuisance and liable to be dealt with summarily under the Act. The notice then set out the defects by reason of which the premises were said to constitute a nuisance and concluded by requiring the appellant to abate the nuisance within twenty-eight days after service upon her of the notice and to execute such works and do such things as might be necessary for that purpose. She failed to comply with the notice. The respondent, who is the chief health inspector of the municipality, then laid an information against her for failure to comply with the notice within the time specified therein. The magistrate who heard the information noted at the foot of the depositions that he found that the nuisance complained of existed and required the defendant, the now appellant, to comply with certain paragraphs of the notice within a period of three months from the date of his decision. From that decision the defendant appealed to quarter sessions at Sydney. The chairman of quarter sessions stated a case for the Supreme Court in

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purported pursuance of s. 131A of the *Justices Act* 1902-1951, but in the stated case his Honour said that at the hearing the appeal was dismissed and the order and conviction of the magistrate were confirmed. The question the learned chairman reserved for the Supreme Court was whether his determination upholding the conviction of the appellant was erroneous in point of law. The Supreme Court answered this question in the negative and, treating the proceedings as an appeal, dismissed it. By an order made on 1st April 1954 this Court granted special leave to appeal from the order of the Supreme Court. Before the magistrate and before quarter sessions the substantial question raised by the defendant appellant was whether the premises were so old as to make it proper for them to be demolished and whether she ought not to be left at liberty to demolish the premises rather than be required to comply with an order putting them in a condition of repair. Before the magistrate her counsel stated that he was instructed that a notice to quit was about to be served upon the tenant so as to enable the owner to carry out her proposal to demolish the premises and to place another building on the whole area having a frontage of thirty-six feet.

The notice given to the appellant requiring her to abate the nuisance stated that the premises were in such a state as to be a nuisance by reason of:—"1. Roof over front verandah, front bedroom, lounge room and kitchen is leaking. 2. Wall of kitchen is damp. 3. The premises are in a state of disrepair as :—(a) Front porch is incorrectly graded and drained." (The remaining subparagraphs are not material). The order made by the magistrate, at all events as drawn up, states that the appellant was charged for that she being the owner of the premises upon whom a notice was served under s. 65 of the *Public Health Act* to abate a nuisance, and then under a *videlicet* sets out the items in the paragraphs of the notice. The order then proceeds to say "And I adjudge that the nuisance complained of exists and that the nuisance be abated by compliance with paragraphs 1, 2 and 3 (a), in the notice above referred to within a period of two months from the sixteenth day of September, 1952." It is, of course, clear that these paragraphs specify the defects and give no directions compliance with which could be directed. The order therefore in the form as made appears to be entirely irregular and one which, if dealt with as it technically ought, could not stand. But there is a further difficulty. The appeal to quarter sessions is given by s. 69 (1), and as has already appeared the order against which that section gives an appeal to a person aggrieved is an order prohibiting the recurrence of a nuisance or requiring the execution of structural works. The section goes

on to make applicable the provisions of the *Justices Act* relating to appeals to quarter sessions from summary convictions. The order in question was not of course an order prohibiting the recurrence of a nuisance. Can it be described as one requiring the execution of structural works ? Unless it was of this description it does not appear to be within the statutory appeal to quarter sessions. On the face of the order there is no reference to alterations that might be structural. It is only by showing that the general words of the order necessarily involve structural alterations that it could be made to appear that the order is one from which an appeal lay to quarter sessions. This does not appear from anything in the record, but no objection to the appeal seems to have been taken at any stage of the proceedings.

However, the procedural difficulties of the case do not stop here. For the fact that, according to the narration of the case stated, the chairman of quarter sessions pronounced a judicial order dismissing the appeal before proceeding to state a case raises a real difficulty as to the application of s. 131A of the *Justices Act*. Later in the case stated his Honour says : " I held that the repair, not renovation, of the premises was sufficient to meet the requirements of the notice and further that the notice of the council and the order of the magistrate were not unreasonable under the circumstances and I dismissed the appeal."

Sub-section (1) of s. 131A of the *Justices Act*, which was introduced into that statute by Act No. 31 of 1951, s. 8 (1) (b), is as follows :—" (1) A chairman of quarter sessions may submit any question of law arising on any appeal to quarter sessions coming before him not being a question of criminal law to the Supreme Court for determination and the Supreme Court may make any such order or give any such direction to the court of quarter sessions as it thinks fit." This provision does not give an appeal from a determination or order of quarter sessions but it enables the chairman to refer any question of law to the Supreme Court for its determination. Once an appeal to quarter sessions has been heard and determined, so that that court has disposed of it by a judicial decision, the opportunity of stating a case under s. 131A has passed : *Roberts* v. *Jones* (1). It would of course be possible for quarter sessions to pronounce a judgment or decision conditionally, that is to say subject to the reservation of a special case and a decision thereon by the Supreme Court. This would accord with the practice evolved long ago before there was statutory authority for a stated

(1) (1928) 28 S.R. (N.S.W.) 543 ; 45 W.N. 156.

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case: see *Reg.* v. *Sutton Coldfield* (1) and *Reg.* v. *Overseers of Walsall* (2) where *Cockburn* C.J. said:—"the judgment of the quarter sessions, if once unconditionally pronounced, would have been final and conclusive; in order to avoid this consequence, and at the same time to prevent the necessity of the case being sent back to the sessions when the Court of King's Bench had pronounced its opinion, the practice became established for the court of quarter sessions to pronounce its judgment conditionally, making it subject to the opinion of the Court of King's Bench, according to which the judgment of the sessions was to be affirmed or quashed as the case might be. In furtherance of this course of proceeding, the order of sessions not being before it, and there being, as I have said, no other way by which the case stated by the sessions could be brought before it, the Court of Queen's Bench lent the assistance of its process of certiorari to bring up the order and case, that the Court might deal with it" (3): see *Young* v. *Campbell* (4); *Re Van Der Lubbe* (5). It may be that in the circumstances the learned chairman's statement in the case should be construed as meaning that he expressed his judicial opinion that the appeal ought to be dismissed conditionally and subject to the case stated, and refrained from dismissing the appeal definitively pending the statement of the case. This no doubt may be considered an artificial construction, warranted only in order to give legal effect to the proceeding. The case stated cannot otherwise be supported. For s. 5B of the *Criminal Appeal Act* 1912, as amended by s. 176 of Act No. 17 of 1939, even if applicable as a result of the last portion of sub-s. (1) of s. 69 of the *Public Health Act* 1902-1952, cannot in the form it has now assumed carry the matter further than s. 131A of the *Justices Act*. On the footing that the stated case can be treated in the manner suggested as properly before the Supreme Court, it should be noted that the power under sub-s. (1) of s. 131A extends to the Supreme Court making such order or giving such direction to quarter sessions as the Supreme Court thinks fit. The power is probably sufficient to authorize a direction to quarter sessions to reform the order of the magistrate or to make some other order in the premises.

But that is not the end of the difficulties of procedure. The case stated does not directly raise the question whether it was either competent or, in the circumstances, necessary for the magistrate

(1) (1874) L.R. 9 Q.B. 153, at p. 155.
(2) (1878) 3 Q.B.D. 457 (cf. (1878) 4 App. Cas. 30: 467).
(3) (1878) 3 Q.B.D., at p. 473.
(4) (1948) 49 S.R. (N.S.W.) 103, at pp. 104-106; 66 W.N. 36, at pp. 37, 38.
(5) (1949) 49 S.R. (N.S.W.) 309; 66 W.N. 140.

to make no order because anything but demolition would be unreasonable, or to stay his hand pending demolition: cf. *Salisbury Corporation* v. *Roles* (1). The chairman of quarter sessions says specifically that he held the repair and not the renovation of the premises was sufficient to meet the requirements of the notice and, further, that the notice of the council and the order of the magistrate were not unreasonable in the circumstances.

Some evidence was tendered before quarter sessions supplementing that given in the magistrate's court. One witness said that, taking into consideration the age of the building, the state of repair, the site and the rental, the only practical remedy from the point of sale or letting was demolition and rebuilding. Another witness stated that the roof was beyond repair and that what was required was a new tiled roof which, together with cleaning and painting of the rooms, regrading the verandah and installing ventilation, would cost approximately £200. This evidence for the appellant did not go uncontradicted and the chairman's finding is hardly consistent with it. The appellant, however, proposed to adduce evidence that further repairs than those indicated in the notice were necessary in order to make the premises reasonably habitable according to proper standards of health and sanitation. The evidence she proposed to adduce included particulars of the repairs necessary and their estimated cost. This evidence the chairman rejected. Two grounds are given in the case stated as those upon which it was contended that the chairman's determination dismissing the appeal and upholding the conviction (*sic*) was erroneous in point of law. The first was that the evidence his Honour rejected was admissible and the second that, having regard to the age, state of repair, value, site, rental and the prohibitive costs of repair or renovation, the demand of the council was unreasonable and that the application should have been refused.

In the form in which the second of these two questions is stated it is one of fact and not of law. If the reasonableness of the demand of the council be a test of the validity of the notice under the *Public Health Act*, and if the burden of proof of reasonableness rest upon the informant, then, but only then, the question whether upon the evidence it was open to the quarter sessions to find that the notice was reasonable would become a question of law: see *Driver* v. *War Service Homes* [*No.* 1] (2); *Shepherd* v. *Felt & Textiles of Australia Ltd.* (3). The second question, which concerns the admissibility

(1) (1948) W.N. (E.) 412.
(2) (1924) V.L.R. 515, at p. 532.
(3) (1931) 45 C.L.R. 359, at p. 379.

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of evidence, may be a question of law. But if the rejection of the evidence was legally wrong that would not necessarily mean that the chairman's determination of the appeal was erroneous in point of law. At most it would mean that the hearing of the appeal miscarried. The question whether the evidence ought to have been received does not depend on its relevance to some distinct issue of fact. It depends upon the bearing of the facts it was proposed to prove upon the exercise of the magistrate's discretion to refuse or defer an order. No doubt if the evidence would have shown or assisted in showing that the condition of the building was such that it was unreasonable and oppressive to require the appellant to repair it when she was ready to demolish it, that is a matter which might have been taken into consideration. If the evidence had been rejected on the ground that there was no discretion or that the discretion was more restricted in scope than a proper construction of Pt. VII shows it to be, then the rejection of the evidence would reflect an error of substance which would have been of sufficient importance to justify the grant of special leave. But the stated case leaves one in doubt whether the rejection of the evidence did in truth proceed from any misconception as to the existence of the scope of the discretion. It is conceivable that it was due to a view of the learned chairman that the additional facts the evidence might prove could not induce him, having regard to the other facts, to refuse to confirm the order of the magistrate. Like all evidence of facts which are relevant to a discretion, the question whether such facts should be inquired into or not must depend very largely on the other circumstances of the case. A tribunal called upon to exercise a discretion and hearing evidence of facts going only to discretion is not in the same position as a court trying a defined issue to which evidence is either logically relevant or not. As a case progresses of the former kind, the tribunal must often reach a position in which it can say with confidence that particular facts could not affect the exercise of its discretion in favour of the party seeking to establish them. A refusal to receive evidence for such a reason involves no question of law unless it exhibits some misconception of the scope of the discretion or the grounds upon which its exercise should proceed. It is therefore not easy to be sure that the determination of the chairman of quarter sessions was based upon the interpretation of Pt. VII adopted in the Supreme Court, by which the possibility of a discretion to refuse or defer an order was denied, or upon an interpretation limiting the discretion too narrowly. Nor is it easy to be sure that the chairman did not pronounce irrevocably a final and definitive judgment before stating

the case. Again there must be some uncertainty whether the order of the magistrate really involved appealable matter. But on the whole it seems proper to presume these matters in favour of the appellant. As to the first, after all the chairman stated the case as involving a question of law and specifically raised in it the question of evidence, and the Full Court decided the question reserved upon an interpretation of the provision of Pt. VII, an interpretation going to the root of the matter. Because it goes to the root of the case it has been made the subject of the earlier part of this judgment. As to the second matter, no objection to the competence of the case stated seems ever to have been made, and much more unexpected results have often been produced by applying the maxim *interpretatio chartarum benigne facienda est ut res magis valeat quam pereat.*

As to the order of the magistrate, it could hardly be sustained in its present form because literally it requires compliance with what is only a catalogue of defects or disrepairs. If this error had not been made, it seems very likely that on its face it would have appeared that it requires structural alteration and therefore is an order from which an appeal lies. In any case no objection appears to have been raised in quarter sessions or afterwards to the competence of the appeal to quarter sessions.

An important consideration affecting what course this Court should take is that the order of the Supreme Court from which this appeal is brought expressly dismisses an appeal from the determination of quarter sessions after pronouncing that determination not to be erroneous in point of law. This order is not only inconsistent with the interpretation of s. 66 (2) adopted in this present judgment; it affirms the correctness of a determination of quarter sessions by which "an order and conviction of the Magistrate", irregular on the face of the document, were confirmed.

On the whole, the conclusion from these considerations is that the proper course for this Court to take is to set aside the order of the Supreme Court and in lieu thereof remit the matter to quarter sessions with a direction given pursuant to sub-s. (1) of s. 131A of the *Justices Act* that the appeal to quarter sessions should be reheard or considered *de novo* and be decided according to law consistently with this judgment. There appears to be no sound reason why the appellant should not receive her costs of the proceedings notwithstanding that it is an appeal by special leave and that if the procedural difficulties had been perceived by the court at the time of the application for special leave they might have been considered to make it a less fit case for special leave.

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Appeal allowed with costs. Order of the Supreme Court discharged. In lieu thereof order that the matter be remitted to quarter sessions with a direction that the appeal to quarter sessions be reheard and be decided according to law consistently with the judgment of this Court. Order that the costs of the appellant of the proceedings in the Supreme Court be paid by the respondent.

Solicitors for the appellant, *T. J. Purcell & Clapin.*
Solicitors for the respondent, *Pike & Pike.*

G. D. N.