ALEXANDER CAMPBELL MACKENZIE (PLAINTIFF) ..... APPELLANT;

1954

*Feb. 11, 12
*May 19

AND

OLIVER M. MARTIN (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Justices and Magistrates—Preventive justice, power to exercise—False Imprisonment—The Public Authorities Protection Act, R.S.O. 1937, c. 135, ss. 1, 2, 3(1)—The Criminal Code, R.S.C. 1927, c. 36, s. 748 (2)—The Magistrates Act, R.S.O. 1937, c. 133, s. 8(1).

The respondent, a police magistrate for the Province of Ontario and a justice of the peace, convicted the appellant, a blind man, on a charge of unlawfully repeatedly calling on the telephone the appellant's estranged wife at her boarding place and at her place of employment thereby causing annoyance and a breach of the peace. He ordered the appellant to find two sureties to be answerable for his good behaviour for three years and on default committed him to gaol for six months. The appellant secured his discharge from custody by habeas corpus proceedings and sued the respondent in damages for false imprisonment. The Court of Appeal for Ontario dismissed an appeal from the judgment of the trial judge who had dismissed the action. The appellant again appealed on the grounds that the respondent was not protected by s. 2 of *The Public Authorities Act*, R.S.O., 1937, c. 135, which prohibits an action against a justice of the peace for any act done by him in the execution of his duty with respect to any matter within his jurisdiction unless done maliciously and without reasonable and probable cause, but was by s. 3 of the Act liable for acting in a matter in which he either had no jurisdiction, or had exceeded it.

Held: (Rand J. dissenting)—That the common law preventive justice was in force in Ontario and neither s. 748 (2) of the *Criminal Code* nor any other section thereof to which the Court's attention was drawn, interfered with the use of that jurisdiction. The respondent therefore had jurisdiction and did not exceed it. He did not proceed on a mistaken view of the law and there was no evidence of malice. *Lansbury v. Riley* [1914] 3 K.B. 229 followed in *Rex v. Sanbach* [1935] 2 K.B. 192 and *Rex v. County of London Quarter Sessions* [1948] 1 All E.R. 72, applied.

Per: Rand J., dissenting—The conditions that at common law vest in a justice of the peace jurisdiction to exercise preventive justice are those that threaten private peace or offend public order or morality. There was nothing of that description here. What the acts did was to annoy but they were of a nature and in circumstances beyond any range of conduct touching peace, order or morality. *Reg. v. Dunne* (1840) 113 E.R. 939; *Reg. v. Justices of Londonderry* 28 L.R. Ir. 440; *Rex v. Justices of Londonderry* [1912] 2 Ir. L.R. 374; *Barton v. Bricknell* 13 Q.B. 393; *Lawrenson v. Hill* (1860) 10 I.C.L.R. 177.

*PRESENT: Rinfret C.J., Kerwin, Rand, Estey and Fauteux JJ.

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APPEAL from the order of the Court of Appeal for Ontario (1) dismissing the appeal of the appellant from the judgment of Judson J. dismissing the action with costs.

F. A. Brewin, Q.C. for the appellant.

G. D. Watson, Q.C. for the respondent.

The judgment of Rinfret C.J. and of Kerwin, Estey and Fauteux JJ. was delivered by:

KERWIN J.: Originally there were several defendants in this action, brought by the plaintiff appellant, but all except the respondent have disappeared from the litigation and we are concerned only with the claim for damages for false imprisonment against the latter, who is a Police Magistrate for the Province of Ontario. The plaintiff is a blind man, possessing real estate of value and residing at Swansea. He was separated from his wife, Martha, who resided, and was employed at Creed's Furs Limited, in Toronto. On March 29, 1945, an information and complaint was sworn to before a justice of the peace for the County of York by a detective of the City of Toronto police force:—

who saith that Alexander Mackenzie, 93 Durie Street of the Village of Swansea, in the County of York, in the months of February and March, A.D. 1945, at the Village of Swansea and City of Toronto, in the said County of York, did unlawfully repeatedly call on the telephone Mrs. Martha MacKenzie, Miss Elsie T. Hodgson, and Creed's Furs Limited, thereby causing the said parties and employees of Creed's Furs Limited, annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace, wherefore the complainant desires that the said Alexander Mackenzie should be brought before a court of summary jurisdiction and that an ORDER should be granted against the said Alexander Mackenzie directing him to find one or more sureties who will be answerable for his good behaviour during such period of time as may seem to the Court just, in accordance with the law, contrary to The Common Law of England, in such case made and provided.

Elsie T. Hodgson was the landlady of the plaintiff's wife.

A summons was issued directed to the plaintiff, reciting the information and stating that the complainant desired that the plaintiff should be brought before a court of summary jurisdiction and that an order should be granted against him directing him to find one or more sureties who would be answerable for his good behaviour during such

(1) [1952] O.R. 849; [1953] 1 D.L.R. 161.

period of time as might seem to the Court just in accordance with the law, and commanding him to appear on April 5th.

On that day the plaintiff appeared before the respondent and pleaded not guilty. The evidence disclosed a very great number of telephone conversations by him with his wife, with various persons at Creed's, and with Elsie T. Hodgson,—all as a result of calls made by him. In connection with one to his wife when she was at her rooming house she testified in chief:—

> Sometimes he cries. He says he is lonesome. He says he loves me. and he tells me he is going to send someone to kill me. I think he is a madman.

and on cross-examination by the plaintiff:—

> Q. You got me to sign another piece of paper in which you take the furniture?—A. The furniture is mine. I was just asking for my own. I am going to sue for it. There is nothing of yours.
>
> Q. You did not do that?—A. I will ask for the furniture. I do not think you too blind to murder me and marry another woman.

The landlady testified that the plaintiff "phoned continually every day any way from sixty to one hundred calls, sometimes over that"; "First we told him to keep off the line and he said how can I keep off the line when I am in love with you"; "I did not keep track of all the time but one day in particular he called one hundred and ten times". The following also appears in her evidence:—

> Q. All these numerous calls you say were the voice of the accused man. Mr. Mackenzie, the accused man here in court to-day?—A. Yes.
>
> Q. What did he have to say on the numerous occasions?—A. He threatened his wife's character; he blackened her character; he threatened her life and the life of her child. He was continually telling what a notorious woman she was, going out with other men. He had the house watched. He would tell me when he phoned up to find out what time she came in and one night she was quite late in returning.

The same witness testified as to a conversation she had with the plaintiff at his home:—"You threatened your wife if she didn't sign over (certain property) in two days she would be found dead on the street corner and nobody would know about it."

The evidence disclosed that the plaintiff made so many telephone calls to Creed's endeavouring to speak to his wife that the Office Manager intervened and told the plaintiff to stop bothering the switchboard operators.

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Upon the conclusion of the evidence on behalf of the complainant, the plaintiff gave evidence and was cross-examined. There being no other witnesses, the magistrate decided:—

> We certainly cannot have this kind of thing going on in our city calling people on the telephone and annoying them so much, so you are ordered Mr. MacKenzie to find two sureties in the sum of $1,000. each who will be answerable for your good behaviour for three years; in default of this you will be committed to jail for six months.

A "Conviction upon a plea of not guilty" was signed by the respondent, followed by a warrant of commitment.

The plaintiff was taken from the room where the inquiry had taken place to the basement in the same building and thence to the Toronto gaol. All this occurred on April 5, 1945. On April 3, 1945, he had been convicted of doing malicious damage to property and had been remanded one week for sentence. On April 10, 1945, he was sentenced on this charge to three months in gaol. He appealed that conviction and was released from custody on bail June 4, 1945, although he was also in gaol under the warrant of April 5, 1945. In the meantime, on June 1, 1945, his application for discharge from custody under that warrant upon a writ of habeas corpus had come before a judge of the Supreme Court of Ontario, who dismissed it on July 4, 1945. The plaintiff appealed to the Court of Appeal from that decision and, pending the hearing of the appeal, was allowed out on bail by order of a judge of the Court of Appeal. Pursuant to his undertaking contained therein, he surrendered himself into custody on September 10, 1945, preparatory to the hearing of his appeal on September 13 and 14, 1945, and he remained in gaol until November 9, 1945, when the Court of Appeal allowed his appeal and ordered his discharge from custody.

The reasons for judgment of the Court of Appeal (1) were delivered by Chief Justice Robertson who first disposed of the argument that no appeal lay from the refusal to set the plaintiff at liberty by holding that the proceedings to compel the plaintiff to find sureties were civil in their nature and that therefore there was a right of appeal under s. 8 of *The Habeas Corpus Act,* R.S.O. 1937, c. 129. He then determined that, in view of the omission from the warrant and "conviction" of a statement that the plaintiff

(1) [1945] O.R. 787.

had neglected or refused to find the required sureties, or that he was in default in that regard, the documents were invalid and, therefore, there was illegality or irregularity in the plaintiff's original caption which afforded ground for his discharge. A question had been raised as to the magistrate's jurisdiction to administer preventive justice but, while the Chief Justice referred to some of the matters to be considered with respect thereto, in view of his conclusion that the warrant and "conviction" were illegal, he did not pursue the subject further.

The present action was then commenced. It was dismissed by the trial judge upon motion for a non-suit at the conclusion of the plaintiff's case. That judgment was affirmed by the Court of Appeal but for different reasons. Several questions were argued before us but, in the view I take of the matter, it is sufficient to consider only one.

The respondent was appointed a magistrate for the Province under s. 2 of *The Magistrates Act,* R.S.O. 1937, c. 133. By s-s. 1 of s. 8 of that Act he was ex officio a justice of the peace. *The Public Authorities Protection Act* in force at the commencement of the action was R.S.O. 1937, c. 135, and by s. 1 "justice of the peace" includes magistrate. Section 2 and s-s. 1 of s. 3 are as follows:—

2. No action shall lie or be instituted against a justice of the peace for any act done by him in the execution of his duty as such justice with respect to any matter within his jurisdiction as such justice, unless the act was done maliciously and without reasonable and probable cause.

3. (1) For any act done by a justice of the peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made or a warrant issued by him in such matter, any person injured thereby may maintain an action against the justice in the same case as he might have heretofore done, and it shall not be necessary to allege or prove that the act was done maliciously and without reasonable and probable cause.

The question is whether the respondent in holding the inquiry and making the "conviction" and signing the warrant of commitment acted in the execution of his duty as a justice of the peace with respect to any matter within his jurisdiction as such justice.

Reference was made to s-s. 2 of s. 748 of the *Criminal Code,* R.S.C. 1927, c. 36, which as it stood at the relevant time reads as follows:—

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child

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some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

The information was not laid under this or any provision of the *Code*.

Whatever was alleged to have been done by the plaintiff was, according to the information, "contrary to the common law of England" and the "conviction" is to the same effect. The point was considered by the Queen's Bench in *Haylock v. Sparke* (1) wherein Lord Campbell, at page 71, considering that the law on the subject commenced with the statute 34 Edw. III, c. 1, states:—

> This statute, intrusting the Magistrates with a wide discretion, authorizes them "to take of all them that be not of good fame sufficient surety and mainprise of their good behaviour towards the king and his people." In 4 *Institute*, p. 181, Lord Coke, remarking upon this clause, says, that the offences against the peace after they are done having been provided for, "now followeth an express authority given to Justices for the prevention of such offences before they are done, viz., to take of all them that be not of good fame (that is, that the defamed and justly suspected that they intend to break the peace) sufficient surety and mainprise of them for good behaviour towards the king and his people (which must concern the king's peace, as is also provided by the word subsequent), to the intent that the people be not by such rioters troubled or indamaged, nor the peace blemished, nor merchants nor other passing by the highways disturbed, nor put in the peril that may happen of such offenders.

In that case it was held that it must be taken that the defendant intended to require sureties for good behaviour, notwithstanding the words "sureties of the peace" in the warrant. It was also held that a Justice of the Peace had jurisdiction to require sureties for good behaviour in some cases of libels against private individuals and that, therefore, the defendant had jurisdiction in the matter out of which the cause of action arose, and within the meaning of 11 & 12 Vict. c. 44, s.1, and consequently was not liable to an action of trespass. Section 1 of this statute is as follows:—

> WHEREAS it is expedient to protect justices of the Peace in the Execution of their Duty: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament

(1) (1853) 22 L.J. (N.S.) M.C. 67, 1 E & B. 471, 118 E.R. 512.

assembled, and by the Authority of the same, That every Action hereafter to be brought against any Justice of the Peace for any Act done by him in the Execution of his Duty as such Justice, with respect to any Matter within his jurisdiction as such Justice, shall be an Action on the Case as for a tort; and in the Declaration it shall be expressly alleged that such Act was done maliciously, and without reasonable and probable Cause; and if at the Trial of any such Action, upon the General Issue being pleaded, the Plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the defendant.

The operative words therein are to the same effect as s. 2 of the Ontario Public Authorities Protection Act, R.S.O. 1937, c. 135, and the first part of s. 2 is in substance the same as s-s. 1 of s. 3 of the Ontario statute.

The matter was considered in more recent times in *Lansbury v. Riley* (1). The actual decision was that where a Court of summary jurisdiction is satisfied that a person brought before it was guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement, the Court may order him to enter into recognizances and to find sureties for his good behaviour, or be imprisoned in default of so doing. However, for present purposes the judgment of Avory J. is of importance as he was of opinion that the statute of 34 Edw. III was not exhaustive of the magistrate's jurisdiction.

Avory J. was also a member of the Court which decided *The King v. Sandbach* (2). There the applicant was convicted of obstructing a police constable in the execution of his duty, by warning a street bookmaker of the approach of the police and so enabling him to evade arrest. Evidence was given at the police court that the applicant had already been convicted of similar offences several times and that the infliction of a fine was no deterrent. The magistrate ordered the applicant to enter into a recognizance to be of good behaviour together with two sureties, or in default to be imprisoned for two months. The applicant sought a rule nisi for a certiorari to quash the magistrate's order on the ground that the magistrate had no jurisdiction to make it, because there was no actual or apprehended breach of the peace, by, or as a result of the conduct of the applicant. Lord Hewart was clearly of opinion that the rule ought to be discharged as he considered the case covered in all material respects by *Lansbury v. Riley* (1) and especially

(1) [1914] 3 K.B. 229. (2) [1935] 2 K.B. 192.

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by the judgment of Avory J. The latter agreed and quoted from Blackstone, Vol. iv, p. 251, to show that the scope of the remedy of binding over a person to be of good behaviour is not limited to circumstances where he has done something which tends to a breach of the peace. The passage from Blackstone reads:—

> This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

Humphreys J. concurred, quoting the following extract from Blackstone at page 256:—

> The other species of recognizance, with sureties, is for the *good abearance* or *good behaviour*. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other. First then, the justices are empowered by the statute 34 Edw. III, c. 1, to bind over to the good behaviour towards the king and his people, all them that *be not of good fame,* wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame,* it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores,* as well as *contra pacem.*

In *Rex v. County of London Quarter Sessions* (1) Lord Goddard pointed out that *Lansbury v. Riley* was clear authority that justices can bind over whether the person is, or is not, of good fame. Later he stated:—

> in the case of the present statute there is a consensus of opinion to be found in the books extending back for some 400 years that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognizances persons whose conduct they consider michievous or suspicious, but which could not, by any stretch of imagination amount to a criminal offence for which they could have been indicted.

Lord Goddard expressed the view that the catalogue of the large number of instances which would justify sureties for good behaviour being taken, given in Dalton's Countrey Justice was not intended to be exhaustive. In my view the common law preventive justice was in force in Ontario; s-s. of s. 748, or any other provision of the *Criminal Code* to

(1) [1948] 1 All E.R. 72.

which our attention was directed, does not interfere with the use of that jurisdiction, and the respondent was intending to exercise it. He, therefore, had jurisdiction over the subject-matter of the complaint, and did not exceed it. Mr. Brewin admitted that the respondent might be excused from the consequences of a mistake of fact by reason of which he assumed a jurisdiction which did not exist: *Calder v. Halket* (1); but he contended that the respondent proceeded upon a mistaken view of the law. In my view the respondent committed no such error.

There was no evidence of malice and the appeal should be dismissed with costs.

RAND J.: (dissenting): This action was brought for damages for false imprisonment arising under the following circumstances. An information was laid by one Martindale, a detective, before the respondent charging that the appellant

did unlawfuly, repeatedly called on the telephone Mrs. Martha MacKenzie (his wife), Mrs. Elsie Hodgson, and Creed's Furs Limited thereby causing said parties and employees of Creed's Furs Limited, annoyance and loss of sleep, inconvenience and worry, the said acts tending towards a breach of the public peace, wherefore the complainant desires that the said Alexander MacKenzie should be brought before a court of summary judisdiction and that an order should be granted against the said Alexander MacKenzie directing him to find one or more sureties, who will be answerable for his good behaviour during such period of time as may seem to the court just, in accordance with the law, contrary to the Common Law of England, in such case made and provided.

A summons was issued containing the language of the complaint. At the conclusion of the hearing in which evidence was adduced by both sides, the magistrate made the following statement:—

We certainly cannot have this kind of thing going on in our city calling people on the telephone and annoying them so much, so you are ordered, Mr. MacKenzie, to find two sureties in the sum of $1,000.00 each who will be answerable for your good behaviour for three years; in default of this you will be committed to jail for six months.

A form of conviction was drawn up which, after setting forth the charge, proceeded:—

And I adjudge the said Alexander MacKenzie for his said offence, to find two (2) persons to go security for his good behaviour in the sum of $1000.00 each for a period of three (3) years, and failing to find two (2) persons to go security for his good behaviour, I adjudge the said Alexander

(1) (1839) 3 Moo. P.C. 28; 13 E.R. 12.

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MacKenzie to be imprisoned in the Common Gaol in and for the said County of York (and there to be kept to hard labour) for the term of six (6) months.

On the same day and so far as appears at the same time, a warrant of commitment was signed which concluded:—

> These are therefore to command you, to take the said accused and him safely to convey and deliver to the prison aforesaid, together with this precept; and I do hereby command you, the keeper of the said prison, to receive the said accused into your custody in the said prison, there to imprison and keep at hard labour for the term of six (6) months, in default of carrying out the court order that Alexander MacKenzie find two (2) persons to go security in the sum of One Thousand Dollars ($1000.) each for a period of three years. And for your so doing this shall be your sufficient warrant.

The accused who is blind and apparently possessed of considerable property, but who was not represented by counsel, was thereupon, on the same day, delivered into prison. So far as it appears, the nature of the conviction was not made clear to him; he was not asked if he was willing to obtain sureties nor is there any suggestion that he refused to do that or was given an opportunity to reach any persons suitable for that purpose. He remained in jail from April 5th to June 4th when he was released on bail by a Justice of the Court of Appeal on the condition that he surrender himself before the hearing of an appeal from a refusal to discharge him on habeas corpus. He surrendered accordingly on September 10th. The judgment of that court setting aside the commitment was rendered on November 9th at which time he was set free.

The action was shortly afterwards brought. At the trial the case was withdrawn from the jury by Judson J. as being barred by the limitation of six months from the "act, negligence or default complained of" as provided by s. 11 of *The Public Authorities Protection Act,* R.S.O. (1950) c. 303. On appeal, the court, though disagreeing with the trial judge on the plea of limitation, affirmed the dismissal but on the ground that the matter of the proceedings being that of binding over to keep the peace, in contradistinction to being ordered to be of "good behaviour", and thus within the jurisdiction of the Justice, the action did not lie unless the act had been done maliciously and without reasonable and probable cause, s. 2 of c. 303, of which there was no evidence.

The *Criminal Code* deals sparingly with the matter of preventive justice. Sec. 748 codifies the cases of binding over upon conviction of an offence directed against the peace and upon a complaint of threats made of personal injury to the complainant or to his wife or child or of setting fire to his property, and forms are provided accordingly. But this by no means exhausts the immemorial exercise of this special jurisdiction. In early Saxon law preservation of the peace was secured in the liability of the freemen of a tithing or a hundred for the conduct of each person within it, which in the time of Edward the Confessor became at least supplemented by an ordinance empowering sureties to be required, administered by conservators of the peace. This capacity was, after the Conquest, incident to certain high offices of state, or based on prescription, or annexed to certain tenures of land. Generally, however, the conservators were elected by the freeholders sitting in full county court before the sheriff. What they were to preserve was the King's peace, to guard the community and individual life of his subjects against mischievous disturbances and fear of personal injuries and trespasses on or to their possessions.

The first modification of this general administration was the sending of writs by Edward III in the first year of his reign to every sheriff commanding him

> that the peace be kept throughout his bailiwick on pain and peril of disinheritance and loss of life and limb.

This was immediately followed by a statute enacted in the same year which provided that

> for the better maintenance and keeping of the peace in every county, good men and lawful who were not maintainers of evil or barretors in the country should be assigned to keep the peace": Blackstone, Bk. 1, p. 350-51.

This assignment was construed to be by royal commission and transferred the appointment of conservators from the freemen to the King. Later, by 34 Edward III, c. 1, the name "justice" was introduced, and jurisdiction for the first time was conferred upon two or more of them to try felonies. As to keeping the peace, they were charged jointly and severally; but a further authority was vested in them to take of those

> that be not of good fame . . . sufficient surety and mainprize *of their good behaviour* towards the King and his people . . . : Burn's Justice of the Peace, 13th ed. vol. 5, p. 755.

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In their commissions these powers were, in Ontario, set forth in detail until 1934; but, as appears in a valuable annotation by C. R. Magone, Q.C., Deputy Attorney General of Ontario, published in 93 Can. C.C. 161, since that year the commission confers generally all the rights, powers and immunities of "justices of the peace"; and as those powers have been exercised for approximately six centuries, the abbreviated incorporation of them by such a reference is not to be taken as in any degree lessening their scope.

This, then, is the foundation of the jurisdiction with which a justice of the peace is invested, but if he acts beyond the authority delineated by this ancient law he does so at his peril. The question is whether in this case he has done so or not.

The Chief Justice of Ontario, speaking for the Court of Appeal, puts the case shortly: it is a matter of binding over to keep the peace; being initially within the jurisdiction of the justice, it was not thereafter lost. The information contains no allegation that a breach of the peace was likely or apprehended but the particulars given are treated apparently as "circumstances that might reasonably tend to breach the peace". It is added that there was some evidence that a threat was made and that this likewise sufficed for jurisdiction.

I regret that I find it impossible to concur in this view of the case. It is necessary to remind ourselves that personal liberty is one of the supreme principles of our law, and where one person is set up in authority over another, he must, in the actions he sets in motion that may shackle that liberty, be able to justify what he does in some power or authority given him by law, or he must answer for the consequences.

What is "jurisdiction" as we use that much abused term? We hear of the "want", the "exceeding", the "declining" and the "abuse", of jurisdiction. In the simpler cases the meaning is clear: a justice of the peace cannot, for example, convict a person of treason: his act purporting to do that would be a nullity; but when the case becomes encumbered with complex features, it requires something more than the mere repetition of these phrases to reach what appear to me to be the essential elements of the conception underlying the term. What is involved is a field of

determinative and coercive action outlined in law within which the authority conferred is to be exercised. Since we are concerned with judicial procedure, the authority to enter upon an inquiry at all may be absent and the subject matter either in its nature or magnitude, or the parties, may determine that. But given that authority, steps thereafter taken may be without a legal foundation. They must be steps of the essence of adjudication or execution, and in these proceedings, the exercise of judicial power; an erroneous ruling on evidence, or an error in the course of the proceedings not of a fundamental character affecting, for example, a person's liberty, would not be of that nature. Once such a basic act is seen to be outside the express or implied authorization of action, then the magistrate is in fact making use of the machinery of justice as a private individual and not as a public officer.

The sources of authority already mentioned and the examples cited by the standard authorities, Dalton, Burn, Hawkins and Blackstone, make it abundantly evident that what the powers here in question are to be directed at are acts and behaviour that "blemish" the peace, as the statute of 34 Edward III puts it, or that offend the moral sense of the community. Most of the examples given are now public wrongs such as vagrancy, keeping disorderly houses, malicious destruction of property, public mischief, libel and the like, and they but confirm the conclusion that the conditions to the exercise of the special power are those that threaten private peace or offend public order or morality.

There is nothing of that description here. The information puts it beyond discussion that what was sought was the cessation of telephone calls directed by the appellant, the object of which was in fact to try to persuade his wife to return to his home. The language "tending to a breach of the peace" was a purely formal phrase with not the slightest foundation either in the acts complained of or in the evidence, which the remarks of the respondent at the conclusion of the hearing make uncontrovertible. What the acts did was to annoy, but annoyance of the nature and in the circumstances here is beyond any range of conduct touching peace, order or morality.

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The case of *Regina v. Dunn,* (1) is particularly pertinent. There articles of the peace were exhibited against a barrister of London for a course of calculated intrusions upon an unmarried daughter of a knight by means of letters, accostings, seeking admittance to her home, and in waiting for and following her upon the streets, to the extent that she became alarmed for her own safety. But no threat was alleged. In giving the judgment of the court, Lord Denman C.J. said:—

> The fair meaning (that is, the terms of the commissions to the justices) is that, if one person informs the court, or a justice of the peace, that he goes in fear and danger of personal violence from another by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted. Unless such a case appear, no jurisdiction appears; nor can we ever infer facts necessary to give jurisdiction from the mere circumstance of an inferior court assuming to act as if they possessed it . . . If this person's conduct did not amount to a threat of personal violence, the justices had no power to bind him over; but if it did, the exhibitant ought to have so stated in the articles, which are defective by reason of the omission . . . But, the power of the sessions and of the justice of the peace to make the order now challenged before us depending wholly on the words of the commission, and those words not being satisfied by the articles exhibited, we are bound to decide that the person must be discharged.

This requirement of precise observance of the authority given obviously expresses the appreciation of the court of the importance of the proceeding. Here we have mere annoyances which compared with those of the complainant in Dunn are petty trivialities.

The same view was taken in *The Queen v. Justices of Londonderry* (2), where it was held that in the absence of evidence showing a danger or likelihood of a breach of the peace, there was no jurisdiction for an order. At p. 446, Sir P. O'Brien C.J. says:—

> It is plain then that in the case before Lord Fitzgerald the evidence was not only looked at but jealously scrutinized, with a view to ascertaining whether the magistrates had acted within their jurisdiction in the order they made—not that I think we should assume the duty of determining the preponderance of the evidence, but we should see whether there was adduced before the magistrates evidence upon which they might reasonably order sureties for good behaviour.

and Holmes J. at p. 461:—

> And the question is, do they (the depositions) contain any legal foundation for the order made by the justices? . . . But . . . the jurisdiction can only be exercised when some facts are proved from which it can be reasonably inferred that there was actual danger of the peace being broken . . .

(1) (1840) 113 E.R. 939 at 947-8. (2) (1891) 28 L.R. Ir. 440.

In *Rex v. Justices of Londonderry,* (1) it was ruled that an order of justices requiring a person to find sureties to keep the peace and be of good behaviour must show on its face facts necessary to give the justices jurisdiction to make such order. In *Caudle v. Seymour,* (2) Lord Denman, in relation to the entering upon an enquiry into a criminal charge, says that "to give him (the magistrate) jurisdiction over the individual accused, there should have been an information properly laid."

Neither the information nor the evidence was sufficient to give jurisdiction to the magistrate on either the ground of threatened breach of the peace or for good behaviour. To say that the general jurisdiction to enter upon the hearing was present is to disregard both of those facts. But assuming that initial authority to be present, the act causing the trespass was without legal foundation and it is to that act we must look. In *Barton v. Bricknell,* (3), in addition to a proper conviction, there were added the words "that in default of sufficient distress" the plaintiff "should be put in stocks for two hours, unless the penalty and costs were sooner paid." The Protection of Public Authorities Act, 11-12 Vic. c. 44, which corresponds to the provisions of the Ontario statute, had been invoked, and Coleridge J., in examining the second section, said:—

> I am not prepared to deny that the present case falls within the literal meaning of these words; for this is an act done under a conviction in a matter in which the defendant has exceeded his authority. But if we give these words their full literal meaning, they contradict the first section We must then try to construe them so as to give effect to the whole act; and I think we do this if we confine sect. 2 to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction.

In *Lawrenson v. Hill,* (4), an action was sustained against a justice for arrest on a warrant to commit for trial based on a complaint that the plaintiff had refused "to give up a key" of a certain house. The allegation stated only a ground for a civil action, and in the course of delivering the judgment of the court Pigot C.B. puts the same view in these words:—

> In the case before us an act done without, or in excess of, jurisdiction is the very act which caused the imprisonment complained of.

(1) [1912] 2 Ir. L.R. 374.
(2) (1841) 1 Q.B. 889.
(3) (1849) 13 Q.B. 393.
(4) (1860) 10 I.C.L.R. 177

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Rand J.

The magistrate acted in good faith; but it is in the lower levels of the administration of justice that injustices too frequently abound; and the courts when from time to time they are called upon to redress grievances must see to it that the arrogation of authority which routine dealing with petty delinquencies and conflicts may tend to produce shall be kept strictly within the limits of the law.

On the other grounds urged by Mr. Watson, I agree with the reasons given for rejecting them by the Court of Appeal and have nothing to add.

I would therefore allow the appeal and remit the case to the trial court for an assessment of damages with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Cameron, Weldon, Brewin & McCallum.*

Solicitors for the respondent: *Smith, Rae & Greer.*

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*PRESENT: Rand, Kellock, Estey, Cartwright and Fauteux JJ.