

me to make the order asked. Of course, nothing I have said has any relevance to whether further particulars should be given. The summons will be dismissed, with costs, which I fix at 5 guineas.

Summons dismissed.

[Solicitors—For the petitioner, R. H. Dunn; for the respondent, Bullen and Burt.] F. M. B.

Before Martin, J.

Nov. 29, Dec. 4, 1940.

THE KING v. FOSTER. Ex parte ISAACS.

Contempt of Court—County Court—Right to be heard in defence—Denial of right—Remedy by certiorari—County Court Act 1928 (No. 3665), secs. 54, 77.

The power of apprehension and commitment conferred upon a Judge by section 54 of the County Court Act 1928 is not exerciseable without first giving the alleged offender notice of the charge made and affording him an opportunity of answering it. The matters constituting the offence should be specifically stated; and, if they are not capable of being formulated in specific allegations, the nature of the charge arising from such matters as a whole should be stated.

In re Pollard, (1868) L.R. 2 P.C. 106 at 120; *Chang Hang Kiu v. Piggott*, [1909] A.C. 312, followed.

In the case of a committal by a Judge upon his own motion, by way of punishment for contempt of Court, the provisions of section 77 of the County Court Act are not applicable.

Semle.—In cases within the terms of section 77 of the County Court Act, review by way of *certiorari* is only applicable where manifest defect of jurisdiction in the tribunal or manifest fraud in the party procuring the order appears.

ORDER NISI FOR CERTIORARI.

ORDER NISI FOR PROHIBITION.

In an action in the County Court at Melbourne brought by Edna Frances Isaacs, an interpleader summons was taken out for a determination, as between the plaintiff and her husband, John Isaacs, as to the ownership of certain chattels claimed in the action. On the hearing of the interpleader issue the plaintiff, Edna Frances Isaacs, conducted her own case before Judge Foster, and, according to an affidavit filed on behalf of the respondents in the later proceedings, continually disregarded rules of evidence and was on several occasions told by Judge Foster that she was prevaricating and misbehaving herself, and that if she persisted she would be punished for contempt of Court. In his final address, Counsel for the claimant, John Isaacs, asked the Judge to give some expression to his view on the matter of the plaintiff's conduct. On the plaintiff rising to speak, she was told

that she would be heard next day, and the Court adjourned. When the Court resumed next day a solicitor appeared for the plaintiff, and asked for an adjournment, on the ground that the plaintiff was unwell. No evidence was called in support of the application. The application was refused, judgment delivered, and at the conclusion of this the Judge signed a warrant for the apprehension of the plaintiff and her imprisonment for fourteen days, on the grounds that she, being a witness, had been guilty in his opinion of wilful prevarication, had misbehaved herself in the Court, and did wilfully insult him. An order *nisi* for a writ of prohibition directed to the bailiff of the County Court at Melbourne and the keeper of the gaol was obtained by the plaintiff, and notice was given to Judge Foster of her intention to apply on the return of the order *nisi* for a writ of *certiorari* to remove the record to the Supreme Court.

On the return of the order *nisi* for prohibition, the order was discharged by Martin, J., but an order *nisi* for a writ of *certiorari*, alternatively prohibition, directed to the Judge and the Registrar of the County Court at Melbourne was granted.

P. D. Phillips for the applicant to move the order absolute.—A person should be heard in his defence before being committed for contempt—*In re Pollard*, L.R. 2 P.C. 106; *Chang Hang Kiu v. Piggott*, [1909] A.C. 312. Section 77 of the County Court Act 1928 applies only to civil proceedings *inter partes*, and does not prevent *certiorari* from lying in the present instance—*Lewis v. Owen*, [1894] 1 Q.B. 102. [MARTIN, J., referred to *Re Bell, Ex parte The Marine Board of Victoria*, (1892) 18 V.L.R. 432.] Failure to hear the other side is not a mere irregularity, but renders the proceeding a nullity. *Certiorari* will therefore lie—*R. v. North, Ex parte Oakey*, [1927] 1 K.B. 491; *R. v. Huntingdon Confirming Authority, Ex parte George and Stamford Hotels Ltd.*, [1929] 1 K.B. 698; *Spackman v. The Plumstead District Board of Works*, (1885) 10 A.C. 229 at 240; *McIntosh v. Simpkins*, [1901] 1 K.B. 487; *Alderson v. Palliser*, [1901] 2 K.B. 833; *Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417 at 442; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R. v. Magistrates Court, Ex parte Morrison*, (1925) St. R. Qd. 220; *Abdey v. Dale*, (1850) 16 L.T. O.S. 365; *Re South Australian Brewing Co. Ltd.*, (1908) 14 A.L.R. (C.N.) 34.

Tait for the respondents to show cause.—Neither prohibition nor *certiorari* is an appropriate remedy for the matter complained of here. Only if there is a want of jurisdiction in the Court below will either writ lie. Where there is a failure to give a person an opportunity to be heard in his defence, it is the decision, not the proceedings, which become a nullity and the writs do not lie—*Colonial Bank of Australasia v. Willan (supra)*; *R. v. Nat Bell Liquors Ltd. (supra)*. *Certiorari* lies only with regard to matters which appear on the record—*Re the Justices of Shrop-*

THE KING v. FOSTER

shire, *Ex parte Blewitt*, (1866) 14 L.T. 598; Halsbury's *Laws of England* (2nd ed.), vol. IX., p. 888; *R. v. Minister of Health*, [1938] 4 All E.R. 32; *In re Bell*, *Ex parte The Marine Board of Victoria* (supra); *R. v. The President of the Commonwealth Court of Conciliation and Arbitration*, *Ex parte The Australian Agricultural Co. Ltd.*, (1916) 22 C.L.R. 261, 22 A.L.R. 355; *Taft v. Rayner*, (1847) 5 C.B. 162.

Phillips, in reply, referred to *R. v. Boycott*, *Ex parte Keasley*, [1939] 2 All E.R. 626.

Cur. adv. vult.

MARTIN, J., read the following judgment:—Application for a writ of *certiorari* directed to a Judge and the Registrar of the County Court at Melbourne, to show cause why a warrant signed by such Judge commanding the bailiff of such Court to apprehend and convey to gaol one Edna Frances Isaacs should not be brought up and quashed; or, alternatively, for a writ of prohibition to prohibit further action being taken under the said warrant.

Mrs. Isaacs was the plaintiff, and conducted her own case in an issue ordered to be tried under an interpleader summons which came on for hearing before His Honour Judge Foster. During the course of the hearing, which lasted some days, the plaintiff, in the opinion of the learned Judge, was guilty of wilful prevarication as a witness, of misbehaviour in Court, and of wilfully insulting him. On the fifth day of the hearing, according to plaintiff's affidavit, Counsel for the claimant, at the conclusion of his address, invited the Judge to punish her for contempt of Court. She alleges she then rose to explain that she had not intended any contempt, but was told she would be heard on the following day, and the Court thereupon adjourned. At that stage she had had no opportunity to address the Court on the interpleader issue. On the same day the plaintiff swears she suffered a nervous breakdown, and was admitted to a private hospital. Next morning she was too unwell to attend the Court, but Miss Silverman, a solicitor, attended on her behalf to apply for an adjournment. This lady deposed that she explained to the learned Judge that the plaintiff was ill, and applied for an adjournment; that His Honour refused the application and proceeded to deliver judgment against the plaintiff on the issue before him. He then ordered that she be imprisoned for fourteen days, and signed the warrant the subject of this application, but owing to the plaintiff's illness the bailiff has not yet acted upon it.

I refused to make absolute a rule *nisi* for a writ of prohibition directed to the said bailiff and the keeper of the gaol at Pentridge, on the ground that neither of them was purporting or claiming to exercise any judicial functions. On the return of that rule other affidavits were filed, including one exhibiting what was sworn to be the transcript of a shorthand note taken of the proceedings in the County Court on the day judgment was delivered, and also one by the

clerk of the claimant's solicitor deposing to incidents which happened during the course of the hearing of the issue tried there, and contradicting some of the allegations contained in plaintiff's affidavit. When the rule *nisi* for prohibition was discharged Counsel for the plaintiff made this application, and an order *nisi* was granted. The application is made on the ground that the learned Judge violated one of the first principles of natural justice, in that he neither specified the conduct of the plaintiff of which he complained nor gave her an opportunity of being heard before sentencing her to a term of imprisonment.

In 1868 the Judicial Committee of the Privy Council considered a petition by a colonial barrister who had been adjudged guilty of contempt of Court and fined, and reported to Her Majesty that "no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed"—*In re Pollard*, (1868) L.R. 2 P.C. 106 at p. 120. In *Chang Hang Kiu v. Piggott*, [1909] A.C. 312, the Judicial Committee dealt with an appeal by certain persons who, under a section of an ordinance in force in Hong Kong, had been committed to imprisonment for perjury at the conclusion of the hearing of an issue. Their Lordships found that, having regard to the nature of the charge made against the appellants, it did not admit of being formulated in a series of specific allegations of perjury, and that the language used by the Judge who committed them was sufficiently specific to make the appellants aware of the pith of the charge against them, but they considered that, before pronouncing sentence, he should have afforded them an opportunity of giving reasons against summary measures being taken, and they referred to *In re Pollard*, (1868) L.R. 2 P.C. 106.

The result of these cases appears to be that when any words, acts or conduct of a person, which a Judge considers merits punishment, are capable of being specifically referred to as constituting an offence, this should be done, but if they cannot be dissected or formulated in specific allegations, the nature of the charge arising from such words, acts or conduct as a whole should be stated, and in either case the person should be given an opportunity of being heard.

If the affidavit of Mrs. Isaacs alone be looked at, it appears that she did not know that she had been guilty of any contempt of Court, and that she was promised an opportunity of being heard on the following day, but was unable, through circumstances beyond her control, to avail herself of that opportunity, and was never in fact heard. As the affidavits, contrary to this view of the case, were filed on behalf of persons not interested in this application, I did not consider

I should have regard to them when the application for this order *nisi* was made, but as the same affidavits have now been filed on behalf of these respondents, both versions of the proceedings in the County Court are now before me.

The first objection advanced by Mr. Tait is that sec. 54 of the County Court Act 1928, under which the learned Judge acted, provides that in certain circumstances the Judge may direct the apprehension of any person, and if he thinks fit, may commit him to prison; that the form of the order of committal provided by the Third Schedule of the County Court Act commands the bailiff to apprehend and convey to gaol the person against whom the warrant issues; and that the section further provides that the order in that form shall be good and valid in law without any other order, summons or adjudication whatsoever. But I do not consider that these provisions are sufficient to deprive a person of the opportunity of knowing what is alleged against him and of answering the charge made. The words "if he thinks fit" suggest that the Judge will consider all relevant matters, including the defence of the person apprehended, before committing him to prison; and clause (2) of the section may well be a provision for safeguarding those who execute the warrant. Neither that clause nor the form in the Schedule can be read as a legislative direction that a person charged with an offence shall not be heard in his defence.

A second objection is that sec. 77 of the County Court Act provides that—"No judgment determination or other order given or made by any judge in any action or matter brought before him or pending in his court shall be removed by writ of error writ of *certiorari* or otherwise." It is clear that if a County Court Judge acts without jurisdiction, this section will not prevail to prevent the exercise of the Supreme Court power to issue a writ of *certiorari*—*Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417; *Hunter v. Sherwin*, (1869) 6 W.W. & A'B. (L.) 26 at p. 32. Mr. Phillips has argued that a departure from the principles of natural justice by a Judge of County Courts either constitutes a manifest defect of jurisdiction on his part or is itself a matter of such grave import that this Court will issue a writ of *certiorari* to remedy it, despite the wording of sec. 77; that the two grounds—manifest defect of jurisdiction in the tribunal and manifest fraud in the party procuring an order—expressly mentioned in *Willan's Case* (*supra*) as those in which this Court can act, despite a privative clause in the statute, are not intended to be an exhaustive summary of the Court's powers; that there is at least a third ground, viz., when the lower Court disregards a fundamental rule of justice, and he contends that there is nothing in the opinion of the Judicial Committee contrary to this contention. He referred to the decision of the Full Court of Queensland in *R. v. Magistrates Court, Ex parte Morrison*,

(1925) St. R. Qd. 220, where it was held that a Court which gave judgment against a defendant who had not been served with a summons, and knew nothing about the proceedings, was regarded as having acted without jurisdiction, since valid service of process on a defendant is a condition precedent to jurisdiction, and to that of the Court of Appeal in *R. v. Huntingdon Confirming Authority, Ex parte George and Stamford Hotels Ltd.*, [1929] 1 K.B. 698, in which a body exercising judicial powers which had made a decision without giving notice of hearing to interested parties, with the result that they were not heard, was held to have brought about a nullity. On the other hand, Mr. Tait argued that the grounds stated by the Judicial Committee in *Willan's Case*, (1874) L.R. 5 P.C. 417, when a superior Court can grant *certiorari* to an inferior Court where there is a restrictive section, are exhaustive, and that unless want of jurisdiction appears at the inception of a case, or, if it appears during the course of the hearing, is of such a nature that, had the Court known of it at the beginning of the case, it would have refused to act, as, for example, a question of title suddenly arising in the course of hearing before a Court which has no jurisdiction to determine such a question, this Court will not grant this remedy. If, he contended, the Judge had jurisdiction at the outset to enter upon an inquiry as to contempt, as he undoubtedly had by sec. 54 of the County Court Act, the fact that he acted entirely without evidence would not be a reason for *certiorari*, and he referred to *Re the Justices of Shropshire, Ex parte Blewitt*, (1866) 14 L.T. 598; and *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 at pp. 151-2, where Lord Sumner said—"A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to a point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void and may be disregarded as a nullity, or that the whole proceeding was *coram non iudice*." In *Ex parte Hopwood*, (1850) 15 Q.B. 121 at p. 128, where there was no proof of service of the summonses on which convictions were recorded, Patteson, J., said, "want of evidence on matter of fact . . . cannot possibly take away jurisdiction," and *certiorari* was refused.

The Full Court of Victoria, in a case in which the question of the taking away the right to *certiorari* by statute was not directly raised, since the Act there under review contained no such provision, has held that where there is no section in the relevant Act,

such as appears in sec. 77 of the County Court Act, the writ will go either because of want or excess of jurisdiction, or because there has been an irregularity in the exercise of jurisdiction, but that mere irregularity in the exercise of jurisdiction is insufficient to justify *certiorari* if there is a privative section in the Act—*In re Bell, Ex parte The Marine Board of Victoria*, (1892) 18 V.L.R. 432 at p. 440, 14 A.L.T. 58. In that case Holroyd and Hodges, JJ., held that what was undoubtedly a departure from fundamental rules (though the case was not argued on that basis), viz., the refusal to permit an interested party who was competent so to do to give evidence on his own behalf, was no more than an irregularity in the exercise of jurisdiction; but the other member of the Court (Higinbotham, C.J.) considered that the Marine Court had no jurisdiction to make a determination conducted in such a manner as to be wanting in an essential condition of statutory jurisdiction, viz., the neglect of the statutory provision in the Marine Act 1890 that the person charged should have an opportunity of making a defence. In view of the opinions expressed by the majority of the Full Court in that case and by the Judicial Committee of the Privy Council in *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, in which *Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417, was expressly approved, and of the fact that the authorities relied upon by Mr. Phillips are all cases where the defects were, or could be, regarded as matters going to jurisdiction to enter upon an inquiry, I consider that nothing has been cited to me to show that the two grounds for review by way of *certiorari*, where there is a privative section, set forth in *Willan's Case*, (1874) L.R. 5 P.C. 417, are not the only ones, and that I should regard them as such.

But a question arises whether the Legislature has denied the remedy of *certiorari* in a case of this nature. Section 77 of the County Court Act provides—“No judgment determination or other order given or made by any judge in any action or matter brought before him or pending in his court shall be removed by writ of error writ of *certiorari* or otherwise but every final decision by which the merits of the case may be concluded of a judge of the court given or made in any such action or matter before any such court or judge shall be subject to review by way of appeal as hereinbefore provided.” “Matter” in the County Court Act includes any proceeding in the Court commenced otherwise than by plaint, and whether in an action or not—sec. 3. Section 77 is one of a group of sections contained in Part VI. of the Act headed “Judgment, New Trial and Appeal.” At least some of these sections appear to be concerned only with a cause or matter *inter partes*. In dealing with the section in the County Court Act of 1869, which corresponds with the present sec. 77, Stawell, C.J., in *R. v. Bindon*, (1879) 5 V.L.R. (L.) 93 at p. 96, said—“The plain object of that enactment is to

“take away *certiorari* in all cases, the statute referring to the provision for an appeal from every final decision by which the merits of the case may be concluded. What is the precise effect of that latter clause need not now be determined; apparently it was inserted to show that the right to obtain a writ of *certiorari* had not been taken away, without adequate provision having been first made for the consideration by another tribunal, on the merits, of “decisions in these cases.” Contempt of Court is a criminal offence—*In re Pollard*, (1868) L.R. 2 P.C. 106—and an order for “commitment” is expressly excluded from those orders which are subject to appeal by sec. 74. It is true that there may be an “order for commitment” in a cause or matter *inter partes*, for the County Court has power to enforce orders made as the Supreme Court may do—sec. 49—and in the Supreme Court a judgment requiring any person to do any act other than the payment of money may be enforced by a writ of attachment or by committal—Rules of Supreme Court 1938, Order XLII., rule 7; and, again, an order for imprisonment made by a County Court Judge under the Imprisonment of Fraudulent Debtors Act 1928 is such an order—*Ingram v. Crawford*, [1934] V.L.R. 289, [1934] A.L.R. 326. But there is insufficient in that fact to hold that a commitment for contempt is not included in the phrase “order for commitment” in sec. 74, and so it cannot be said that Part VI. of the Act is exclusively concerned with actions or matters *inter partes*.

Although in sec. 77 an order of commitment is not made an exception to the general words denying *certiorari*, I think it probable that the Legislature only intended to take away that remedy, in the case of a final decision, where there was a right of appeal under sec. 74; that it was aimed at actions or matters *inter partes*; and that a committal for contempt is not one made by a Judge in any action or matter “brought before him” or “pending in his Court,” since those words connote a proceeding initiated by a party in some manner provided by the Act or rules made thereunder, and are not apt to describe action taken by a Judge of his own motion to punish a criminal contempt. If the words quoted were not intended to have some restrictive effect, it is difficult to understand why they were inserted in the section at all. Accordingly, in my opinion, the right to grant *certiorari* in this case is not taken away by sec. 77.

Should then the writ issue? The affidavit of Joseph Davis shows that during the Court proceedings the plaintiff continually disregarded rules of evidence and conduct; that she was told from time to time by the learned Judge she was prevaricating and misbehaving herself, that if she persisted in so conducting herself she would be dealt with for contempt of Court, and that at one stage His Honour addressed her as follows: “I shall reserve what action should be taken in respect

"of your conduct throughout this trial and particularly your conduct in the last episode, until the conclusion of the case, when hardship will not be imposed upon other people. What course I take will be determined by the way you behave. You certainly will be punished, if you offend again, for contempt of Court"; that thereafter she attacked the credit of witnesses called by herself, insulted the Judge and defied his rulings.

It appears from her own affidavit that she thought she was to be given an opportunity to address the Judge on the question of contempt of Court on the final day of hearing. This part of her affidavit is contradicted by Mr. Davis, who deposes: "I say further that the said Edna Frances Isaacs made no reference to the matter of her being punished for contempt of Court on the afternoon of 17th October, 1940, and that she did not seek to make any reference thereto. His Honour did inform the said Edna Frances Isaacs that she was entitled next to address him, but did not say anything to the said Edna Frances Isaacs in respect of the matter of her punishment for contempt of Court, nor did the said Edna Frances Isaacs say anything in respect of that matter to His Honour at or about the time mentioned in her said affidavit or at all on that afternoon." It is, at the least, doubtful whether anything was said regarding her being heard on the question of contempt, but the applicant cannot complain if her own oath of her understanding of what the Judge said be accepted. She did not attend Court on the final day, nor, although she was represented by a solicitor then, was any evidence tendered of her inability to be present.

From the transcript of the proceedings on that day it appears that the solicitor (who is not her present legal representative) made no application in terms for an adjournment, but the learned Judge apparently understood that such an application was intended, and I think her address to him should be treated as such. It could hardly have been made in a more maladroit manner. The solicitor gave her own opinion of the plaintiff's health, stated that she had been in communication with Dr. Adamson, and intimated to the Judge that he could telephone the doctor if he wished to verify her statement. No reason was given why Dr. Adamson was not there to testify, but, according to the affidavit of Gavin Greenless, the solicitor did say that she had not had an affidavit prepared because she had knowledge herself of Mrs. Isaacs' condition, and had thought it would be sufficient if she made personal application as she had done successfully with other Judges.

In the absence of any evidence of the plaintiff's illness, in view of the opinion the learned Judge had formed of the plaintiff during several days of the hearing, that he had seen her late in the afternoon of the preceding day, that he had told her he reserved what

action he would take against her until the conclusion of the case, and that all the evidence in the case before him had been led, it is not surprising that he doubted whether she was really too ill to appear, and, in the exercise of his discretion, decided to proceed with the case before him, as he had a right to do—County Court Rules, Order XXII., rule 11a.

But her committal to gaol was a matter quite apart from the interests of the other parties to the litigation, and it could in no wise have prejudiced them had he given her solicitor a further opportunity to call evidence of her inability to be present before proceeding to find her guilty of a criminal contempt and sentencing her to imprisonment. Although the affidavit of Mr. Davis discloses that at frequent intervals during the hearing of the interpleader issue, the Judge threatened to take action against her if she persisted in her misbehaviour, it does not appear that he at any time distinctly stated the specific charges on which he later found her guilty or that he asked her if she had anything to say why she should not be dealt with by him. It may well be that some of the charges did not admit of being formulated in a series of specific allegations, but, having regard to the fact that she was not a lawyer, and presumably was not versed in Court procedure, it cannot be presumed with any certainty that she was aware of the pith of the charges against her, and she swears she had no knowledge of any contempt on her part. Certainly I do not think she had such an opportunity to be aware of them, as had Mr. Pollard in the case already referred to—*In re Pollard*, (1868) L.R. 2 P.C. 106.

The casual manner in which the application for the adjournment of the interpleader issue was made was the fault of her solicitor, and though the plaintiff has to bear with the consequences of that, subject to any application she may make for a new trial of that issue, in a matter of such moment as a commitment to gaol, I cannot think that the Judge was justified in leaping to the conclusion that she was malingering and pronouncing sentence upon her without formulating charges, or giving her an opportunity to speak in her defence.

The affidavit of Dr. Adamson, filed in these proceedings, contains evidence that she was too ill to be present on the final day of hearing, and the statement of a solicitor made in Court concerning her own knowledge of the plaintiff's condition and of the information given her by Dr. Adamson, should have been sufficient to have moved His Honour to grant some reasonable time to produce evidence of the statements made before sentencing her to imprisonment. It is understandable that the learned Judge was suspicious of her sudden illness, but in view of the medical evidence now on the file, it appears that his suspicions led him to take a course which resulted, through no fault of hers, in her being sentenced to imprisonment without knowing of the charges against her or being heard in her

defence, and it is of the very essence of justice that no person be condemned unheard.

Although the question whether or not he will grant an adjournment is primarily one for the Judge concerned, appeals against refusals to grant adjournments have been allowed where the exercise of discretion seems likely to bring about a real injustice to the parties—*Maxwell v. Keun*, [1928] 1 K.B. 645. In that case Atkin, L.J., said—[1928] 1 K.B. 645 at p. 657—"In the exercise of a proper judicial discretion 'no judge ought to make such an order as would 'defeat the rights of a party . . . unless he is satisfied 'that he has been guilty of such conduct that justice 'can only properly be done to the other party by 'coming to that conclusion.' There is good reason why these words should apply *mutatis mutandis* to a criminal case.

The affidavit of Gavin Greenless shows that the learned Judge read a prepared judgment, including the passage in which he sentenced the applicant to a term of imprisonment. Of course, the fact that a Judge has prepared a judgment does not necessarily mean that he will deliver it in that form, as it is always open to him to vary it before pronouncing it in Court, but its preparation in this case suggests either that Mr. Davis' recollection that nothing was said about contempt prior to the adjournment on the preceding day is to be preferred to that of the applicant, and that the Judge had no intention of formulating charges and hearing a defence thereto, or that he had made up his mind that no defence could be advanced by the applicant to the charges he intended to make.

Mrs. Isaacs has no right to proceed by way of appeal from the order depriving her of liberty, and as in my opinion the above facts show an irregularity in the exercise of jurisdiction by the learned Judge, I think she is entitled to the relief she asks. When seeking the order *nisi* Mr. Phillips urged that this was a case for *certiorari*, and doubted whether prohibition would lie after the Judge had signed his warrant, and, on the return of the order *nisi* he advanced no argument in favour of the latter remedy. The warrant has not been executed. If it were it would be effected by an officer of the County Court, and there is authority to the effect that where there has been no acquiescence on the part of the applicant prohibition will lie even after judgment, so long as there is something left for it to operate upon, and in some cases even after execution—*Roberts v. Humby*, (1837) 3 M. & W. 120; and the cases cited by Lord Maugham in *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*, [1937] A.C. 898 at p. 918. But there is also authority that this form of relief will not be granted after judgment unless want of jurisdiction appears on the face of the proceedings. However, as no argument was addressed to me on this matter and as the applicant seeks *certiorari*, with the risks involved in

the construction I have given to sec. 77 of the County Court Act, I will not pursue the question of prohibition further.

Mr. Phillips also asked that if the decision were in his favour I would act under Order LIII, rule 11, of the Rules of the Supreme Court, and I see no reason why I should not adopt this course. Accordingly a writ of *certiorari* will issue to remove the order of the County Court and the warrant signed thereafter into this Court, and on this being done they will be quashed without further order.

Order accordingly.

[Solicitors—For the applicant, Wright and Cornwall; for the respondents, F. G. Menzies, Crown Solicitor.]

F. M. B.

High Court of Australia.

FULL COURT — (Rich, A.-C.J.,
Starke and Williams, JJ.) } Mar. 13, 14, 28.
(Melbourne.)

DILLON v. GANGE.

Transport regulation—Taxi-cab—Negligence of driver—Responsibility of licensed owner—Relationship of driver to licensee—Bailee or servant—By-law prohibiting driver except as servant—Presumption arising from by-law—Not conclusive evidence.

A by-law of the City of Melbourne provides that no owner shall, without the approval of the town clerk, entrust or hand over any motor car of which he shall be the licensee to any person to let, use, drive or ply for hire with the same, except in the capacity of servant of the owner. Upon appeal in an action brought to recover damages in respect of the negligence of the driver of a licensed motor car,—

Held, that the by-law and the fact that the driver was in charge of the car with the consent of the licensed owner, although affording some evidence that the driver was the servant of such owner, did not amount to conclusive evidence on that subject.

Clutterbuck v. Curry, (1885) 11 V.L.R. 810, and *McKinnon v. Gange*, [1910] V.L.R. 32, 15 A.L.R. 640, applied.

Decision of the Supreme Court of Victoria affirmed.

APPEAL.

By-law No. 239 of the City of Melbourne, cl. 17, made under the Carriages Act 1928 (Vic.), sec. 4, provides as follows:—"No owner shall without the 'approval of the Town Clerk entrust or hand over 'any motor car of which he shall be the licensee to 'any person to let, use, drive or ply for hire with