[HIGH COURT OF AUSTRALIA.]

THE MASTER RETAILERS' ASSOCIATION OF NEW SOUTH WALES . APPELLANTS;

AND

THE SHOP ASSISTANTS UNION OF NEW SOUTH WALES, THE GROCERS ASSISTANTS UNION OF NEW SOUTH WALES, F. LASSETTER AND COMPANY, LIMITED, AND THE PRESIDENT AND MEMBERS OF THE COURT OF ARBITRATION . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 2, 5, 6, 7, 8.

Griffith, C.J., Barton and O'Connor, JJ.

Industrial Arbitration Act (*N.S.W.*) (*No.* 59 *of* 1901), *secs.* 13, 15, 26 (*a*), (*b*), 37—*Industrial agreement—Agreement not to be binding unless made a common rule—Unenforceable agreement—Jurisdiction of Court of Arbitration to make industrial agreement a common rule—Common rule a means of enforcement of an existing award, order or direction—Prohibition.*

The Court of Arbitration has no jurisdiction to entertain an application by the parties to an industrial agreement which has not been made an award of the Court to have the terms of the agreement declared a common rule.

The power to declare a common rule, conferred upon the Court by sec. 37 of the *Industrial Arbitration Act*, can be exercised only with a view to the enforcement of an award, order, or direction.

It is, therefore, a condition precedent to the exercise of that power, that there should be in existence an award, order, or direction, made by the Court in pursuance of a hearing or determination, upon a reference within the meaning of sec. 26, sub-secs. (*a*) and (*b*).

An agreement was made between an association of employers and two unions of employés, fixing the conditions of employment for two years from the date of the agreement, and on the same day another agreement was made

between the same parties, providing that the former agreement should not come into force or be binding upon the parties to it, unless it should be made a common rule. Both agreements were in writing, and were registered with the Registrar of the Court, as provided by sec. 13 of the Act. The parties then filed in the Arbitration Court, and advertised a notice of an application to have the terms of the agreement declared to be a common rule. This was the ordinary method of initiating proceedings in that Court for that purpose.

Held, that the Court of Arbitration had no jurisdiction to entertain the application, and that immediately after the notice any person might apply to the Supreme Court for a writ of prohibition, to restrain the Court of Arbitration from further proceeding.

Held, further, that the original agreement, not being inforcable against any one, was not a subsisting industrial agreement within the meaning of sec. 15.

Decision of the Supreme Court, (1904) 4 S.R. (N.S.W.), 384, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, (1904) 4 S.R. (N.S.W.), 384.

The following statement of the facts is taken from the judgment.

On December 3rd, 1903, an industrial agreement was made between the respondents F. Lassetter & Co. Ltd., of the first part, and the United Grocers' Assistants of New South Wales, an industrial union of employés, and the respondents, the Shop Assistants' Union of New South Wales, another industrial union of employés, the two latter unions being called parties of the second part. The agreement recited that the parties had met in conference, and had agreed to enter into an agreement on the terms and conditions set out in the first and second schedules, and that the agreement was to be registered under the *Industrial Arbitration Act*, 1901. The agreement went on: "it is agreed between the company and the Grocers' Assistants Union and the Shop Assistants Union that the terms conditions and regulations hereinafter set forth shall be binding as between the parties thereto for a period of two years from the date thereof." The first term of the agreement was that any person should be deemed to be a shop assistant who was engaged in any capacity in the retail reception, sale, or delivery of goods, whether in a shop, office, or warehouse, at certain trades set out in detail. The agreement then proceeded to precribe a complete code for the regulation of all these businesses. It consisted of 21 articles, and was

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to regulate the whole affairs of the trades mentioned in the agreement. It may be assumed, though it was not stated in the agreement or on the record, that Lassetter & Co. carried on all these businesses; otherwise they would be matters with which they had no concern. The agreement was registered on 4th December.

On 3rd December another agreement was made between the same parties, which stated: "It is agreed between the parties that the industrial agreement this day entered into between them shall not come into force or be binding on the parties thereto unless such agreement shall be made a common rule, relative to the trades or businesses mentioned in the industrial agreement." That agreement was registered on 10th December, and so became an industrial agreement.

The three parties to the agreement then filed a notice in the Arbitration Court, "In the matter of No. 27" (the original registration) "and of an application that the said agreement may be made a common rule for the State of New South Wales applicable to the retail reception, sale, or delivery of goods, &c." All the trades were enumerated as before, and notice was given that the parties to the agreement, that is all three unions or associations, intended to apply to the Court of Arbitration on 15th February for an order declaring the terms and provisions of the above mentioned industrial agreement to be a common rule applicable to the reception, sale, and delivery of goods, whether in shops, offices, or warehouses in the trades enumerated. The filing of the notice was, according to the practice of the Arbitration Court, the commencement of a proceeding in the Court. Thereupon the present appellants, the Master Retailers Association, who are an industrial union of employers, made application to the Court of Arbitration, on summons, to set aside the notice, on the ground that the agreement was not an industrial agreement within the meaning of the Act, and that the Court of Arbitration had no jurisdiction to order it to be made a common rule, and further that it was an abuse of the process of the *Arbitration Act*.

The application was dismissed.

There was thus a proceeding in the Arbitration Court, in which the Court had asserted its jurisdiction. Thereupon the appellants applied to the Supreme Court for a prohibition to restrain the

Arbitration Court from proceeding to give effect to the application on the grounds, (1) that the Court had no jurisdiction to make the agreement of 3rd December a common rule, (2) that the agreement of 3rd December was not a valid and subsisting industrial agreement, (3) that the Court of Arbitration had no jurisdiction to order an industrial agreement, or any term thereof, to be a common rule.

The Supreme Court granted a Rule Nisi, but, on the motion to make the rule absolute, discharged the rule with costs, being of opinion that the Court of Arbitration had jurisdiction to make the terms of the agreement a common rule, binding upon the whole of the trades in New South Wales.

From this decision the present appeal was brought.

Gordon K.C., and *Rolin* for the appellants.

Holman and *J. A. Brown*, for the respondents, the Shop Assistants Union of New South Wales.

The other respondents did not appear.

Holman, for the respondents, took the preliminary objection that there was nothing for the Court to prohibit. There was no proceeding initiated in the Arbitration Court. A notice had been issued by the respondents, by advertisement in certain papers, of their intention to make an application, and a copy of the notice filed in the Court of Arbitration; but no step had been taken to carry it into effect when the application for a prohibition was made by the appellants. The only proceeding in the Arbitration Court was the taking out of a summons by the appellants calling upon the respondents to show cause why the notice should not be set aside. The summons was dismissed, but the application for a common rule had not been proceeded with.

[*Gordon* K.C., read an affidavit from which it appeared that the advertisement and the filing of the notice were the ordinary and only method of initiating proceedings, according to the practice of the Arbitration Court.

GRIFFITH C.J.—It seems to be analogous to a notice of motion in other Courts. It is a notice to all the world.]

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It is rather analogous to the advertised notice preliminary to applying for probate. Before prohibition can issue some step must be taken: *Stroud's Judicial Dictionary* (2nd ed., sub. "Process"); *R.* v. *Castle* (1).

[GRIFFITH C.J.—The Court, on the hearing of the summons, treated the matter as pending, and refused to stay proceedings. It thereby asserted its right to deal with the matter.]

That was a mere statement, not an assertion of jurisdiction by an act of the Court. The summons was altogether beside the proceedings. The notice was a mere condition precedent to the initiation of proceedings, and nothing further has been done.

GRIFFITH C.J. The rule is clearly laid down in *Mayor of London* v. *Cox* (2), that, where want of jurisdiction is apparent upon the proceedings, prohibition goes at any time after service of the process, *i.e.*, as soon as the jurisdiction of the inferior Court is asserted. The superior Courts always guard very jealously their right to prohibit an inferior Court from exceeding its jurisdiction. A mere stranger is entitled to come to the superior Court and apply for a prohibition to restrain an inferior Court, if it appears to be about to step beyond its jurisdiction. The only question is, is there a proceeding pending? We are told that it is the practice of the Arbitration Court, when it is intended to make application for a common rule, to treat the notice as the initiation of the proceedings. It appears, indeed, that that is only fair play, because in that way those interested in the application are given an opportunity of being heard in opposition. We are told also that it is the practice to file the notice in the office of the Court. In fact it is just as much the initiation of the proceedings as the filing of a notice of motion, or issuing of a writ of summons. There is no magic in the word writ or summons. These things are called by different names in different Courts. It does not matter what the originating proceeding is; as soon as it is filed, the proceedings are begun, and, if the want of jurisdiction appears on the face of them, any person may apply for a prohibition to restrain the Court from further proceeding. The objection must therefore be over-ruled.

(1) 27 L.J. M.C., 70.

(2) L.R. 2 H.L., 239.

Gordon K.C., for the appellants. The basis of the decision of the Supreme Court was that this agreement was a valid industrial agreement, and, as such, by virtue of sec. 15, had the same effect, and was enforceable in the same way, as an award of the Court. But, assuming that the Court was right in its construction of sec. 15, there was here no valid industrial agreement. It was subject to the second agreement, which provided that the first was not to have any binding effect until it should be made a common rule. Therefore at the time of the application it was a nullity. If it had no life then, it cannot receive life from a subsequent proceeding, which can only take place on the assumption that the agreement has life already. Before a common rule can be made, based upon an agreement, there must be somebody bound by it. There must be some "practice, regulation, rule, custom, term of agreement, condition of employment, or dealing in relation to an industrial matter," to be made a common rule: sec. 37 (i.). The fact that two or more parties have actually made an agreement, and are bound by it, is some guarantee to the Court that the terms of the agreement are beneficial to the industry, and work well in practice. The registration does not make it an industrial agreement, unless it is already operative as an agreement apart from the Act. In *Pym* v. *Campbell* (1), which was relied upon by the respondents in the Arbitration Court, an agreement was drawn up subject to the approval of a third party, and it was conceded that, though on the happening of a certain event, it would become operative, it was nevertheless of no effect in the meantime. That is all that is contended for the appellants here.

Assuming that the agreement was valid as an industrial agreement within the meaning of sec. 15, the Arbitration Court had no jurisdiction to make it a common rule in the manner attempted. Sec. 37 of the Act provides that a common rule may be declared "with a view to the enforcement of" an "award, order or direction." There must therefore be in existence, at the time of the application for a common rule, a valid award, order or direction. Sec. 26 gives the Court power to make such an award, order, or direction, in pursuance of a hearing or determination, which can only take place on a reference under the Act. There is no other

(1) 6 El. & Bl., 370.

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power to make an award. The reference must be by an industrial union, or by some person affected or aggrieved by an order of the Court (sec. 28). There was in this case no reference within the meaning of that section, and there was no award to be enforced by a common rule. The Supreme Court were of the opinion that by sec. 15 an industrial agreement could be enforced in the same way as an award, and that therefore anything that the Court could do for that purpose under sec. 37, could be done for the purpose of enforcing an industrial agreement; but the making an award a common rule is not an enforcement of it.

[O'CONNOR J. I think it must be taken that all the powers given to the Court by the various sub-sections in sec. 37 are to be exercised "with a view to the enforcement of its award, order, or direction." That is the only grammatical construction of which the words are capable.]

Assuming that to be so, sec. 15 provides that the agreement shall have the same effect and may be enforced in the same way as an award, "as between the parties thereto," and not for all purposes. To make it a common rule is not enforcing it between the parties, but against strangers. The power of the Court to enforce an industrial agreement must be limited by the words "as between the parties to the same," and, reading sections 15 and 37 together, it is impossible to hold that such an agreement can be enforced by being made a common rule. Outside secs. 15 and 37 there is nothing in the Act to suggest any power in the Court to make an industrial agreement a common rule, or to enforce it in any way. When an industrial agreement is before the Court on a proper reference, and an award has been made, the Court may, with a view to the enforcement of its award, declare all the terms of the agreement to be a common rule of the industry, and so in effect make the agreement a common rule. But that would be after a hearing and determination on the merits, which is very different from an application to have a particular agreement, possibly arrived at by collusion, directly declared a common rule. The legislature contemplated that matters would not be referred to the Court unless there was a *bonâ fide* dispute between parties. For instance, one of the parties to an industrial agreement might come to the Court to have it enforced against the other, who was

reluctant. The Court might then make an award, and later declare a common rule. Here there was no real grievance; the only object of the application, as appears from the terms of the second agreement, was the obtaining of a common rule.

The Act, being in restraint of the liberty of the subject, should be construed strictly, and in favour of the subject. The Court has given a mistaken decision, which can be reviewed by prohibition: *Brown* v. *Cocking* (1).

Holman for the respondents. This Court will not interfere if the Arbitration Court has merely made an error in law that does not go to the root of the Court's jurisdiction. Sec. 32 provides that its decisions are not to be reviewed on any ground of informality or want of form. There was no usurpation of jurisdiction in the present case. The Court has full power to deal with the application by virtue of secs. 15 and 26 (*a*). It was an "industrial matter referred to it by an industrial union." That general expression is intended to cover matters, outside actual disputes, which it would be impossible to particularise. The Court is given a quasi-legislative power, that of making "by-laws" or "regulations," a power altogether distinct from the judicial power which all Courts must have. Its power is not confined to dealing with disputes *inter partes*.

[GRIFFITH C.J.—All the provisions in sec. 26 are applicable to proceedings between parties. The Court cannot make an order except between parties. It is a Court to "hear and determine."]

The feature of a common rule is that it binds persons who are not parties, though the Court, in their interests, allows them to appear and be heard. The definition of industrial dispute omits matters which are manifestly within the Court's jurisdiction. This was a matter affecting industries, even upon the assumption that the first agreement was nullified by the second. It was a "dealing in relation to an industrial matter," which the Court may make a common rule. There is no restriction upon the right of a union to refer industrial matters to the Court. It is therefore immaterial whether there was a valid industrial agreement

(1) L.R. 3 Q.B., 672.

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in existence or not, or any dispute which could be settled by agreement or reference.

[O'CONNOR J.—Is not the whole object of this Act the deciding and settling of disputes? Is it not taking it a long way from that to make the Court a board of trade for regulating the conditions under which businesses are to be carried on?]

The application by the union involves both a request to make employers obey the union, and a request that other employers may be made to obey the same rule, so as to put all upon an equal footing. The common rule is for the protection of employers bound by an award against the competition of employers who would not otherwise be bound. There is no need for any aggravated dispute to be in existence; a mere difference of opinion would be a matter for settlement. Every industrial agreement implies some such difference at least, and the policy of the Act is to encourage amicable settlements rather than litigation. One union of employers may have a difference with another similar union, and may come to the Court to have the matter settled if no agreement can be arrived at otherwise. That would be clearly an industrial matter, though not within the definition of "industrial dispute" in the Act. The legislature has not attempted any exhaustive enumeration of matters within the jurisdiction of the Court, and therefore the mere fact that such applications as that now in question are not specifically mentioned or indicated, cannot be taken as an argument that they are outside the jurisdiction of the Court.

If the Court can entertain the application, it can make an order in respect of it, and enforce that order by making the agreement a common rule. It is no more objectionable than a consent award. The Court will not confirm or enforce it unless it is fair to the parties who are to be bound by the order. It can take evidence and, after hearing, come to a determination on the merits. Then, instead of making the agreement, as such, a common rule, the Court can make an award in terms of the agreement, and declare the award or its terms to be a common rule. This would be a strict compliance with the procedure suggested by secs. 26 and 37, and the parties to the agreement arrive at the same end as if the agreement had been directly declared a common rule upon an

application for that purpose. The defect, if any exists, is, therefore, one of procedure. The parties have only failed to ask for an award, as a preliminary to the common rule. This could be cured by the Court, either by amendment, or by first making an award, and then declaring that to be a common rule. It would be within the powers given by sec. 26 (*g*) (ii.), to "amend or waive any error or defect in the proceedings." The only error on the part of the Court has been doing, by a short cut and without amendment, what it could have done by a longer way by amendment, even if it could not waive the irregularity altogether. It is, therefore, a mere informality or want of form in the proceedings, which is not a ground for prohibition: *South-Eastern Railway Co.* v. *Railway Commissioners* (1). The mere possibility that injustice may be done if the matter is proceeded with, is no valid ground for a prohibition. It cannot be assumed that the Court will make an unjust order.

[GRIFFITH C.J.—The difficulty in your way is the presence of the words "with a view to the enforcement of its award, order or direction."]

The foundation for the common rule is the circumstances which lead to the Court's determination, not the determination itself. So long as the proper persons are before the Court and the matter dealt with is within its jurisdiction, the Court can exercise all the powers conferred by secs. 26 and 37. It is a common practice of the Court to make an award and a common rule in the same order, as a result of the hearing and determination. The parties have not asked for an award in this case, but the Court may nevertheless make one. There is no more likelihood of collusion than if all had been in order and an award had been asked for.

[GRIFFITH C.J., referred to *McIntosh* v. *Simpkins* (2).]

The defect there was not the absence of a condition which the Court itself could supply, but an absence of certain external circumstances "necessary as a preliminary to the Court's jurisdiction," which could not be waived. There was no irregularity here which could not have been cured by amendment. A Court of appeal will not interfere with the decision of an inferior Court on merely technical grounds: *New Lambton Land and Coal Co.*

(1) 6 Q.B.D., 586. (2) (1901) 1 K.B., 487, at p. 491.

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Ltd. v. *London Bank of Australia Ltd.* (1).

The two documents of 3rd December, constituted a valid and subsisting industrial agreement. They form "an industrial agreement . . . varied by another industrial agreement," within the meaning of sec. 14, and are therefore binding on the parties. The agreement so made possessed all the formal characteristics essential to an agreement, viz., parties, objects, a specified term of operation, &c. The mere suspension of its force until the happening of a condition does not affect its validity as an agreement. It binds the parties in the meanwhile. They cannot repudiate it or do anything to prejudice its fulfilment at the appointed time. [He referred to *Hochster* v. *De la Tour* (2), *Goss* v. *Lord Nugent* (3), *Pym* v. *Campbell* (4), *Wallis* v. *Littell* (5), *Lindley* v. *Lacey* (6).]

An industrial agreement, except that it deals with industrial matters, is not in any way distinguishable from any other agreement. Sec. 15 does not refer only to such industrial agreements as may be enforced immediately. The word "agreements" must be taken as generally as if it were used anywhere else.

If it is a valid agreement it may be made a common rule. Sec. 15 puts industrial agreements on the same footing as awards, with regard to enforceability; therefore everything that the Court may do under sec. 37 with a view to the enforcement of an award, may be done with a view to the enforcement of an industrial agreement, if applicable thereto. The words "as between the parties to the same," in sec. 15, do not limit the power of the Court. There is no more difficulty in the enforcement of an agreement by declaring it a common rule, than in enforcing an award in that way. Both agreements and awards have parties, and, speaking strictly, can only be enforced against the parties bound thereby. But sec. 37 speaks of a common rule being made with a view to the enforcement of an award. The common rule is as applicable to an agreement as to an award. It is not considered equitable or conducive to the proper observance of an award, that the award should be binding upon one employer or set of employers

(1) 1 C.L.R., 524.
(2) 2 El. & Bl., 678.
(3) 5 B. & Ad., 58.
(4) 6 El. & Bl., 370.
(5) 11 C.B. N.S., 369.
(6) 17 C.B. N.S., 578.

only. So it is not just to expect an employer to bind himself by agreement with his employés to observe certain restrictions, if other employers are allowed to remain free from those restrictions, and the knowledge that the agreement can be made a common rule will further the objects of the Act, that is, it will encourage the settlement of differences by agreement instead of by litigation. Moreover, if an industrial agreement is in existence, the employer who is a party to it will be more likely to observe its conditions, if other employers also are made subject to them. In that sense the declaration of the common rule may appropriately be made with a view to the enforcement of the agreement. If so, it may be done "in any proceeding," no matter how the agreement has been brought before the Court. [He referred to several cases before the Court of Arbitration, in which the Court had declared an industrial agreement to be a common rule.]

This is a remedial Act, and the Court is entitled, in dealing with it, to consider the evils which the Act was intended to remedy, and construe its provisions liberally in the direction of carrying out the intention of the legislature: 1 *Blackstone's Commentaries*, 15th ed., pp. 86, 87; *Hardcastle, Interpretation of Statutes*, 3rd ed., p. 70; *Collman* v. *Roberts* (1); *Dapueto* v. *Wyllie & Co.* (2).

[GRIFFITH C.J.—That rule does not apply where the Statute, which establishes a new Court, itself prescribes a condition for the exercise of the new jurisdiction.]

Reference was also made to *Ex parte Ardill* (3); *Ex parte Commissioners of Kingstown* (4); *R.* v. *Local Government Board* (5); *Ex parte Walker* (6).

Gordon K.C. in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

8th December.

GRIFFITH C.J. [His Honor having stated the facts in connection with the making of the two agreements of 3rd December, proceeded:]

(1) (1896) 1 Q.B., 457.
(2) L.R. 5 P.C., 482, at p. 492.
(3) 19 N.S.W. W.N., 107.
(4) 16 L.R. Ir., 150; S.C. on appeal, 18 L.R. Ir., 509.
(5) 10 Q.B.D., 309.
(6) 2 Arbitration Report (N.S.W.), 207.

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Upon the registration of the second agreement the position between the parties was that their relations were regulated by the two documents, as together forming one agreement or quasi-agreement, but the consequence also was that no obligations were imposed upon any of the parties to the agreement contained in the first document, although it has been called an agreement. It was an agreement in one sense, but it was an agreement incapable of enforcement, because it imposed no obligation upon any one.

[His Honor, having referred to the proceedings in the Arbitration Court and the Supreme Court, continued:]

The question raised is one of very great importance. The application is made by two industrial unions of employés, who have come to a common understanding with their employers, or rather, with one firm of employers, and by those employers, to impose the arrangement they have made as between themselves, upon the whole State of New South Wales, which is practically calling upon everybody who is engaged in this business in the State, to litigate with them in one proceeding for the purpose of regulating in all its details the business of those trades. The question for us to consider is whether the Arbitration Court has any such jurisdiction. If that Court has jurisdiction the Supreme Court cannot interfere with it in its exercise, but, if it has not such jurisdiction, the Supreme Court is bound, on being appealed to, to interpose its hand, and see that the limit is not transgressed. The matter turns entirely upon the construction of the *Arbitration Act*. We were asked by Mr. Holman to say that the Act is a remedial Act, and that, therefore, it ought to be construed liberally, as distinguished from a penal Act, which, as it used to be said, should be construed strictly. It may be remarked that the old distinction drawn between remedial and penal Acts has of late years been much discredited. What has been laid down in modern cases is that the duty of the Court is to interpret Acts according to the intent of the Parliament which passed them. On this point I have had occasion to quote more than once on this bench the opinion of the judges given in the House of Lords in the *Sussex Peerage Case* (1). Lord Chief Justice *Tindal*, deliver-

(1) 11 Cl. & F., 85, at p. 143.

ing the opinion of the judges, says:—"My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law giver." As was said by this Court in *Clancy* v. *Butchers' Shop Employés Union* (2):—"In construing the Act it should be borne in mind that it is an Act in restriction of the common law rights of the subject, and, though that is no reason why the fullest effect should not be given to its provisions, it is a reason why the meaning should not be strained as against the liberty of the subject." The great fundamental principle of our jurisprudence is liberty. Where it is alleged that the liberty of individuals may be restrained, the party alleging the right of restraint must establish by some Statute or by judicial decision that the liberty has been restricted. It is not necessary to refer to the general objects of the Act, as they are familiar to all of us. They are recited in the title, which states in a summary and concise way the obvious purpose of Act, which is "to provide for the registration and incorporation of industrial unions, and the making and enforcing of industrial agreements; to constitute a Court of Arbitration for the hearing and determination of industrial disputes, and matters referred to it; to define the jurisdiction, powers, and procedure of such Court; to provide for the enforcement of its awards and orders; and for purposes consequent on or incidental to those objects." The object of the Act therefore is to establish a new tribunal, called a Court of Arbitration, for the hearing and determination of industrial disputes and matters referred to it. It is not to constitute a board of trade, or a municipal body with power to make by-laws to regulate trade, but a Court of Arbitration, for hearing and determining industrial disputes and matters referred to it. And it will be found, on examining the language of the Act, that the words used are always words apt to be used in speaking of a tribunal. The functions of the Court are described as "to hear and determine industrial disputes and matters." The

(2) 1 C.L.R., 181, at p. 201.

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manner in which a question within the jurisdiction of the Court is to come before it for its judicial determination is by "reference," which is the term always used in ordinary legal language for describing the process by which individual persons constituting a private tribunal of arbitration submit the matter to it. And the decision of the Court is spoken of as an "award," which is the apt word to describe a decision of a private tribunal of arbitration. All the provisions of the Act are in accordance with this view. The jurisdiction of the Court is conferred and limited by section 26, which provides: "The Court shall have jurisdiction and power:—(a) on reference in pursuance of this Act to hear and determine, according to equity and good conscience—(1) any industrial dispute; or (ii.) any industrial matter referred to it by an industrial union or by the registrar; (iii.) any application under this Act." So that the Court has no power to give an "award order or direction" except in pursuance of a "hearing and determination," which again are words apt for describing a judicial proceeding. Then follow a number of provisions incidental to judicial proceedings. Sec. 28 limits the persons who may invoke the jurisdiction of the Court. Sec. 29 provides that a union or persons entitled to invoke the jurisdiction may make application to the registrar. That is how proceedings are instituted. Sec. 30 provides: "Any party to a reference" (again assuming that it is a proceeding to which there are parties) "may apply for directions." The section goes on to say that "at the hearing . . . . particulars of the claims of the parties may be ordered," with other provisions, showing that the proceedings are judicial proceedings between parties, to be ended by a hearing or determination, which may be an award (which is in the nature of a judgment), order or direction. Then sec. 37 provides: "In any proceeding before it the Court may do all or any of the following things with a view to the enforcement of its award, order or direction." Among other things it may "(1) declare that any practice, regulation, rule, custom, term of agreement, condition of employment, or dealing whatsoever in relation to an industrial matter, shall be a common rule of an industry affected by the proceeding." Before examining this section in detail, I will refer to the opinion expressed by the learned judges of

the Supreme Court upon it. The learned Chief Justice (1) says: "as I understand one part of the argument, it was that the industrial agreement should be made an award before being made a common rule. I do not see how this is possible. There is no provision in the Act for the purpose. An award is the adjudication of arbitrators terminating a dispute; but where there is an agreement *inter partes* there is no dispute to be terminated by arbitration. I do not see any difficulty in the matter. Under sec. 37 of the Act the Court may declare that any regulation, rule, or term of an agreement in relation to an industrial matter shall be a common rule. These words appear to me to expressly include industrial agreements." With great respect I point out that the Act does not say so. The section says that "with a view to the enforcement of its award order or direction," the Court may declare that any regulation, &c., shall be a common rule. I will call attention to that phrase directly. His Honor goes on to say: "Sec. 15 of the Act provides that an industrial agreement shall have the same effect as an award, and the Court shall have full and exclusive jurisdiction in respect thereof." With great respect again, these are not the words of the section, to which I shall call attention later on. If secs. 37 and 15 did provide what the learned Chief Justice thought, then it would be the natural consequence that this prohibition should be refused. Mr. Justice *Owen*, with reference to the same point, says (2): "In the course of the argument we decided that the Industrial Arbitration Court had power under sec. 37 of the Act (1901 No. 59) to make an industrial agreement a common rule, and that the power in that respect of the Court was not limited to the case where an award had been made. That section is peculiarly worded. It says:" [His Honor read the section down to the end of sub-sec. (1).] "It was contended that the words 'with a view to the enforcement of its award' implied that it was only after an award had been made that the Court could make a common rule for the purpose of enforcing its award; but that appeared to us to be too narrow an interpretation of the Act." The reasons why they came to this conclusion are not there clearly stated. It

(1) (1904) 4 S.R. (N.S.W.), 384, at pp. 387-8.

(2) (1904) 4 S.R. (N.S.W.), 384, at p. 392.

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appears, however, that on the same day when the reserved judgment was given the Court had already given judgment in the case of *Ex parte Leahy* (1), in which case also they had under consideration the provisions of sec. 37. They were examining sec. 37 especially with regard to one provision of it, namely: "The Court may, with a view to the enforcement of its award order or direction, order . . . . the cancellation of the registration of an industrial union." They were examining it to see whether the words "with a view to the enforcement, &c.," limited the power of the Court to order the cancellation of an industrial union. That was the question immediately before them, and they thought that the words did not apply to that limb of the section or to some others, because they thought the powers in question were not in their nature capable of being exercised for such a purpose. Amongst those which they thought incapable of such exercise was the power to make a common rule, and the power of cancellation. They therefore read the section, as to those powers, without these words. This is what the learned Chief Justice said (2): "On reading that section it will be seen that of its eight sub-clauses there are only three—the fourth, seventh and eighth—which directly refer to the enforcement of an award, order or direction. Of the remaining five, the first, second, and third relate to the power of the Court to declare and enforce a common rule. The fifth deals with the cancellation of registration of an industrial union, and the sixth gives the Court power to expel any member from an industrial union. I am of opinion that the words in the 37th section, 'with a view to the enforcement of its award, order or direction,' must be read as being confined to those clauses of the section which deal with the enforcement of an award &c.; but leave the preceding words of the section to apply generally to the five clauses of the section, which do not deal with the enforcement of awards, &c." If the section is read with these words left out, there would, no doubt, be a general power in the Court to make a common rule whenever it thought fit. But we cannot leave out words in a Statute, if a sensible meaning can be given to them. Our business is to construe the law,

(1) (1904) 4 S.R. (N.S.W.), 401.
(2) (1904) 4 S.R. (N.S.W.), 401, at p. 412.

not to make it. *Primâ facie* the meaning of the words is plain, "in any proceedings before it the Court may do all or any of the following things with a view to the enforcement of its award, order or direction." In my opinion all the powers enumerated in sec. 37 are capable of being exercised for that purpose. The words therefore cannot be rejected as to any of them. And surely, when power is given to take certain steps for the purpose of enforcing a judgment or judicial determination, it is assumed that there is in existence some judgment or judicial determination to be enforced. How, in the nature of things, can you enforce a non-existing judgment? On that point I will read a few words from the judgment of *Collins*, L.J. (cited by this Court in *Maloney* v. *McEacharn*), (1), in *McIntosh* v. *Simpkins* (2). That was a case in which a Court of limited jurisdiction, as the Court of Arbitration is, had taken a step, as the Court of Appeal thought, without complying with a statutory condition. "We are not entitled to approach this case as if there were no provision enacting that an affidavit in a particular form should be the foundation of the proceedings. To say that the question is merely, and apart from the statutory conditions, whether a *primâ facie* case is made out would be to strike out these safeguards in the case of a debtor against whom it is proposed to put in force the provisions of the *Debtor's Act*, 1869." So here, we are not entitled to approach this case as if there were no provision that this power of making a common rule was conferred on the Court "with a view to the enforcement of its award, order or direction." Nor can we say that the question is whether apart from the condition a case can be made out for a common rule.

The reference here to a safeguard leads naturally to the inquiry whether this provision, that there should be an award as the foundation of a common rule, is or is not a statutory safeguard provided by the legislature. Now this Act confers enormous powers for the regulation of trade, and probably the greatest of all is the power to declare a common rule. If the view is correct that a common rule can only be declared as ancillary to an award or judicial determination, there is at least this safeguard provided by the legislature, that a common rule cannot be enforced, govern-

(1) 1 C.L.R., 77. (2) (1901) 1 K.B., 487, at p. 491.

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ing the whole community or a considerable part of it, without the previous sanction of a judicial determination by a tribunal constituted for the purpose of deciding it, and constituted in a manner which is supposed to render it specially competent for that purpose. There is no special provision contained in the Act that notice shall be given to any one before the making of a common rule, but the legislature has reposed the largest confidence in the Court, and amongst other things, it says that, if the Court in the course of a judicial determination has made an award, order or direction, and thinks it necessary for the enforcement of the award—that is I take it, in order to make the award of practical effect—it may declare a common rule. But the safeguard is that the judicial mind of the Court has been applied to the subject before it exercises that extraordinary power. No doubt the Court does generally require public notice to be given before strangers are to be made subject to its decree, but the Act does not expressly require it to be done. Nor does the Act prescribe in what way or under what circumstances the Court is to give its judicial determination, but it has apparently contemplated that it would be a real judicial determination, and not merely a consent order. Indeed, although a judgment made by consent is just as valid as a judgment made in any other way, if not obtained by fraud, it may, I think, be fairly inferred that the legislature supposed and expected that the Court, in making an award, to which effect might be given upon persons not parties to the litigation, would only exercise its power after a real judicial determination, which, in point of form, made an essential preliminary. Moreover, the provision is not in terms that the Court may make a code for the government of any industry or industries. The words are: "declare that any practice, regulation, rule, custom, term of agreement, condition of employment, or dealing whatsoever in relation to an industrial matter, shall be a common rule of an industry affected by the proceeding." It was suggested in the Supreme Court that a common rule is not a proceeding in the nature or form of an award. In making an award the Court is dealing with a contest between parties. As between them, it may appear reasonable to the Court that a particular term, condition, or custom of employment ought to be imposed, and that it would be a reasonable thing to impose it as

between them; but it might also be manifest, when making an award or after making it, that if the terms were imposed upon the particular employers who were parties to the award, and not upon others engaged in the same business in competition with them, the competition of those not bound by the same restrictions would be unfair. Therefore, in order to enable the Court to do complete justice in any case, that is, to make an award fair to the parties, power is given to extend to the whole of the industry any condition of that sort. It is very likely that the Court, having power to extend one term, may extend all—though that does not seem to have been the intention of the legislature, but it may be within the words of the Act—and may have power to regulate the whole trade in accordance with the terms of a particular award. But that is not a matter which we have to decide now. The question is whether the foundation of the power to declare a common rule is not a previous judicial determination. It is asked, why should it be? It is no argument to say, why should it be, if the legislature has said that it shall be. But, if the question is asked, the answer is obvious. The safeguard to the community at large is that a judicial body has applied its mind judicially to the question in the presence of the parties interested in setting up the opposite view, and has come to a conclusion on the subject. That is the great protection to the public. If the same power existed with regard to a private agreement, that safeguard would be entirely gone. Any industrial union, however small, might make a bargain with its employers, perhaps in a very small way of business, and there would be absolutely no safeguard as to the terms of the agreement, and then application might be made to the Court, which, without any judgment of its own, might make the terms of the agreement a common rule. The question is whether the legislature has not imposed this safeguard before the Court can declare a common rule. These reasons seem to me and to my learned brothers to be absolutely conclusive to show that literal effect not only can, but ought, to be given to the statute, and that it is only with a view to the enforcement of an award that the Court can declare a common rule. If that is the meaning of the Act, the Court cannot, in the absence of that foundation, institute a proceeding to which the whole world at large would be parties for

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the purpose of declaring a common rule. I am unable to see any distinction in principle between that and the cases mentioned in the course of the argument, where the Matrimonial Causes Court has jurisdiction to modify a settlement after a decree for dissolution of marriage. In doing so it affects the rights of parties other than the parties to the suit. It is a special power given by the statute to affect the rights of persons not parties to the suit, but that power cannot be exercised without the existence of the condition prescribed as the foundation of the proceeding, that is, the judgment. So here, in the absence of an award, judgment, or judicial determination, there is no jurisdiction to make a common rule. It is said however that these are idle words, because it may be a friendly suit. The condition imposed by the legislature is that there shall be a judgment. No Court can impose upon the Arbitration Court the manner in which it shall perform its duties. If the Court is satisfied with consent between the parties before it, it may, if it thinks fit, exercise its judicial mind. That course is open to it, and no Court can interfere with it. But the legislature, I think, contemplated that it should be a real judgment, and not a merely formal one. That, however, is not a matter to give rise to interference by the Supreme Court. But although this is so, the position with regard to an industrial agreement is not the same. I have quoted the judgment of the learned Chief Justice on this point. He says that sec. 15 provides that an industrial agreement shall have the same effect as an award. The words of sec. 15 are—"An industrial agreement as between the parties bound by the same shall have the same effect as an award." It is impossible to leave out the words "as between the parties bound by the same." Secs. 13 to 15 contain a code as to industrial agreements. They provide that an industrial union may make an agreement with another industrial union or with an employer for a specified term, and the agreement must be filed. Then it becomes an industrial agreement, and may be rescinded or varied. The second part of sec. 14 goes on to describe the parties on whom an industrial agreement is binding. Having given the definition at considerable length, the Act goes on to say that an industrial agreement "as between the parties bound by the same" shall have certain effects.

If you strike out these words, which is an extraordinary mode of construction, no effect is given to the concluding part of the preceding section, which is the foundation and definition of these words, and is devoted to defining the words "parties bound by the same." The Supreme Court rejects these words altogether and their definition. When an industrial agreement is entered into, the obligations of it are not imposed upon the parties against their will, but by their own agreement and assent. When the Act says that it may be enforced as between themselves, it simply means that the terms to which they have agreed by a registered agreement may be enforced as between them, but nobody else is bound by it. But an award also can only be enforced, *qua* award, as between the parties to the litigation. Yet, it is said, a common rule can be made after an award. That is true. The parties to the award are bound by it, but a common rule affects persons not parties to the award; and it is suggested that because an industrial agreement also binds the parties to it, who are expressly defined, therefore it also may be, like an award, enforced against others not parties to it. This seems to be a singular argument. It is said that there will be just as much difficulty in carrying out the terms of an industrial agreement as of an award, because it might contain conditions which expose the employer to great competition. But the answer is—then why make the agreement? The parties can alter it or rescind it. That is a matter entirely in the hands of the parties. If they make an agreement which proves to be inconvenient, they are allowed to rescind it. That is no reason why an agreement should be said to be on the same footing as an award. The president of the Arbitration Court thought it would be inconvenient if the Court could not have the advantage of an amicable settlement between the parties. That, however, is a matter for the legislature, and, if the Court is to be able to take advantage of it, they must be placed in that position by Parliament.

For these reasons it seems to me that it is impossible to say that a mere industrial agreement, which has not been made an award of the Court, may be enforced by making it a common rule without rejecting from sec. 15 the words "as between the parties bound by the same." The enforcement by means of a common rule is not the enforcement of an agreement between the

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parties at all. It is an enforcement against other persons, strangers to the agreement, and is an extension of the agreement to other persons. That is sufficient, of course, to dispose of the case.

But there is another point I should advert to. It is contended by the appellants that, even if an agreement could be made the foundation of a common rule, it must at least be an agreement capable of enforcement. It is provided by sec. 15 that industrial agreements, "as between the parties bound by the same shall have the same effect and may be enforced in the same way as an award of the Court of Arbitration, and the Court shall have full and exclusive jurisdiction in respect thereof." But how can an industrial agreement, incapable of being enforced, be enforced? It is a contradiction in terms. The present agreement is not capable of enforcement. No party to it can take proceedings against the other parties, and therefore it cannot be enforced.

For these reasons it appears to me that the Arbitration Court has asserted a jurisdiction which the legislature did not intend to give it, and by means of a short cut, and without first providing the statutory foundation prescribed as what I may call the safeguard by the Act, has endeavoured to impose obligations upon persons over whom it had no authority.

Appeal allowed with costs against all respondents except the members of the Arbitration Court. Order of Supreme Court discharging Rule Nisi discharged with costs. Rule absolute for prohibition with costs.

Solicitors for appellants, *Westgarth, Nathan & Co.*

Solicitors for respondents, Shop Assistants Union, *Brown & Beeby.*

C. A. W.