1957 *Present:* Basnayake, C.J., Pulle, J., and K. D. de Silva, J.

A. MOHIDEEN, Appellant, *and* INSPECTOR OF POLICE, PETTAH, Respondent

S. C. 1345—M. C. Colombo, 19,862/B

Criminal Procedure Code—Accused produced in custody without process—Report filed by police officer who produced the accused—Duty of Magistrate to record evidence before framing charge—Sections 126 A (1 and 2), 148 (1) (b), 148 (1) (d), 151 (2), 187 (1), 425.

Held (PULLE, J., dissenting), that where an accused is brought before the Court in custody without process and a report under section 148 (1) (*b*) of the Criminal Procedure Code is filed, the failure of the Court to record evidence on oath, as required by sections 151 (2) and 187 (1), before a charge is framed against the accused is an irregularity that cannot be cured by applying the provisions of section 425 of the Code.

APPEAL from a judgment of the Magistrate's Court, Colombo. This appeal was referred to a Bench of three Judges under section 48 of the Courts Ordinance.

On August 20, 1955, a Police Sergeant submitted to the Magistrate a report of an investigation into a cognizable offence and at the same time produced the accused in Court in terms of section 126 A (1) of the Criminal Procedure Code. The Magistrate, acting under section 126 A (2), remanded the accused to the custody of the Fiscal till August 22, 1955. On August 22, the Police Sergeant instituted proceedings against the accused by filing a report in terms of section 148 (1) (*b*) of the Code. When the report was filed the accused was present in Court under Fiscal's custody. The Magistrate then framed a charge against him to which he pleaded "Not guilty". Subsequently he was tried and convicted. The accused appealed, and the question for decision was whether the Magistrate should have recorded evidence on oath in terms of section 151 (2) of the Code before he proceeded to frame a charge against the appellant.

A. Nagendra, for the accused-appellant.

D. St. C. B. Jansze, Q.C., Acting Attorney-General, with *V. S. A. Pullenayegum*, Crown Counsel, for the complainant-respondent.

Cur. adv. vult.

December 9, 1957. BASNAYAKE, C.J.—

I have had the advantage of reading the Judgment prepared by my brother de Silva. As the question that arises for consideration on this appeal is one of some importance, instead of recording my bare concurrence I wish to add my own views as briefly as possible on certain aspects of the question dealt with in my brother's Judgment.

The report under section 148 (1) (*b*) of the Criminal Procedure Cod was preceded by a report of an investigation into a cognisable offenc under section 126 A (1) of the Code. In that report Sub-Inspector o Police W. F. S. Peiris, who does not state that he is an officer in charg of a Police Station, purported to summarise the statements of the wit nesses examined in the course of the investigation. On that report th Magistrate made an order under sub-section (2) remanding the accusec till 22nd August. On that day a report under section 148 (1) (b) wa filed, and the accused who was present in Fiscal's custody was charged from the charge sheet under section 187. Now, section 187 of the Criminal Procedure Code requires that where an accused is brought before the court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against him. It has been held in a number of decisions of this Court, the chief of which is *Ebert v. Perera* [1], that the provisions of section 187 are imperative, and that failure to comply with the requirements of that section cannot be cured under section 425 of the Criminal Procedure Code. It is urged on behalf of the Crown that, where an accused is brought before the court in custody and a report under section 148 (1) (*b*) is filed, the provisions of section 151 (2) are not as a rule complied with. The practice is to frame the charge against the accused and read the charge as required by section 187 (3). If the provisions of section 187 are imperative, as I think they are, it is difficult to resist the conclusion that the requirement that the Magistrate shall ascertain whether there is sufficient ground for proceeding against the accused after the examination directed by section 151 (2) is also imperative. The fact that a practice which is contrary to the section has grown is no ground for holding that that practice is legal. A practice however inveterate cannot alter the law. Section 148 prescribes the methods by which proceedings in a Magistrate's Court may be instituted. The learned Attorney-General argued that proceedings may be instituted in more than one of the ways prescribed. I am unable to agree with that contention. The opening words of the section are : " Proceedings in a Magistrate's Court shall be instituted in one of the following ways ". To give effect to the learned Attorney-General's contention it would be necessary to interpolate the words " or more " between the word " one " and the word " of ". The rules of construction of statutes do not permit such a course. If it has been the practice not to observe the requirement of that section but to institute proceedings in more than one of the prescribed modes it should cease. In the instant case when the accused was brought before the court from Fiscal's custody accused of having committed the offences referred to in the report under section 126 A, he was brought before the Magistrate of the court, in custody without process, accused of having committed offences which such court had jurisdiction to inquire into. Be that as it may, the question whether proceedings were instituted under section 148 (1) (*d*) or 148 (1) (*b*) is of little importance in this case as admittedly the accused was brought before the court otherwise than on a summons

[1] *(1922) 23 N. L. R. 362.*

or warrant. In such a case clearly the procedure under section 187 must be followed. The word " brought " in that section does not mean brought by a Police Officer, but compelled to attend either by virtue of the fact that he is in Police custody and is forwarded to court or is accompanied by a Police Officer or is compelled to attend by virtue of having executed a bail bond under section 126 A or section 127. The learned Attorney-General contended that " brought before the court " would include cases in which the accused happens to be in court on his own business, whereupon he may be charged by the Magistrate if he consents to be charged. I am unable to agree that a person who happens to be in court on some private business of his can suddenly be called upon to answer a charge of which he has not been given notice. The law provides that when criminal proceedings are instituted under section 148 (1) (*a*), (*b*), or (*c*), the Magistrate shall, if he is of opinion that there is sufficient ground for proceeding against some person who is not in custody, if the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, issue a summons for the attendance of such person, or if the case appears to be one in which according to that column a warrant should issue in the first instance, issue a warrant for causing such person to be brought or to appear before the court at a certain time. In every case under paragraph (*a*) or (*b*) of section 148 (1) before issuing the warrant he must examine on oath the complainant or some material witness. If he is so minded he may before issuing even a summons examine on oath the complainant or some material witness. These are very necessary safeguards which are provided by law in the public interest. The accused person should have warning of the charge that is going to be laid against him ; he should have an opportunity of resorting to legal advice. It is unthinkable that a person who happens to be in court on other business should be suddenly put into the dock and called upon to answer a criminal charge without being afforded an opportunity of taking legal advice. I do not think therefore that it is open to a Magistrate to frame a charge against a person under section 187 except where he has been brought before the court in one of the ways contemplated by the Criminal Procedure Code or where he appears on a summons or warrant. The safeguard of an examination as directed by section 151 (2) before the charge is framed is a most salutary one because a citizen should not be made to face a criminal charge except where there is ground for placing him in peril. It was urged that the adoption of the procedure prescribed in section 151 (2) before framing a charge is inconvenient and would create difficulties. I am unable to agree that this is a consideration which can affect the interpretation of section 187. Provisions such as are prescribed in the Code for safeguarding the rights of citizens must be strictly observed, and non-compliance with such provisions can bring about only one result and that is to render proceedings void.

The learned Attorney-General argued that even if the true construction of section 187 was that the examination directed by section 151 (2) should precede the framing of the charge, section 425 applies to this case, and that the omission to carry out the requirement of section 151 (2) would not be such an irregularity as would enable this Court

to reverse or alter in appeal the judgment of the Magistrate unless it occasioned a failure of justice. He relied on the words " no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during the trial unless such error, omission, irregularity, or want has occasioned a failure of justice ". He stated that the instant case fell within the ambit of the words " other proceedings before trial ". He submitted that we were not free to set aside this conviction as the omission of the Magistrate has not occasioned a failure of justice.

I am unable to agree that a failure to comply with the imperative requirement of the Code in regard to the framing of charges is an omission or irregularity within the ambit of section 425. Disregard of the provisions of an enactment such as the Criminal Procedure Code, especially a provision such as section 187 the observance of which is a condition precedent to a summary trial, cannot be regarded as an " omission in the complaint, summons, warrant, charge, judgment, or other proceedings ". In my opinion section 425 was not designed to apply to a complete disregard of the imperative requirements of the Code. It seems to me to have been designed to apply to errors, omissions or irregularities other than disregard of the imperative provisions of the Code. Failure to observe provisions which are intended for the benefit of the citizen and are in the interests of justice, especially in criminal statutes, must be presumed to occasion a failure of justice. It is not necessary for the party seeking relief to establish that the failure to observe an imperative requirement of the Code has occasioned a failure of justice. As in the case of a trial to which the Court of Criminal Appeal Ordinance applies, a wrong decision of law is a sufficient ground for setting aside a conviction unless the prosecution is in a position to establish that no substantial miscarriage of justice has actually occurred.

The words " subject to the provisions hereinbefore contained " in section 425 remain to be considered. They have not been the subject of interpretation in any reported case previously decided by this Court. My own view is that those words are designed to embrace the sections of the Code which occur before section 425 and not only the provisions of sections 423 and 424. The learned Attorney-General submitted that those words applied only to the two preceding sections in Chapter XLII, but I am unable to agree with him. The word " hereinbefore " is a word of wide import and would ordinarily, in the absence of any controlling words in the context, apply to all that has gone before. In this context there is nothing that limits its meaning. On the other hand its association with the words " provisions " and " contained " on either side of it leaves no room for doubt as to its meaning. In India there has been a difference of opinion as to whether the word " hereinbefore " occurring in the corresponding section of the Indian Criminal Procedure Code has reference to all the provisions preceding the section or only to the two sections immediately preceding it. In *Ram Subhag Singh v. Emperor*[1] it has been held by the High Court of

[1] *(1916) A. I. R. Calcutta 693, at 701.*

Calcutta that it refers to only the two preceding sections but a contrary view has been taken in the case of *Raj Chunder Mozumdar v. Gour Chunder Mozumdar* [1], and in *Nilratan Sen v. Jogesh Chunder Bhattacharja* [2]. That view has also been approved in the Full Bench decision in the matter of *Abdur Rahman and Keramat* [3], and in the Privy Council decision of *Subramaniam Iyer v. King Emperor* [4]. In the last mentioned case it was held that disobedience of express provision as to the mode of trial cannot be regarded as a mere irregularity. The Lord Chancellor in the course of his judgment said that, "the remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of adminstering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity". The Lord Chancellor stated in support of his view the observations of Lord Herschell, and Lord Russell of Killowen, in the case of *Smurthwaite v. Hannay* [5] wherein Lord Herschell said with reference to joinder of plaintiffs: "If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

I am of opinion therefore that the case of *Vargheese v. Perera* [6] has been rightly decided and that the appellant is entitled to succeed.

The next question is whether in allowing the appeal we should direct a retrial or acquit the accused. I think the facts deposed to by the witnesses disclose a very grave crime for which the accused should be tried in the manner provided by the Criminal Procedure Code.

PULLE, J.—

I have the misfortune to arrive at a decision in this appeal which does not commend itself to my brethren. In regard to two incidental matters arising out of the question—whether the charges against the appellant were framed after due compliance with the requirements of the Criminal Procedure Code—I am, if I may be permitted to say so, in complete accord with the opinions expressed by them. The first is that if the Code ordains a procedural step to be taken preliminary to the framing of a charge, the failure to take that step would vitiate the charge. The second which is a corollary to the first is that a conviction upon such a charge cannot on an appeal be allowed to stand by invoking the provisions of section 425. A charge bad in law is not a mere irregularity which can be cured.

On the day the appellant was taken before the Magistrate in custody without process the accusation against him was set forth in a written report purporting to be under section 148 (1) (*b*) which was accepted by the Magistrate. In my opinion proceedings were instituted in the Magistrate's Court against the appellant when the report under section 148 (1) (*b*) was accepted by the court as it is undoubtedly one

[1] *(1894) 22 Calcutta 177.*
[2] *1 Calcutta Weekly Notes 57.*
[3] *(1900) 27 Calcutta 840 at 847.*
[4] *(1901) 28 I. A. 257.*
[5] *1894 A.C. 494.*
[6] *(1942) 43 N. L. R. 561.*

of the ways of instituting a proceeding. Section 126A provides for the remand of a person from time to time pending an investigation under Chapter XII. If the argument is valid that when the appellant, who was on remand pending such an investigation, was produced on 22nd August, 1955, there was an institution of proceedings under section 148 (1) (*d*), it must follow that even on the very first occasion he was produced under section 126A (1), the court had no alternative but to take the evidence required by section 151 (2) and to frame a charge under section 187 (1). It would serve no purpose, if the investigation is incomplete, to embark on a trial ; or to embark on an inquiry, if the offence under investigation, still incomplete, is an indictable one. I think that, so long as an inquirer is exercising the powers conferred on him by Chapter XII, it is open to him to cause proceedings to be instituted under section 148 (1) (*b*). The bare fact that in pursuance of an earlier order of detention the appellant was produced on 22nd August, 1955, did not make the " institution " of proceedings any the less one under section 148 (1) (*b*).

If I am correct in the view which I have just expressed, there was no room for the application of section 151 (2) which deals with only a case where proceedings have been instituted under section 148 (1) (*d*). There was also no room for the application of section 151 (1), because it provides for a case where the accused is not in custody. In the result the framing of a charge against the appellant upon the report being filed was, in my opinion, perfectly proper.

Section 187 (1) speaks of an examination directed by section 151 (2). The latter provision is limited by its very terms to section 148 (1) (*d*) and cannot be extended to cover an institution of proceedings under section 148 (1) (*b*). As section 151 (2) did not apply, it cannot be said that the charge framed against the appellant was in violation of section 187 (1) or any other provision of the Code by reason only of the fact that the person who brought the appellant before the court was not examined on 22nd August.

In my opinion the appeal fails and should be dismissed.

K. D. DE SILVA, J.—

On August 20, 1955, a Police Sergeant submitted a report to the Magistrate and at the same time produced the accused-appellant in Court in terms of section 126 A (1) of the Criminal Procedure Code (hereinafter referred to as the Code). The Magistrate acting under section 126 A (2) remanded the accused to the custody of the Fiscal till August 22, 1955, on which date the Police Sergeant instituted proceedings against him by filing a report in terms of section 148 (1) (*b*) of the Code. When this report was filed the accused was present on remand. The offences disclosed in the report were (1) putting one Abubucker in fear of injury in order to commit extortion, (2) mischief, and (3) house trespass punishable under sections 374, 410 and 434 of the Penal Code respectively. The Magistrate then framed a charge against the accused to which he

pleaded " not guilty ". On a subsequent day he was tried and convicted and sentenced to 2 years' rigorous imprisonment and 2 years' Police supervision. The appeal is from this conviction and sentence.

This matter originally came up for hearing before my brother (H. N. G.) Fernando, when the Counsel for the appellant raised a point of law relying on the decision of Soertsz J. in *Vargheese v. Perera* [1]. As my brother Fernando doubted the correctness of that decision he reserved this appeal to be heard by a fuller Bench to be appointed by My Lord the Chief Justice.

The point of law which arises on this appeal is that the Magistrate should have recorded evidence on oath in terms of section 151 (2) before he proceeded to frame a charge against the appellant. It is submitted that the failure to do so is not merely an irregularity but amounts to an illegality which vitiates the conviction. In support of that contention the Counsel for the appellant relied on the decision in *Vargheese v. Perera* [1]. In that case the prosecuting officer made a report to Court in terms of section 148 (1) (*b*) alleging that the accused had committed an offence in contravention of the Poisons, Opium and Dangerous Drugs Ordinance and at the same time he produced the accused before the Court. The Magistrate without examining the prosecuting officer or any other person on oath framed a charge against the accused who pleaded guilty. When the case came up before this Court in appeal on a point of law Soertsz J. held that the Magistrate had disregarded an imperative requirement of section 151 (2). The learned Judge was of the view that this procedure amounted to an illegality which was fatal to the conviction. The Attorney-General who appeared for the respondent in the instant case submitted that *Vargheese v. Perera* [1] was wrongly decided. He sought to support this conviction on the ground that the proceedings in this case were instituted under section 148 (1) (*b*). His submission was that the examination contemplated by section 151 (2) is restricted to proceedings instituted under section 148 (1) (*d*). He also argued that in any event it was possible to regard these proceedings as coming under both paragraphs (*b*) and (*d*) of section 148 (1) and that therefore the Magistrate was entitled to act under either of those paragraphs and that in the proceedings instituted under section 148 (1) (*b*) there is no requirement of law to record evidence on oath before framing the charge. The Attorney-General also submitted that even if the procedure followed by the Magistrate was wrong it amounted merely to an irregularity to which the provisions of section 425 apply.

Section 148 (1) of the Code makes provision for the institution of proceedings in a Magistrate's Court in six different ways which are set out in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of that section. The paragraphs relevant to this appeal are (*b*) and (*d*). Paragraph (*b*) reads :—

" on a written report to the like effect being made to a Magistrate of such court by an inquirer under Chapter XII or by a peace officer or a public servant or a Municipal servant or a servant of a District Council or a servant of a Local Board ; "

[1] *(1942) 43 N. L. R. 564.*

while paragraph (*d*) is in the following terms :—

"on any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try ; "

Section 151 (1) deals with the issue of process, after the institution of the proceedings under paragraphs (*a*) or (*b*) or (*c*) of section 148 (1) against a person who is not in custody. Under this provision the Magistrate shall either issue summons or warrant in conformity with the First Schedule of the Code. According to the proviso of section 151 (1)

(i) The Magistrate may, if he thinks fit, issue summons instead of a warrant.

(ii) In any case under paragraph (*a*) or paragraph (*b*) of section 148 (1) the Magistrate shall, before issuing a warrant and may before issuing a summons record evidence on oath and

(iii) (not material to this appeal.)

Section 151 (2) provides that when proceedings have been instituted under paragraph (*d*) of section 148 (1) the Magistrate shall forthwith examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

My brother Fernando has taken the view that when the proceedings are instituted under paragraph (*b*) of section 148 (1) the fact that the accused is produced in custody does not alter the character of the institution of the proceedings. That is to say, the proceedings instituted under section 148 (1) (*b*) continue to be a proceeding instituted under that section even though the accused is produced in custody.

That is why he considered that *Vargheese v. Perera* [1] was wrongly decided. His view is that no examination under section 151 (2) was necessary in that case although the accused was produced in Police custody, because the proceedings were instituted under section 148 (1) (*b*). The facts in that case are substantially similar to those of the instant case.

It is section 187 of the Code which deals with the framing of charges. The question whether or not evidence has to be recorded in any particular case before the charge is framed against the accused has to be decided in terms of the provisions of that section. That section reads :—

"Where the accused is brought up before the Court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2) if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused."

It was contended by the Attorney-General—and that was the view taken by my brother Fernando too—that as these proceedings were instituted under section 148 (1) (*b*) there was no obligation on the Magistrate to hold the examination contemplated by section 151 (2). He

[1] *(1942) 43 N. L. R. 564.*

also submitted that the words "if necessary" should be interpolated immediately after the words "directed by section 151 (2)" in section 187 (1). I do not think there is any justification for such an interpolation. Section 151 does not make provision for a situation when the accused is present in proceedings instituted under section 148 (1) (*b*). It sets out the procedure to be followed only when the accused person is not present in Court. If section 151 is silent as to what procedure is to be followed when the accused is present at the time of the institution of proceedings under section 148 (1) (*b*) there is no reason why the other sections of the Code should not be examined to obtain the necessary guidance. That guidance, in my opinion, is offered by section 187 (1). The opening words of paragraph (*d*) of section 148 (1) are "On any person being brought before a Magistrate of such court in custody without process" whereas, section 187 (1) refers to a case "where the accused is brought before the Court otherwise than on a summons or warrant." It is significant that the words "in custody" appearing in section 148 (1) (*d*) are omitted in section 187 (1). Therefore the latter section is wider in application than paragraph (*d*) of 148 (1) and it embraces all cases where the accused is present otherwise than on summons or warrant. This section 187 (1) includes not only a case where the accused is present in custody, but also when he is present on remand on Police bail or on being warned by the Police to appear in Court. In all those instances it would appear, that it is incumbent on the Magistrate to hold the examination contemplated by section 151 (2). I am unable to see what valid objection there can be to the utilisation, in section 187 (1), of a wholesome procedure devised earlier by section 151 (2) for a different, though, an analogous purpose.

I am unable to assent to the proposition that *Vagheese v. Perera*[1] came to be wrongly decided because Soertsz J. in construing section 151 (2) ignored its opening words "where proceedings have been instituted under section 148 (1) (*d*)". These opening words are not relevant in interpreting section 187 (1) because that section is not restricted only to the proceedings instituted under 148 (1) (*d*).

No case was cited to us where it has been held that it is proper to frame a charge against an accused without holding the examination contemplated by section 151 (2) when he is produced in custody and the proceedings are instituted under section 148 (1) (*b*). In *Assen v. Maradana Police*[2] the proceedings were instituted under section 148 (1) (*b*) and the accused was produced in custody while the charge was framed without recording evidence on oath. Howard C.J. held that this amounted to an irregularity but as no prejudice had been caused to the accused he declined to interfere with the conviction and sentence. The facts in *Thomas v. Inspector of Police, Kottawa*[3], were exactly similar to those of the instant case. There Wijeyewardene J. expressed the view that framing of the charge against the accused without recording evidence was an irregularity but as no prejudice had been caused to the accused he dismissed the appeal. The decisions in *Cader v. Karunaratne*[4] and

[1] (1942) 43 N. L. R. 564.
[2] (1944) 45 N. L. R. 263.
[3] (1945) 47 N. L. R. 42.
[4] (1943) 45 N. L. R. 23.

Dias v. Nadharaja[1] are not in point because in neither of those cases was the accused produced in custody.

In the instant case I am of opinion that when the charge was framed against the accused without holding the examination contemplated by section 151 (2) there was a failure to comply with the provisions of section 187 (1). Does this non-compliance amount merely to an irregularity or an illegality fatal to the conviction ? In *Ebert v. Perera*[2] which is a decision of a Bench of three Judges it was held that charging an accused from a report filed under section 148 (1) (*b*) in respect of an offence punishable with more than three months' imprisonment amounted to an illegality which cannot be cured by section 425. That section reads :—

> " Subject to the provisions hereinbefore contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
>
> (*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or
>
> (*b*) of the want of any sanction required by section 147 ; or
>
> (*c*) of the omission to revise any list of assessors,
>
> unless such error, omission, irregularity, or want has occasioned a failure of justice. "

It is important to observe that this section expressly states that it is to operate subject to the earlier provisions of the Code. One of those provisions is section 187 relating to the framing of the charge. Therefore the non-compliance of an imperative requirement of section 187 cannot, in my view, be cured by this section. In *Vethanayagam v. Inspector of Police, Kankesanturai* [3] My Lord the Chief Justice when he was a Puisne Justice, held that failure to comply with section 190 was not merely an irregularity but an illegality which cannot be cured by section 425 and stated as follows :—

> " Non-observance of a procedural statute is an illegality and not a mere irregularity as was laid down in the case of *Smurthwaite v. Hannay* (1894, A.C. 494) "

With respect, I agree with that observation.

If I may say so with respect, *Vargheese v. Perera* [4] was correctly decided. The point of law raised on this appeal is entitled to succeed. The failure to comply with the provisions of section 187 (1) vitiates the conviction.

I would therefore quash the proceedings and remit the case for trial on a charge that should be framed in conformity with the provisions of section 187 (1), that is to say, after holding the examination directed by section 151 (2).

Appeal allowed.

[1] *(1947) 48 N. L. R. 301.*
[2] *(1922) 23 N. L. R. 362.*
[3] *(1949) 50 N. L. R. 185.*
[4] *(1942) 43 N. L. R. 564.*