

in view of the unexplained delays in applying for the rules *nisi*, the writs should be refused.

Rules nisi discharged with costs.

Solicitor for the applicants: *P. N. Roach.*

Solicitor for the respondents: *A. H. O'Connor* (Crown Solicitor).

Ex parte ABRAHAM MALOUF; Re GEE.

Ex parte WADDIY MALOUF; Re GEE.

1943. In Banco: Jordan C.J., Halse Rogers and Roper JJ.

June 9, 28, 1943.

Prohibition—Conviction on summary trial—Failure to take written depositions—Appeal to Quarter Sessions—Grounds for refusal of writ—Stay of execution on conviction—Justices Act, 1902 No. 27, s. 70 (4)—Amendment Act, 1940 No. 6, s. 2 (1) (j).

The applicants, after trial before a magistrate at which no written depositions were taken, were each convicted on charges of having in his custody goods reasonably suspected of being stolen: both appealed against the convictions to the Court of Quarter Sessions and later applied for prerogative writs of prohibition.

Held, that the failure to take written depositions was a course of trial which deprived the applicants of the protection of an essential step in criminal procedure and, as a result, made nullities both of the trial and of the convictions but that such result was no reason for refusing a prohibition, nor did it prevent the trial of the appeals to the Court of Quarter Sessions or the hearing of a fresh summons on the same information.

Held, also that, as the execution of the convictions had been stayed on the institution of the appeals, there was no longer anything which could usefully be prohibited and the rules *nisi* should be discharged.

Grounds for and scope of prerogative writs of prohibition and *certiorari* discussed.

Distinction between the exercise of the supervisory jurisdiction of superior courts by means of prerogative writs over courts and other tribunals under a legal duty to act judicially, considered.

PROHIBITIONS.

The following statement of facts is taken from the judgment:—

These two matters came before us upon the return of two rules *nisi* for prerogative writs of prohibition.

It appears from the evidence in support of the rules that in each matter the applicant was on 10th December, 1942, convicted summarily before a magistrate upon a charge laid under the Police Offences Act, 1901, s. 27, of having goods in his custody which might be reasonably suspected of being stolen; and that upon conviction one was sentenced to imprisonment for three months, and the other to imprisonment for one month. On neither occasion were written depositions of the evidence taken as required by s. 70 (4) of the Justices Act, 1902-1940. On 10th December, each applicant filed a notice of appeal to Quarter Sessions; and, it is admitted, duly entered into a recognizance to prosecute the appeal, so that execution of the convictions became stayed pursuant to s. 123. The rules *nisi* were not obtained until 20th May, 1943.

Moverley, for the applicants.

Barwick K.C. and *Superman* (for *W. H. Collins* on War Service), for the respondents.

Cur. adv. vult.

June 28.

The judgment of the Court was delivered by

JORDAN C.J. [after stating the facts, continued:] In view of the course of the argument, it is convenient to consider the position of the applications irrespectively of the facts that appeals to Quarter Sessions are pending and that there has been great delay in moving for the rules, and then to deal with the effect of these last two matters.

It is necessary, in the first place, to determine the scope of the prerogative writ of prohibition. This writ was issuable not only by the Court of King's Bench but also by the Courts of Common Pleas and Exchequer and by the Court of Chancery: *R. v. The Justices of the Courts of London and The London County Council*.⁽¹⁾ Originally, the writ of *certiorari* to quash was somewhat wider in its scope than the writ of prohibition, because by the former a superior court exercised a jurisdiction which was not exclusively supervisory but was to some extent corrective. So long as it remained necessary for a summary conviction by justices to set out on its face the evidence given at the trial, such a conviction would be quashed upon *certiorari* if it appeared from the face of it that there was no evidence at all to establish some essential ingredient of the offence charged: *R. v. Nat Bell Liquors Limited* (2); *Ex parte Lovell* (3); *Parisienne Basket Shoes Pty Ltd. v. Whyte*.⁽⁴⁾ Since the Jervis Act Legislation which has removed evidence from the face of the conviction, the purely corrective jurisdiction exercisable by *certiorari* has become greatly diminished, if indeed it has not disappeared: *R. v. Nat Bell Liquors Limited*.⁽⁵⁾ Hence, in *R. v. Electricity Commissioners* (6), *Atkin* L.J., said "I can see no difference in principle between *certiorari* and prohibition except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which

(1) [1894] 1 Q.B. 453 at 457, 459.

(2) [1922] 2 A.C. 128 at 149-153.

(3) (1938) 38 S.R. 153 at 166.

(4) (1937) 59 C.L.R. 369 at 392.

(5) [1922] 2 A.C. 128 at 159-161.

(6) [1924] 1 K.B. 171 at 206.

would result in its final decision being subject to being brought up and quashed on *certiorari*, I think that prohibition will lie to restrain it from so exceeding its jurisdiction."

In *R. v. Nat Bell Liquors Limited* (1) the Privy Council pointed out, in relation to *certiorari*, that the jurisdiction so exercisable by a superior court is one of supervision, not of review, and that the "supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise." Similarly, the supervisory jurisdiction which is exercisable by the prerogative writ of prohibition goes not only to preventing excess of jurisdiction by an inferior court, but to preventing such a court from doing something which is "contrary to the general laws of the land, or . . . so vicious as to violate some fundamental principle of justice": *Martin v. Mackonochie*. (2) So long as an inferior court keeps within the limits of its jurisdiction, any mistakes, however gross, which it may make in ruling upon law or fact do not, as a general rule, expose its proceedings to the prerogative writ of prohibition: *Ex parte Lucas* (3); *Ex parte The Attorney-General*; *Re Cohen* (4); and mistakes can be corrected only upon appeal, if appeal lies. But such a court is subject to the supervisory jurisdiction of a superior court by means of the prerogative writs, unless that jurisdiction is expressly taken away by statute.

In this connection, it is necessary to draw a distinction between persons or tribunals which, whether technically courts or not, are subject to a legal duty to act judicially, and courts proper, which are subject also to a legal duty to try cases according to the ordinary law of the land: *Ex parte Wilson*; *Re Cuff* (No. 2) (5); *Ex parte Gosling* (not yet reported). In the former case, the prerogative writ of prohibition will lie to the tribunal (1) if it exceeds its jurisdiction, or (2) if it acts in contravention of the principles of natural justice: *ibid.* In the case of courts proper, it will lie to an inferior court not only in these cases, but also (3) if such a court deliberately disobeys the law by refusing to apply the general law of the land, or the provisions of some statute shown to be applicable, and insists on determining a matter according to principles of its own, or (4), in case, at any rate, of criminal proceedings, if the trial is so conducted as to deprive an accused person of the protection given by some essential step in criminal procedure, and to make a *de facto* conviction in law a nullity, so that it is void *ab initio*, as contrasted with voidable only and therefore valid unless steps are taken to set it aside.

The law is well settled as to the availability of the prerogative writ of prohibition in cases of excess of jurisdiction; although difficult questions may arise as to whether a court or tribunal has power to determine, unexaminably, facts upon the existence of which its jurisdiction depends: *Ex parte Mullen*; *Re Hood* (6); *Parisienne Basket Shoes Pty Ltd. v. Whyte* (7): an order or conviction made in excess of jurisdiction by an inferior court is void and not voidable: *ibid.* (8).

(1) [1922] 2 A.C. 128 at 156.

(2) (1879) 4 Q.B.D. 697 at 732.

(3) (1910) 10 S.R. 325; 27 W.N. 102;
16 Austn Digest 705.

(4) (1923) 23 S.R. 111; 39 W.N. 251;
16 Austn Digest 779.

(5) (1940) 40 S.R. 559 at 563-4.

(6) (1935) 35 S.R. 289 at 298-301.

(7) (1937) 59 C.L.R. 369 at 391.

(8) (1937) 59 C.L.R. at 389.

Again, an inferior tribunal is subject to prohibition if one of its members sitting to adjudicate has a pecuniary, or any substantial, interest in the matter before it: *R. v. Farrant* (1); *R. v. Hendon Rural District Council* (2), or if it determines a matter without giving one of the parties an opportunity of being heard, or refuses to allow him to present his case: *R. v. North* (3); because such action is in contravention of natural justice. Where there has been such a contravention, the determination is not necessarily void, but may be voidable only and valid unless and until it is set aside: *Dimes v. Grand Junction Canal* (4); *R. v. Simpson* (5); cf. *McPherson v. McPherson*.(6)

As regards the ground numbered three above, although a mistake as to the proper construction of a statute is of itself no ground for prohibition: *R. v. Minister of Health* (7), the writ would lie if an inferior court refused to be bound by the statute or by a decision of a superior court as to its proper construction, or by the ordinary law of the land. The law upon this branch of prohibition is expounded in such leading authorities as *Gould v. Gapper* (8) and *Veley v. Burder*.(9) It by no means follows that *Parisienne Basket Shoes Pty Ltd. v. Whyte* (10) would have been decided as it was, if it had been established that the inferior tribunal had insisted on entertaining the prosecution, notwithstanding that its attention had been drawn to the fact that it was out of time, on the ground that it disapproved of statutes of limitation and refused to be bound by them, or that it had been directed by some high officer of state that the limitation provisions of the Act were to be disregarded.

As to (4), it was said by Lord Sumner in *Crane v. Public Prosecutor* (11) that to conduct a trial in such a way as to deprive an accused person of the protection given by essential steps in criminal procedure makes a *de facto* conviction in law a nullity, i.e., in the case of an inferior court: a judgment of a superior court is never a nullity: *Revell v. Blake* (12); *Scott v. Bennett*.(13) In *R. v. Marsham* (14), a person was summarily convicted before a magistrate, and, through an oversight, a witness for the prosecution gave evidence without having been sworn. The mistake having been discovered, the magistrate re-tried the case upon sworn evidence an hour or two afterwards, and the accused was convicted. On an attempt being made to quash the second conviction upon *certiorari*, on the ground that the first conviction was not a nullity, was valid until quashed, and had not been quashed, it was held that the first conviction was, in the circumstances, a nullity, and the magistrate was right in disregarding it and embarking on a regular trial notwithstanding that the void conviction had not been formally quashed: cf. *Revell v. Blake* (15); *Bannister v. Clarke* (16); *Ex parte Whelan* (17); *Ex parte Lucas*.(18) *Avory J.*, said that the conviction would have been quashed on *certiorari* as having been a judgment given on evi-

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| (1) (1887) 20 Q.B.D. 58. | (11) [1921] 2 A.C. 299 at 331. |
| (2) [1933] 2 K.B. 696. | (12) (1873) L.R. 8 C.P. 533 at 544. |
| (3) [1927] 1 K.B. 491. | (13) (1871) L.R. 5 H.L. 234 at 245-6. |
| (4) (1852) 3 H.L.C. 759. | (14) [1912] 2 K.B. 362. |
| (5) [1914] 1 K.B. 66. | (15) (1873) L.R. 8 C.P. 533 at 544. |
| (6) [1936] A.C. 177. | (16) [1920] 3 K.B. 598. |
| (7) [1939] 1 K.B. 232. | (17) (1891) 8 W.N. 50; 12 Austn Digest 515. |
| (8) (1804) 5 East 345 at 364-372. | (18) (1910) 10 S.R. 325 at 337; 27 W.N. 102 at 104; 16 Austn Digest 705. |
| (9) (1840) 12 A. & E. 265 at 311-313. | |
| (10) (1937) 59 C.L.R. 369; Austn Digest (1934-1939) 1875. | |

dence not on oath. Since this would not have been an instance of the special corrective jurisdiction exercisable upon *certiorari* in respect of error appearing on the face of the record, but an instance of the supervisory jurisdiction exercisable upon evidence *dehors* the record, I see no reason in principle why proceedings on a void conviction which would be quashable on *certiorari* should not be prohibited by prohibition.

If these principles be applied to the facts of the present case, I am of opinion, that, apart from the effect of the appeal to Quarter Sessions and the delay which has occurred in applying for the prerogative writs, the rules should be made absolute. It appears that the magistrate, when adjudicating upon the cases, deliberately refrained from complying with the express and peremptory direction of an applicable statute. "The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party": *R. v. Bertrand*.⁽¹⁾ The direction which was disobeyed is not one of a merely directory nature, as in *R. v. Fletcher*.⁽²⁾ It is one the non-compliance with which prevents the Supreme Court from effectively entertaining an appeal by statutory prohibition under s. 112 of the Justices Act, because it makes it impossible to supply the Court with the necessary material. "Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but, if it is to be taken to good purpose, the depositions must be put into permanent form, while the evidence is being given": *R. v. Nat Bell Liquors Limited*.⁽³⁾ Hence, the Supreme Court has no alternative to granting a statutory prohibition irrespectively of the merits of the case, if an application for it is made in time. If the result of this be to prevent further proceedings, the community is injured in that a possibly guilty man escapes just punishment. If further proceedings may nevertheless be maintained, the burden of a further trial is thrown upon the prosecutor. Apart from this, as is pointed out in the case just cited ⁽⁴⁾, "even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge." In these circumstances, failure to take written depositions is, in my opinion, a course of trial which deprives an accused person of the protection given by an essential step in criminal procedure, and makes nullities of both the trial and the conviction: cf. *R. v. Gee* ⁽⁵⁾; *R. v. Phillips*.⁽⁶⁾ The fact that the magistrate was led to refrain from taking written depositions through a *bona fide* but mistaken supposition that he was entitled to disobey the directions of the Act, because he had been so informed by the formal but invalid pronouncement of a high executive authority, does not mend matters. Indeed, it has been held to be a denial of natural justice for a person who is subject to a legal duty to act judicially, not to decide matters for himself, and to act under the direction of an outside person or body which, however distinguished, has in law no authority to interfere: *Evans v. Donaldson*.⁽⁷⁾ The fact that the conviction is a

(1) (1867) L.R. 1 P.C. 520 at 534.

(2) (1866) L.R. 1 C.C.R. 320.

(3) [1922] 2 A.C. 128 at 163.

(4) [1922] 2 A.C. at 163.

(5) [1936] 2 K.B. 442 at 446.

(6) [1939] 1 K.B. 63 at 68.

(7) (1909) 9 C.L.R. 140 at 153, 154-5; 16 Austn Digest 776.

nullity is no reason for refusing a prohibition. "In such cases the court acts on the assumption that the legal proceedings will be duly followed up unless the Court interferes": *Whittle v. Bishop*.(1)

Assuming, however, that the rules be made absolute, this (apart from any question as to the appeals to Quarter Sessions) does not prevent the resumption of the trials: *R. v. Marsham*.(2) It is true that, in view of the provisions of s. 56 of the Justices Act, 1902, fresh proceedings could not now be instituted against the applicant *ab initio*; but there is nothing to suggest that the proceedings which have led to the present motion were not duly instituted by information, or that any irregularity occurred in the course of the trial except that of failing to comply with the provisions of s. 70 as from the point at which evidence began to be taken. If this be so, then, to paraphrase the language of Lord Sumner in *Crane v. Public Prosecutor* (3), all the necessary steps have been taken for trying him before a magistrate, he ought to be tried, but tried he has not been. As at present advised, it having been now established that there has been no valid trial upon the information, I can see no reason why the applicant should not now be tried according to law upon that information: *Crane v. Public Prosecutor* (4); *Ex parte Russell*.(5) If an information or complaint has been laid or made in time, the fact that there has been long delay in applying for or issuing the summons and in bringing the case on for trial does not invalidate the trial: *Bouron Bros. v. Bishop* (6); *Burns v. Evans*.(7) And the fact that a summons has already been issued does not prevent the issue of another summons: *Williams v. Letheren* (8), so long as it is issued by the magistrate before whom the information was laid: *R. v. Pickford* (9); *Ex parte Gobbert*; *Re Wilks*.(10) But all this is apart from the fact that steps have been taken to bring into existence still pending appeals to Quarter Sessions.

It is necessary, now, to consider the effect of the fact that the applicants on 10th December last appealed to Quarter Sessions against both convictions, and entered into recognizances under s. 123 of the Justices Act, 1902. No provision is made by the Act for withdrawing an appeal, once it has been launched. Section 122 (2) provides that every such appeal shall be set down for hearing at the Court of Quarter Sessions; and s. 123 provides that upon the appellant entering into the prescribed recognizance the execution of the conviction or order shall be stayed. Hence, the applicant has by his own act set in motion a proceeding which has stayed the execution of the conviction and involves a new trial, in which the prosecution must prove its case *de novo* and the defence may produce such evidence as it thinks fit: *Ex parte Morrissey*.(11) No part of any depositions taken before the magistrate can be used as evidence for either party unless the other party consents (save subject to certain conditions, when the witness is not available). It has been submitted that in these circumstances there is no longer anything to prohibit. The fact that the *de facto* trials and convictions from which the appeals are brought turn out to be nullities does

(1) (1895) 13 N.Z.L.R. 670 at 673-4.

(2) [1912] 2 K.B. 362.

(3) [1921] 2 A.C. 299 at 332.

(4) [1921] 2 A.C. 299 at 329-330, 333, 337.

(5) (1908) 8 S.R. 173; 25 W.N. 64; 12 Austn Digest 528.

(6) (1910) 29 N.Z.L.R. 759.

(7) [1927] Q.S.R. 207; 12 Austn Digest 233.

(8) [1919] 2 K.B. 262.

(9) (1861) 25 J.P. 549.

(10) (1941) 41 S.R. 140 at 142; 58 W.N. 113 at 114.

(11) (1911) 11 S.R. 550; 28 W.N. 130; 12 Austn Digest 468.

not prevent the trial of the appeals at Quarter Sessions: *Russell v. Bates* (1); *Crane v. Public Prosecutor*. (2) A different position arises in England in relation to the trial of indictable offences, where a valid committal is a condition precedent to a valid indictment: *R. v. Gee*. (3) In *R. v. Wands-worth Justices* (4), on an application for *certiorari* in a case in which the justices had convicted without giving the accused an opportunity of defending himself, *Humphreys J.*, remarked: "One can understand the prosecutors saying: 'If only you had gone to Quarter Sessions, we should have had the opportunity of putting our house in order and of giving evidence against you which we never attempted to put before the justices.' There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal before which, it may be, the necessary evidence will be adduced. I think he is perfectly entitled to come to this court and say upon precedent and authority: 'I was convicted as the result of a denial of justice and I ask for justice, which can only be done by the quashing of that conviction.'" Here, however, the accused has himself put in train the new proceedings which will lead to his acquittal or conviction at Quarter Sessions, and, in the result, no further proceedings can be taken in respect of the convictions before the magistrate. If the appeals should be unsuccessful and the convictions and sentences confirmed, what are in form confirmations will be in substance and effect re-impositions of the same penalties by another court. The fact that a statutory prohibition may be granted notwithstanding that an appeal is pending to Quarter Sessions, as was decided in *Ex parte Giles* (5), is not inconsistent with this. A statutory prohibition is itself an appeal, as the result of which the Court may not only stay further proceedings, but make such further order as may be just and necessary: s. 115. The prosecutions now in question having both become transferred into the Court of Quarter Sessions, and the execution of the convictions by the magistrate having been stayed, I am of opinion that there is no longer anything in respect of the magistrate's convictions which could usefully be prohibited. If there were, the position would be very different: *Estate and Trust Agencies* (1927) *Limited v. Singapore Improvement Trust*. (6)

There is the further matter of the delay in moving for the rules. The convictions before the magistrate took place on 10th December, 1942; and more than five months were allowed to elapse before any steps were taken to apply for the prerogative writs. The defect complained of does not appear on the face of the conviction, and in these circumstances the court has a discretion. A short delay, such as might not unreasonably be required to enable the convicted person to obtain advice as to his legal position, will not deter the court from granting the writ: *In re Scadden* (7); *R. v. North* (8), nor will delay occasioned by ignorance on the part of the applicant of the existence of the facts which invalidated the proceedings which are now sought to be challenged: *Serjeant v. Dale* (9); but substantial delay "except perhaps upon an irresistible case. and an excuse for the delay,

(1) (1927) 40 C.L.R. 209; 12 Austn Digest 468.

(2) [1921] 2 A.C. 299 at 323, 331.

(3) [1936] 2 K.B. 442.

(4) (1941) 166 L.T. 118 at 119.

(5) (1912) 29 W.N. 83; 12 Austn Digest 463.

(6) [1937] A.C. 898 at 917-919.

(7) (1875) 16 N.S.W.L.R. 125 at 129.

130; 11 W.N. 170 at 171, 172; 16 Austn Digest 729.

(8) [1927] 1 K.B. 491 at 500, 506.

(9) (1877) 2 Q.B.D. 558 at 568.

such as disability, malpractice, or matter newly come to the knowledge of the applicant " will lead the court to decline to interfere by means of the prerogative writ : *Mayor of London v. Cox*.⁽¹⁾ In the present case, no explanation has been given of the long delay ; and this in my opinion supplies an additional reason for refusing the rules.

For the reasons which I have stated, I am of opinion that the rules *nisi* should be discharged with costs.

Rules nisi discharged with costs.

Solicitor for the applicants : *P. N. Roach*.

Solicitor for the respondents : *A. H. O'Connor* (Crown Solicitor).

THE AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD.
v. ROGERS.

1943. In Banco : Jordan C.J., Halse Rogers J. and Nicholas C.J. in Eq.

Landlord and Tenant—Use and occupation—Unregistered Torrens Title lease — Tenancy at will — Applicability of terms of lease — Oral variation of lease.

The plaintiff leased to the defendant a property under the Real Property Act for a period of seven years. The lease was not registered. The defendant entered the premises and carried on business therein. The plaintiff claimed, under a count for use and occupation, the full amounts for rental according to the lease. The defendant set up an oral variation or cancellation of the lease, and claimed to have complied with the terms as altered.

Held, that there was a common law tenancy at will between the parties, on all such terms of the memorandum of lease as were applicable to a tenancy of that type, and that a stipulation for payment of rent was clearly a term so applicable.

Held, further, that no evidence of variation or cancellation of the terms of the written document was admissible, as the agreement related to land.

What must be proved and what may be recovered under a count for use and occupation considered.

NEW TRIAL MOTION.

The following statement of facts is taken from the judgment of the Court :—

This is a motion for the new trial of an action in which the plaintiff by its declaration claimed to recover the sum of £800 from the defendant, Edith Annie Rogers for the use by the defendant with the plaintiff's permis-

(1) (1867) L.R. 2 H.L. 239 at 283.