HIGH COURT OF AUSTRALIA

Parisienne Basket Shoes Proprietary Limited

Vs.

Whyte

(Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.)

25 February 1938

Latham C.J.

On 20th June 1936 the respondent, an inspector of factories under the *Factories and Shops Act 1928*, laid informations and procured summonses to be issued calling upon the defendants (Parisienne Basket Shoes Pty. Ltd., George Marinoff and Angel Petroff) to answer charges of breaches of sec. 233 of the Act. The section provides, *inter alia*, that where a price or rate of payment for any person or persons or classes of persons has been determined by a wages board and is in force, it shall be an offence for any person to employ any person at a lower price or rate. One information alleged that the defendants did "in respect of the period commencing on the 17th day of April 1936 and ending on the 23rd day of April 1936, employ" one Papas at a lower rate than the rate determined. The other information made a charge in respect of the same period in the case of another alleged employee named Zorich.

When the information relating to Papas was called on, all the defendants pleaded not guilty and Marinoff and Petroff denied that the relation between themselves and Papas was that of employer and employee. The case was adjourned, and, at the adjourned hearing, the court ordered the proceedings against Marinoff and Petroff to be transferred to a trade tribunal in accordance with sec. 40 (1) of the *Factories and Shops Act 1934* (See sec. 40 (18)). No objection was taken to the jurisdiction of the justices.

When, after an adjournment, the case relating to Zorich was called on for hearing, the defendants did not appear but counsel on their behalf objected to the jurisdiction of the court. An order nisi for prohibition was obtained in both cases and, upon its return, was discharged. An appeal to the Full Court failed, and an appeal is now brought by special leave to this court.

It is contended for the appellants that the court of petty sessions had no jurisdiction to try either of the cases for two reasons: (1) that the informations were out of time; (2) that the summons in each case had lapsed before it was served.

The first objection depends upon sec. 229 (a) of the Act, which requires that an information for an offence such as that created by sec. 233 "shall be laid within two months after the commission thereof." The informations were laid on 20th June 1936. The period in respect of which the offences are alleged to have been committed was a period beginning on 17th April 1936, that is, at a time more than two months before the information was laid. Objection was taken that the information was out of time and that the justices had no jurisdiction to deal with it.

If the justices had jurisdiction to decide upon the objection based upon sec. 229 (a), then it is

immaterial in these prohibition proceedings whether their decision was (in the case which they heard) or may be (in the other case which they have not yet heard) right or wrong (*Colonial Bank of Australasia v. Willan*[1]; *Amalgamated Society of Carpenters and Joiners v. Haberfield Pty. Ltd.*[2]). When jurisdiction is given to decide a question, there is power to decide it, rightly or wrongly, and not only power to decide it rightly (*R. v. Nat Bell Liquors Ltd.*[3]).

Sec. 229 (a) of the *Factories and Shops Act*, when applied to the present cases, provides that the information shall be laid within two months after the commission of the alleged offence. This is a quite ordinary form of statutory limitation of proceedings (Cf. *Justices Act 1928*, sec. 210). The court before which the information is heard is bound by such provisions, and prima facie the position is that the court must decide whether it operates as a bar to proceedings in a given case or not. Thus, in the case of proceedings before a court of petty sessions for a civil debt recoverable summarily the court should not make an order if the cause of action, being based upon a simple contract, arose more than six years before the initiation of the proceedings. Such a case cannot be distinguished in principle from the present case. The *Statute of Limitations* (21 Jac. I. c. 16), sec. 3, provides that "all actions of debt grounded upon any lending or contract without specialty ... shall be commenced and sued within six years next after the cause of such action or suit and not after." Sec. 229 (a) of the *Factories and Shops Act* provides that informations for certain offences "shall be laid within two months after the commission thereof."

Upon principle, one would think that such provisions were directions to the court which it was bound to observe, but only with the consequence that, if the court failed to observe them, its decision would be set aside as wrong in appropriate proceedings by way of appeal or review, if the law made provision for such proceedings. It cannot be said that, whenever a court makes an erroneous decision, it acts without jurisdiction. An order made without jurisdiction—as if a court of petty sessions purported to make a decree of divorce—is not an order at all. It is completely void and has no force or effect. The persons who make the order will, for example, if any action by way of interference with person or property is taken under the authority of the order, be liable in an action of trespass. But an order is not rendered void *ab initio* when it is set aside on appeal as erroneous. The fact that it was erroneous does not show or even suggest that it was made without jurisdiction. Jurisdiction is not merely jurisdiction to decide a question rightly.

The only question therefore is whether the court has jurisdiction to decide upon a question arising in relation to a statutory provision imposing a time limitation upon proceedings. If it has no jurisdiction to decide the question wrongly, then it has no jurisdiction to decide it at all—even rightly. Thus, if the court has no jurisdiction to decide upon such a question, the court could not even decide that a debt which was incurred within a week before the making of a complaint was a debt in respect of which the cause of action arose within six years from the commencement of the proceeding. Such a question would, theoretically, be involved in every claim for a civil debt. Thus, the justices would have no jurisdiction in any such case until a higher court had determined this particular question. A principle which brings about such a result almost provides its own refutation.

But the argument cannot be answered merely by a reference to results. Mr. *Ashkanasy* has referred the court to a series of cases in which it was either decided or plainly assumed that an inferior court had no jurisdiction to proceed when the proceedings were out of time by reason of a statute of limitations—not merely that it had made an error in proceeding which would be corrected by a superior court. Among the cases are *Hill v. Thorncroft*[4]; *R. v. Tolley*[5]; *R. v. Pickford*[6]; *R. v. Hammersmith Profiteering Committee*[7]; *In re Prince; Ex parte Binge*[8] (prohibition granted on ground that a section (11 & 12 Vict. c. 43, sec. 11) identical in relevant terms with sec. 229 (a) of

the *Factories and Shops Act 1928* operated to limit the jurisdiction of justices); *Ex parte Egan*[9]; see also *Polley v. Fordham*[10]. The case of *Sommerville v. Mirehouse*[11] is a clear decision the other way. There it was said by *Cockburn* C.J., in reply to a contention that sec. 11 of *Jervis' Act* (11 & 12 Vict. c. 43) deprived the justices of jurisdiction when the complaint was out of time, that "they made a judicial mistake in deciding that a sufficient complaint was made within the time limited by" the statute. "It was within the duty of the justices to determine the question which was raised in this case before them; indeed that question was a matter which they were bound to decide"[12]. This, I think, is the principle that must be applied; otherwise, all error must be held to involve want of jurisdiction.

A simple illustration will suffice to make the matter clear. Justices have jurisdiction to hear complaints for the recovery of certain civil debts. The law so provides. The law also provides that such debts shall not be recoverable unless the proceeding is commenced within six years after the cause of action arose. The justices will act wrongly if they make an order for a complainant either in a case where there is no debt, or in a case where the proceedings are out of time. But they have jurisdiction to determine (subject to such review as the law provides) whether or not there is a debt. In exactly the same way they have jurisdiction to determine whether or not the proceeding is out of time. A denial of these propositions necessarily involves the proposition that, in relation to all matters, their jurisdiction is a jurisdiction only to decide rightly, with the consequence that, in deciding otherwise than rightly, they do not decide at all and any order made is *coram non judice*. Such a proposition cannot be accepted. In my opinion this contention that a limitation provision such as sec. 229 (a) touches or affects jurisdiction is based upon a wrong view of the nature of jurisdiction, and it should accordingly be rejected. Thus, in my opinion, the first ground of the order nisi fails.

The second point relied upon by the appellants depends upon the fact that the summons in each case was returnable on 9th July 1936. Neither summons was served on or before that date. On 3rd August 1936 a justice of the peace, who was an employee of the Department of Factories and Shops, altered the summons by substituting 3rd August for 9th July and by writing the word "Extended" with the date 3rd August 1936 and his initials in the margin of the summons. Sec. 23 (3) of the *Justices Act* provides that "if by statement on oath or by affidavit it is made to appear to the justices or court of petty sessions before whom or which the summons is returnable or to any justice that from any cause service as aforesaid cannot be promptly effected such justices court or justice may extend the time for hearing" and may make an order for substituted service. No statement or oath by affidavit was made to a justice at any time as to difficulties in effecting service or prompt service or otherwise in relation to the summons. Thus, in this case, the justice had no power to extend the time for hearing of either summons by virtue of sec. 23 (3).

But it is urged that rule 23 of the rules made under the *Justices Act* authorized the justice who purported to extend the time to act as he did, so that the time was effectively extended. Rule 23 is as follows:—"The time for hearing any summons shall not be extended unless application to have such time extended be made before or on the date upon which such summons is returnable or within one month thereafter, and the time for hearing any summons shall not be extended more than once. Where the time for hearing any summons is extended the justice or one of the justices extending such time for hearing shall alter the date on which such summons is made returnable and shall write his initials and the date of making such alteration in the margin of the summons in a line with that on which the alteration is so made." This rule, however, does not purport to confer any authority to extend the time for hearing. It is negative in its terms. It operates merely by way of limiting a power the existence of which is assumed. That power is to be found in sec. 23 (3) of the Act and nowhere

else. Even if there were any ground for suggesting that any person who happens to be a justice had some general power, independent of statute, of extending in a casual way the time for hearing an information, the specific provisions of the statute contained in sec. 23 (3) would terminate the existence and prevent the exercise of any such power. It is quite possible that rule 23 is *ultra vires* in assuming to limit, in respect of time for the application for extension and otherwise, the exercise of the power conferred by sec. 23 (3). It is not necessary to determine that question in the present case. It is sufficient to decide that neither sec. 23 (3) nor rule 23 operated to give any legal effect to what was done by the justice in the present case. It has been faintly suggested that what took place on 3rd August 1936 amounted to the laying of a fresh information or to the issue of a fresh summons on the old information. But apart from the embarrassing fact that any fresh information would have plainly been out of time, it is clear that no new information was laid and no new summons was issued. The justice has made an affidavit as to the facts and has stated that the extensions "were made by me on information given me by ... a clerk employed in the said department who stated to me (in substance) that the extensions were required in order to suit the convenience of the Crown Law Department." It is not suggested that any new fees were paid when the extensions were made, and it is plain that the justice did not intend to issue any new summons, but merely to extend the time for hearing a summons which had already been issued and which, if no valid extension were made, had lapsed.

There are no provisions other than sec. 23 (3) and rule 23 which can be relied upon as authorizing the "extension" of a summons. Such authority could be given only by statute. A summons is directed to a specified person. It commands his attendance at a specified place on a specified day to answer a particular information which is written on the same paper (*Justices Act*, sec. 18 (2)). It has, and can have, no conceivable operation in relation to him, or legal significance in imposing a duty upon him, unless and until service (personal or other) is effected as prescribed by law. When the return day has passed and the summons has not been served, then, apart from such a statutory provision as is contained in sec. 23, the summons is deprived of all possible significance and effect. It becomes a direction to the person named in it as defendant to do a patently impossible thing, namely, to appear before a court upon a past day. Thus, in the present case, the summonses, not having been served when the return day arrived and not having been lawfully extended, became meaningless pieces of paper. They could not be the basis of or constitute the initiation of any legal proceedings.

In Papas' case, however, the defendants appeared in court on 20th August, were charged, and pleaded "not guilty," no objection being taken to jurisdiction. The justices, therefore, had jurisdiction to hear the information then laid to which the defendants pleaded. "Process is not essential to the jurisdiction of the justices to hear and adjudicate": *R. v. Hughes*[13], where *Hawkins* J. says that, even where there is an illegal warrant, an illegal arrest thereunder, and no information in writing as required by the law (e.g., *Justices Act 1928*, sec. 18), a person who, appearing in court, and being charged with an offence, pleads to it, may legally be convicted instanter. (See, also, *O'Donnell v. Chambers*[14].) Thus, in Papas' case the court had jurisdiction to deal with the charge, and prohibition accordingly does not lie.

It may be observed that the information with which the court dealt in Papas' case was the information laid in the court and to which the defendant pleaded—not the earlier written information upon which the summons was issued. This appears from *R. v. Hughes*[15]. The summons became irrelevant. The defendants did not, by appearing and pleading (without objection), waive irregularities in relation to the past summons. They consented to being tried on an information there and then laid and waived the statutory requirement that a summons should be

issued before that information was heard. As *Isaacs* J. said in *Ridley v. Whipp*[16], *R. v. Hughes*[17] was a case of "a charge made instanter in the presence of the accused and accepted by the court, which calls on the accused to answer; jurisdiction is there given, though the requirements of justice must be satisfied. The jurisdiction in that case is as to an entirely new complaint." The information laid at the hearing to which the defendant actually pleaded in Papas' case was plainly out of time, though, for reasons which I have given, I do not regard that fact as important in prohibition proceedings.

But in Zorich's case the position is different. In that case the defendants did not appear in answer to the summons, and did not plead. They simply objected by their counsel to the jurisdiction. In such circumstances the defendants are not to be considered as being "then bodily present" and lawfully called upon to answer the charge, to use the phrase appearing in the judgment of *Hawkins* J. in *R. v. Hughes*[18]; see also *Dixon v. Wells*[19]; *Pearks, Gunston & Tee Ltd. v. Richardson*[20]; *Ray v. Justices of Melbourne and Whitney*[21]. The rule that a defendant may raise an objection to jurisdiction without being held to "appear" so as to waive any "objections to jurisdiction" represents a fundamental safeguard in the administration of justice.

I therefore reach the conclusion (though with doubt on account of the differing opinions of the justices of the Supreme Court and of my learned brethren) that in Zorich's case there was no information which the defendant could be called upon to answer. The rest of this judgment depends upon this proposition. But before stating what I regard as the consequences of this fact I wish to refer to two matters which might be thought to be relevant but which, in my opinion, are not relevant. First, there are provisions in the *Justices Act* authorizing proceedings in the absence of a defendant (sec. 88 (9)). These provisions, however, depend entirely upon a summons having been duly served, and accordingly, if the foregoing reasoning is correct, they have no application to this case. The "summons" referred to in this section must be a real summons, not a piece of waste paper—a document which recorded only a past abortive attempt to start legal proceedings. Secondly, there are provisions in the *Justices Act* designed to prevent the administration of practical justice being impeded by defects in substance or in form of an information, complaint, summons or warrant (See *Justices Act 1928*, secs. 85 (3), (4), 94 (1), 96, 104, 159, 160, 196). But these sections all relate to some actual information, &c.—not to cases where there is no information, &c.

It is true that the authorities to which reference has already been made show that, if the defendants had appeared, the justices could have proceeded upon an information then and there laid. But they did not appear. One of the defendants was a company and could not possibly be present to be then and there charged (*Oxford Tramways Co. v. Sankey*[22]). Thus, no information was laid in the presence of the defendants. All that happened was that a charge against absent persons was stated in the presence of a court. The question is whether, in such circumstances, that court has any jurisdiction to proceed.

As the authorities already cited show, an irregularity in procedure may be waived: and see *Backhouse v. Moderana*[23]. But questions of procedure can arise only where there is a proceeding. Procedural provisions relate entirely to the manner of conducting or carrying on proceedings. Jurisdiction exists only in proceedings, not *in vacuo*, apart from any proceeding. If there is neither informant nor defendant, a court of petty sessions cannot convict a person *ex mero motu*. If there is an informant, but no defendant either summoned or charged in the presence of the court, the court has nothing before it in relation to which it can act by way of hearing a charge. Under special statutory provisions, a justice may in such circumstances extend the time for hearing a summons which has not been served or may issue a warrant. But the court has no jurisdiction to proceed with

the hearing of the charge. It can decide nothing, because there is no proceeding in the course of which its powers are capable of being exercised. I repeat that, upon the foregoing reasoning, this is not a case of failure to serve a summons or of a defect in a summons. It is a case of there being no summons in existence which, at the relevant time, even purports to require any person to attend the court or to do any other act. Reduced to its relevant essentials, it is a case of a person appearing before justices assembled in a court and making a charge against A, B and C (who are not present) and nothing more. When this has been done, a justice may act ministerially by issuing a summons or, in a proper case, a warrant (*Justices Act 1928*, secs. 29, 30, 31, 32). But the court of petty sessions cannot act at all. The basis of any judicial proceeding is absent.

The laying of an information or making of a complaint is a fact which may or may not initiate a proceeding in which a court can act. If no summons or warrant is issued and the proposed defendant is not present and required to answer the information or complaint, the matter falls to the ground. That an information in itself, followed by nothing else, does not constitute the beginning of a proceeding is shown by the fact that, if the justice before whom it is laid declines to take any action and nothing further happens, nothing of legal significance has taken place in relation to the defendant with respect to the charge made. He is, so long as matters remain in the condition described, in the same position in every respect as if nothing had been done. A court has no jurisdiction to hear or determine the proposed charge. The only alternative to this view is that a court of petty sessions can convict any person of any offence without summons, warrant, or appearance and that the conviction is good until set aside in some manner. I can find nothing in the *Justices Act*, which is the source of the jurisdiction of courts of petty sessions, to support such a proposition. Thus, I am of opinion that the court has no authority, power or right to proceed in Zorich's case.

Perhaps I should add that nothing that I have said would prevent the informant from laying a new information in that case. Of course, the informant is not interested in such a possibility, because such an information would obviously be out of time. There are authorities which possibly might enable the informant to obtain the issue of a new summons upon the original information (*Brooks v. Bagshaw*[24]; *R. (Futter) v. Justices of County Cork*[25]; *Williams v. Letheren*[26]; and see *R. v. Wakeley*[27]). But it is not desirable to speculate upon such contingencies. The justices have not yet made any order in Zorich's case, except that (in what I regard as the absence of unsummoned defendants) they have adjourned the hearing. It does not appear to me to be necessary to express any opinion in these proceedings as to the possible significance in proceedings before a trade tribunal of the objections raised.

For the reasons which I have given, I am of opinion that the appeal in Zorich's case should be allowed and that prohibition should issue in that case.

Starke J.

The appellants, being a limited company and two individuals, were charged on two informations for that the appellants did in respect of the period commencing on 17th April 1936 and ending on 23rd April 1936 employ Peter Papas and M. Zorich respectively at a lower rate of wages than determined by a wages board appointed pursuant to the *Factories and Shops Act 1928*.

The informations were brought before the Court of Petty Sessions at Fitzroy on 3rd September 1936, and the court, consisting of a police magistrate and two justices of the peace, transferred the proceedings in Papas' case, so far as the individual defendants were concerned, to a boot-trade

tribunal, pursuant to the *Factories and Shops Act 1934*, sec. 40 (18), and otherwise adjourned the proceedings. The appellants thereupon obtained a rule nisi calling upon the informant, the justices of the peace at Fitzroy and persons appointed or purporting to be appointed a boot-trade tribunal to show cause why a prerogative writ of prohibition should not issue prohibiting the further prosecution of the informations.

The rule nisi was discharged by the learned Chief Justice of the Supreme Court of Victoria, and his decision was affirmed by the Full Court. Special leave to appeal to this court was granted, and this appeal now falls for determination. "The principle is quite clear," said Lord Chief Justice *Hewart* in *R. v. Swansea Income Tax Commissioners*[28], "that a writ of prohibition is issued only where there is something done in the absence of jurisdiction or in excess of jurisdiction." The cases establish that a defect of jurisdiction may arise in several ways. "There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry" (*Colonial Bank of Australasia v. Willan*[29]; *Mayor &c. of London v. Cox*[30]). There are various decisions and dicta in the books which assert that prohibition lies where an inferior court acts in a manner contrary to the principles of natural justice. The phrase is vague and its limits by no means clearly defined (See *Mayor &c. of London v. Cox*[31]; *Mackonochie v. Lord Penzance*[32]; *Martin v. Mackonochie*[33]). But where an inferior tribunal has jurisdiction a mistaken exercise of that jurisdiction is no ground for prohibition, for that is a ground of appeal, if an appeal be provided.

Now it is argued for the appellants that the information for the offence was not laid within two months of the commission of the offence as required by sec. 229 (a) of the *Factories and Shops Act 1928* and that this is an essential preliminary or condition precedent to the jurisdiction of petty sessions. The informations were laid on 20th June 1936, and the charge relates to a period commencing on 17th April and ending on 23rd April 1936. It would appear from the charge as laid that the offence was not complete until the conclusion of the period and is consequently laid within the time required by the Act (*Bruce v. Lloyd-Tayler*[34]). If, however, the charge is in respect of each day within the period, still the information is as to several days laid within two months after the commission of the offence. But it is really unnecessary to pursue or finally to determine this matter, for, in my opinion, the time provision prescribed by sec. 229 (a) is not an essential preliminary or a condition precedent to the jurisdiction of the petty sessions. It must be conceded that some cases were cited which support such an interpretation of the section (*In re Prince; Ex parte Binge*[35]; *Dowell v. Beningfield*[36]; *Law Quarterly Review*, vol. 47, at p. 578), but *Sommerville v. Mirehouse*[37] is a decision to the contrary. The question must depend upon the terms of the particular statute in question. Prima facie, procedural statutes do not touch jurisdiction. The *Factories and Shops Act 1928* merely prescribes that a party shall lay his information within a prescribed period, but that touches his right to proceed and not the jurisdiction or capacity of the tribunal to adjudicate. A tribunal would adjudicate wrongly if it ignored the provision and might be corrected upon appeal in cases in which an appeal is provided. But error in adjudication does not touch jurisdiction or the capacity to adjudicate. Another contention was that the justices were never seised of the information and so were without jurisdiction in relation to the matters charged.

It is argued that the return dates of the summonses were extended without authority and contrary to the provisions of the *Justices Act 1928*, sec. 23 (3), and the *Justices Act Rules 1936* (No. 1), rule 23. It is desirable to summarize the facts. On 20th June 1936 the informations were laid and summonses to appear were made returnable on 9th July 1936. On 3rd August 1936 a justice extended the

summons in Papas' case to 13th August 1936 and in Zorich's case to 3rd September 1936. The extension was made without any oath or affidavit as required by the *Justices Act 1928*, sec. 23 (3). Service was effected in Papas' case after 3rd but before 10th August and in Zorich's case after 3rd August and about 27th August 1936. On 20th August 1936 the information in Papas' case came before the justices in petty sessions and was adjourned to 3rd September 1936. On 3rd September 1936 the information in both Papas' and Zorich's cases came before the justices for hearing. The summons in each case was apparently lodged with the clerk of petty sessions before 3rd September 1936 and was entered in the register book for hearing (*Justices Act 1928*, sec. 20 (1); *Justices Act Rules 1936* (No. 1), rules 4 and 10), and apparently also affidavits of service were filed. The appellants appeared at the hearing in Papas' case, but did not appear, and stated that they declined to appear, in Zorich's case.

The twenty-third section of the *Justices Act 1928* directs that certain rules "shall be observed with regard to the serving of summonses," and one of these rules is that contained in sec. 23 (3) relating to the extension of the time for hearing. These provisions do not, nor do the provisions in the *Justices Act Rules 1936* (No. 1), rule 23, whether consistent with the Act or not, touch the jurisdiction or the capacity of the tribunal to adjudicate; they are provisions regulating the proper course of procedure in matters incident to the jurisdiction of the justices and over which they have jurisdiction (*Barker v. Palmer*[38]; *Zohrab v. Smith*[39]; *In re Lenaghan; Robinson v. Lenaghan*[40]; *Ex parte Hopwood*[41]).

An irregularity in the extension of time for hearing of the summonses might, no doubt, be a ground for setting aside the order granting it or for an appeal, if an appeal is provided. But the informations were in fact before the justices; service had been effected. In Papas' case the appellants actually appeared, but they refused to appear in Zorich's case despite the fact that they had been served.

In my opinion the motion of the appellants for a prerogative writ of prohibition in this case is wholly misconceived and the Supreme Court was right in denying it.

This appeal should be dismissed.

Dixon J.

The question for decision upon this appeal is whether in the circumstances of the case a prerogative writ of prohibition should go to a Court of Petty Sessions and to a trade tribunal appointed or to be appointed under sec. 40 of the *Factories and Shops Act 1934* Vict.. A trade tribunal is a body consisting of a County-Court judge and two other persons representing respectively the employers and employees in a trade. It is appointed by the Governor in Council, and its purpose is to hear and determine proceedings for breach of a wages-board determination whenever an objection is raised that the relation of employer and employee does not subsist between the defendant and the person in respect of whom the defendant is alleged to have broken the determination. If in proceedings for contravention of a determination such a point is taken, the court hearing them must proceed no further in the matter, but must order the transfer of the proceedings to the trade tribunal. The reason for requiring such a course appears from the special power conferred upon a trade tribunal. For, if it is satisfied that, in substance, the relationship is that of employer and employee, or that the relation has been devised to evade the wages-board determination, the trade tribunal is empowered to decide the proceedings as if the relationship of employer and employee in fact subsisted.

The appellants are defendants to two informations for contravening sec. 233 (1) of the *Factories*

and Shops Act 1928 by employing persons at a lower rate of wages than the rate determined by a wages board. Under sec. 229 (a) an information for such an offence must "be laid within two months after the commission thereof." Each information alleged that the defendants so employed a person in respect of a specified week, four days of which fell outside and three days of which fell within the period of two months calculated back from the date of the informations. To one information the defendants appeared and pleaded not guilty. The hearing went far enough to enable their counsel to raise the objection that the relation obtaining was not that of employer and employee, and the Court of Petty Sessions made an order that the proceedings be transferred to a trade tribunal. To the second information the defendants did not appear. They refrained from appearing because of some facts ascertained after they had appeared and pleaded to the first information. The magistrate before whom the informations had been laid had issued summonses returnable at a date which had expired before either summons was served, but each summons had been extended and the return date amended. In the margin the word "extended" appeared with some initials and a date which was later than the original return day.

The facts ascertained by the defendants were that an officer of the Department of Labour, who was a justice of the peace, had made the extensions without any evidence that service could not promptly be effected and merely upon the request of a clerk who stated that it was for the convenience of the informant.

The grounds upon which the defendants sought a writ of prohibition were that, as appeared on the face of the information, the prosecutions were begun more than two months after the commission of the offence charged, and, secondly, that in any event the original summonses had lapsed.

The first ground is founded on the view that each information alleges one indivisible offence consisting in keeping a person at work for a remuneration calculated according to an insufficient rate. To employ at an insufficient rate for a continuous period is one offence, not a plurality of offences, and therefore, it is said, as the week mentioned in the information begins earlier than the two months allowed for instituting a prosecution, the informations had not been laid within two months from the commission of the offence charged.

I am by no means sure that such an offence is complete until an underpayment or failure to pay the full rate has taken place. If so, the point is bad in substance. For the time of the underpayment or failure to pay may have been within the two months, that is, at the end of the week mentioned in the information. But the decision of this question does not, in my opinion, lie with us in proceedings of the present nature. The limitation of time for laying an information is not a limitation upon the jurisdiction of the court or tribunal before whom the charge comes for hearing. The time bar, like any other statutory limitation, makes the proceedings no longer maintainable, but it is not a restriction upon the power of the court to hear and determine them. It is not true that because an information is in fact laid out of time, the Court of Petty Sessions is powerless to deal with it. Whether or not an information was laid too late is a question committed to their decision; it is not a matter of jurisdiction. In courts possessing the power, by judicial writ, to restrain inferior tribunals from an excess of jurisdiction, there has ever been a tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or

appeal. But, if there be want of jurisdiction, then the matter is *coram non judice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable (Cp. *The Case of the Marshalsea*[42]).

How absurd would it be to deny to the court before which such informations as those now in question are brought power to dismiss them on the ground that they are out of time and to do so with costs. If the court can do this, it means that it can take cognizance of the proceedings and make a valid order in relation to them. Suppose the court were to decide erroneously that the information was too late; its order of dismissal would not be void. The information could not, while the order stood, be brought on again for hearing. The order for costs could not be ignored and execution thereof resisted. The dismissal would not be a mere refusal of jurisdiction; it would be an adjudication, and, subject to proceedings by way of review or appeal, it would be final. The finality of such a decision is illustrated by the course taken in *R. v. Mainwaring*[43]. A statute relating to the inspection of coal mines provided that penalties thereunder might be recovered in a summary manner within three months of the commission of the offence. An offence was committed on 17th December 1856 for which an information was laid on 9th January 1857. It came on to be heard on 20th January 1857 and was dismissed on the ground that, before the laying of the information, no prior notice of the neglect complained of had been given to the defendant. No such notice was required by law[44]. A writ of mandamus was obtained directed to the magistrates commanding them that they "forthwith proceed to hear and determine the merits of the information." To this writ the magistrates made a return setting out that on 22nd December 1857 they did in obedience to the writ proceed to hear and determine the information and that it appeared before them that the alleged offence was committed on 17th December 1856 and thereupon, as it manifestly appeared before them that more than three months had elapsed since the alleged commission of the offence, that is, between the date of the offence and the date on which they were then hearing it, they adjudged and determined that the information be dismissed. Now, this return meant, first, that the magistrates had construed the statute as meaning, not that an information must be laid within three months of the offence, but that the conviction itself must be had within that time; second, that they did not treat the hearing held pursuant to the writ of mandamus as the resumption of a duty they should have performed on the original hearing which fell within the three months, but as a proceeding which must be dealt with as at the date it took place. Upon a demurrer to the return of the magistrates judgment was given for them. *Coleridge* and *Erle* JJ. thought that the construction the magistrates had placed upon the statute was probably erroneous, and *Crompton* J. was not sure of it, although *Campbell* L.C.J. agreed in it. But the whole court considered that it was for the justices to determine what the Act meant and how it applied to the facts. This decision is the more notable because of the exigency of the writ as an answer to which the return was upheld; namely, "to hear and determine the merits of the information." In other words, it was held that to decide whether or not the limitation of time prescribed had been observed was a matter within the jurisdiction of the magistrates and further that it was a determination of the merits of the information. *R. v. Mainwaring*[45] is a case in which the decision given by the magistrates, whether right or wrong, upheld the objection that the prosecution was out of time. If they had decided the other way and overruled the objection, the correctness or incorrectness of their decision would have been equally irrelevant to the validity of the order they made. For the legislature had not made their power to hear and determine the proceedings dependent upon the actual period of time elapsing from the actual commission of the offence. On the contrary, that question, together with all others going to the liability of the defendant to conviction, was submitted to their adjudication.

It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall

depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed. In the past a tendency may have appeared in the superior courts of common law to adopt constructions of statutes conferring powers on magistrates and others which would result in the withdrawal from their exclusive or conclusive determination matters which we should now think were intended for their decision. But, even then, it must not be forgotten that this tendency was manifested in proceedings by certiorari and not in prohibition. When prohibition is based upon want of jurisdiction it means that the proceedings are *coram non judice*, that a judgment or order, when given or made, would be void. But certiorari is a proceeding for quashing orders that are voidable only. When nothing was intended in favour of orders of courts of inferior jurisdiction and magistrates and when convictions before them were bad unless they set out on their face the information, the process and the materials upon which they were founded, it was almost inevitable that whatever grounds existed for setting aside an order or conviction would be available upon certiorari. For a conviction was liable to quashing if upon its face a failure in the observance of law appeared. But it is one thing to quash a conviction or order for error on its face and another to hold that the court or magistrate usurped jurisdiction in making it. This explains the case referred to in the argument (*R. v. Hammersmith Profiteering Committee*[46]), where upon certiorari a conviction was quashed in respect of an offence which according to the conviction itself was committed more than the statutory period before the prosecution.

We are concerned in the present case with prohibition, and I am clearly of opinion that the prerogative writ of prohibition does not lie to prohibit a Court of Petty Sessions from proceeding upon an information upon the ground that it was laid after the expiry of a time limited in the manner adopted by sec. 229 (a) of the *Factories and Shops Act 1928*. The effect of such a limitation when considered with the provisions creating the offences to which it applies is to impose upon a person offending a penal liability during the prescribed period. Throughout the time limited he is under a liability to punishment, afterwards that liability is gone. Upon a prosecution the question for the decision of the court or tribunal is whether within that period he has committed the offence charged. Their jurisdiction necessarily includes the determination of that entire question.

The second ground upon which the application for the writ was based is largely governed by the same considerations. The question which arises out of the manner in which the summons was extended is whether an effective summons under the original information subsisted. This, in my opinion, is not a matter lying outside the determination of the Court of Petty Sessions upon which its jurisdiction is contingent. Subject to proceedings by way of review or appeal, the Court of Petty Sessions must decide the question before it proceeds to the merits of the charge upon which the defendants did not appear. In the case in which they did appear and an order of transfer was made, it will be for the trade tribunal to decide the question and perhaps the further question of the effect of the defendants' appearance and their making answer to the information. But there is one observation which I think should be made. It relates to the grounds upon which this point was decided in the Supreme Court. *Mann* C.J. decided it upon the ground that rule 23 of the rules of procedure under the *Justices Act* implies a power to extend a summons independently of sec. 23 (3) of the *Justices Act 1928*. As a matter of interpretation, I feel unable to adopt this view. It is unfortunate that on a

matter of such daily practice the statute and the rule should have got into such a condition, but I think that it is better that we should take this opportunity of stating our view upon it. My own is that the rule is not so expressed as to increase the power given by sec. 23 of the Act or to confer a new power of extension. Except in cases where some limitation of time for laying the information is in question, I should regard the matter as of no importance. For, when a justice extends the return date of a summons already issued by another justice and does so by amending the date and signing it or initialling the summons, I should be disposed to treat the transaction as the laying of the same information afresh and the issue by the second justice of a somewhat irregular summons thereon (See *R. v. Hughes*[47], *Dixon v. Wells*[48] and *Williams v. Letheren*[49]). Sec. 18 (2) of the *Justices Act 1928* would be satisfied because the information and summons are on the same document. But, when a fresh information would be out of time, this mode of treating the matter would result in the dismissal of the charge on that ground.

The Full Court of Victoria appear to have dealt with the point as one not going to jurisdiction but to process, and in this I agree. But the judgment adds that the mere fact of there being no summons does not take away jurisdiction if the parties are before the justices. This observation apparently applies to one only of the two informations, for to the other there was no appearance.

In my opinion the appeal should be dismissed.

Evatt J.

I have read and agree with the judgment of my brother *Dixon.*

McTiernan J.

I agree with the judgment of my brother *Dixon.*

Appeal dismissed with costs.

Solicitor for the appellants, William Harrison.

Solicitor for the respondent, F. G. Menzies, Crown Solicitor for Victoria.

[1] (1874) L.R. 5 P.C. 417.

[2] [1907] HCA 37; (1907) 5 C.L.R. 33.

[3] (1922) 2 A.C. 128, at pp. 151, 152.

[4] (1860) [1860] EngR 1153; 3 E. & E. 257; 121 E.R. 438.

[5] (1803) 3 East 467; 102 E.R. 676.

[6] (1861) 30 L.J. M.C. 133.

[7] (1920) 89 L.J. K.B. 604; 36 T.L.R. 264.

[8] (1864) 1 W.W. & a'B. (L.) 12.

[9] (1899) 15 W.N. (N.S.W.) 159.

[10] (1904) 20 T.L.R. 639.

[11] (1860) [1860] EngR 1126; 1 B. & S. 652; 121 E.R. 857.

[12] (1860) 1 B. & S., at p. 657.

[13] (1879) 4 Q.B.D. 614, at pp. 625, 629.

[14] (1905) V.L.R. 43; 26 A.L.T. 73.

[15] (1879) 4 Q.B.D., at p. 623.

[16] [1916] HCA 76; (1916) 22 C.L.R. 381, at p. 399.

[17] (1879) 4 Q.B.D. 614.

[18] (1879) 4 Q.B.D., at p. 623.

[19] (1890) 25 Q.B.D. 249, at pp. 255, 256.

[20] (1902) 1 K.B. 91.

[21] (1891) 17 V.L.R. 186; 12 A.L.T. 208.

[22] (1890) 54 J.P. 564; 6 T.L.R. 151.

[23] [1904] HCA 26; (1904) 1 C.L.R. 675.

[24] (1904) 2 K.B. 798.

[25] (1917) 2 I.R. 430.

[26] (1919) 2 K.B. 262.

[27] (1920) 1 K.B. 688.

[28] (1925) 2 K.B. 250, at p. 254.

[29] (1874) L.R. 5 P.C., at p. 442.

[30] (1866) L.R. 2 H.L. 239.

[31] (1866) L.R. 2 H.L. at p. 276.

[32] (1881) 6 App. Cas. 424.

[33] (1878) 3 Q.B.D. 730, at p. 745; (1879) 4 Q.B.D. 697, at p. 744.

[34] (1933) V.L.R. 196.

[35] (1864) 1 W.W. & a'B. (L.) 12.

[36] (1841) Car. & M. 9 [1841] EngR 29; ; 174 E.R. 384.

[37] (1860) [1860] EngR 1126; 1 B. & S. 652; 121 E.R. 857.

[38] (1881) 8 Q.B.D. 9

[39] (1848) 17 L.J. Q.B. 174.

[40] [1848] EngR 474; (1848) 2 Ex. 333; 154 E.R. 520.

[41] [1850] EngR 500; (1850) 15 Q.B. 121; 117 E.R. 404.

[42] [1572] EngR 412; (1612) 10 Co. Rep. 68 b, at pp. 76 a, 76 b [1572] EngR 412; ; 77 E.R. 1027, at pp. 1038-1041.

[43] (1858) E.B. & E. 474 [1858] EngR 750; ; 120 E.R. 586; 27 L.J. M.C. 278.

[44] (1858) 27 L.J. M.C., at p. 280, n.

[45] (1858) E.B. & E. 474 [1858] EngR 750; ; 120 E.R. 586; 27 L.J. M.C. 278.

[46] (1920) 89 L.J. K.B. 604; 122 L.T. 720.

[47] (1879) 4 Q.B.D., at p. 625.

[48] (1890) 25 Q.B.D., at pp. 254, 258.

[49] (1919) 2 K.B., at pp. 268-270.

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