[HIGH COURT OF AUSTRALIA.]

RICHARD CLANCY . . . . . APPELLANT;

AND

BUTCHERS' SHOP EMPLOYES UNION, JAMES JOHN NEWS SECRETARY,

AND

THE PRESIDENT AND MEMBERS OF THE COURT OF ARBITRATION, NEW SOUTH WALES . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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March 18, 21, 22, 28.

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

Industrial Arbitration Act (*No.* 59 *of* 1901), *ss.* 2, 13, 15, 26, 28, 32—*Industrial agreement—Industrial matter—Industry—Work done or to be done—Jurisdiction of Arbitration Court—Excess of jurisdiction—Prohibition—Shops—Hours of closing—Keeping open after hour agreed upon—Early Closing Act* (*No.* 38 *of* 1899), *s.* 1.

Notwithstanding sec. 32 of the *Industrial Arbitration Act* prohibition will lie to the Court of Arbitration from the Supreme Court if it exceeds its jurisdiction.

Ex parte the Caterers and Restaurant Keepers Association, (1903) 3 S.R. (N.S.W.), 19, so far as it decided that prohibition would lie to the Court of Arbitration, approved.

The term "industrial matters," in sec. 2, includes only matters that directly affect the work actually done or provided by the employer to be done by the employé, or that relate to the mutual rights and privileges of employer and employé. It does not extend to all matters that indirectly affect or relate to an industry.

The control or regulation of an employer's business after the hour at which the employés have left the place of employment for the day, as by making him close his shop to the public, is not an "industrial matter" within the meaning of sec. 2, and it does not become one by being treated as such in an agreement made between an union of employers and an union of employés for the purpose of settling an industrial dispute.

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The Court of Arbitration has no jurisdiction to make an award or to enforce an agreement dealing with matters that do not come within the definition of "industrial matters" in sec. 2.

Decision of the Supreme Court, (1903) 3 S.R. (N.S.W.), 592, reversed.

APPEAL from a decision of the Supreme Court, (1903) 3 S.R., (N.S.W.), 592.

The appellant was a member of the Master Butchers and Live Stock Buyers Association, an industrial union registered under the *Industrial Arbitration Act* 1901. Some time before February, 1903, a dispute arose between the association and the respondent union, which was also registered under the Act, with regard to the conditions and terms of employment in the trade. This dispute having been referred to, and being pending in, the Court of Arbitration, an agreement purporting to be an industrial agreement under the Act was entered into between the respondent union and the association covering all the points in dispute, and this agreement was subsequently made an award of the Court of Arbitration, and made a common rule, binding upon the appellant and all other persons engaged in the trade within a certain area. While the reference to the Court was pending, the appellant sent in his resignation to the secretary of his association, but this was treated as having no effect, by virtue of sec. 9 of the Act. Clause 4 of the agreement provided that "all shops close at 5 p.m. on Mondays, Tuesdays, Thursdays and Fridays; at 1 p.m. on Wednesdays, and at 9 p.m. on Saturdays." Many other matters were dealt with in other clauses of the agreement, but no penalty was fixed for a breach of any of the terms or conditions by the parties. The Court of Arbitration, however, in the award which adopted and embodied the agreement, and made it a common rule, directed that certain penalties should be paid for breach of the award by any person upon whom it was made binding, and provided procedure for the recovery of the penalties. In the case of a breach by members of the Masters' Association the penalty was to be a sum not exceeding £5, to be paid to the respondent union, or to its registered officer. On 3rd June, 1903, a summons was taken out by the respondents calling upon the appellant to show cause before the Arbitration Court why he should not pay a penalty of £5 for a breach of the award, in that he had contravened

clause 4 of the agreement embodied in the award by keeping his shop open until 9.30 p.m. on a Saturday. The summons came on for hearing before the Court on 27th July, and it was contended on behalf of the appellant that the Court had no jurisdiction to enforce the award, in that it limited the right of a butcher to keep his shop open within the limits of time allowed by the *Early Closing Act of* 1899, and that the matter dealt with in clause 4 of the agreement upon which the award was based was not an industrial matter, and the Court had jurisdiction in reference to industrial matters only. Under the *Early Closing Act* the time at which the appellant was bound to close his shop on Saturday was 10 p.m. On 4th August the President, *Cohen*, J., delivered judgment imposing a penalty of £2 10s. in respect of each breach, with costs, to be paid by a certain date to the respondent News.

On 10th August, 1903, a Rule Nisi was obtained by the appellant for a prohibition restraining the respondent union and the members of the Arbitration Court from further proceeding upon the order of 4th August inflicting the penalty upon the appellant, on the grounds (1) that the order of 4th August and the award of 3rd February, 1903, dealt with a matter that was not an industrial matter; (2) that the order and award were in conflict with the *Early Closing Act of* 1899.

On 6th November the Supreme Court (consisting of *Stephen*, A.C.J., *Owen*, J., and *Pring*, J.), heard argument on the motion to make the Rule absolute, and on 4th December delivered judgment discharging the Rule Nisi with costs, (*Pring*, J., dissenting). The judgments are reported in (1903) 3 S.R. (N.S.W.), 592.

The Supreme Court had held in a previous case—*Ex parte Caterers and Restaurant Keepers Association*, (1903) 3 S.R. (N.S.W.), 19—that prohibition would lie to the Court of Arbitration if it acted in excess of jurisdiction, and the point was therefore not raised before the former Court in this case.

Gordon, K.C. (*Wade* with him), for appellant. The Court of Arbitration had no jurisdiction to make the order complained of. It has jurisdiction only to deal with "industrial matters" as defined by sec. 2, and the matter dealt with in clause 4 of the agreement does not come within that definition. The President

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of the Court virtually decided that it was not an industrial matter. In his judgment, at page 388, he expressed the opinion that the provisions of the Act "covered every condition of employment which mutually and directly affects the relation of employer and employed," and proceeded to say, "Speaking for myself, I am unable to see how these mutual relations are affected, if the employé is released from work whilst the shop in which he is employed may be open." In that view, the matter could not be made a common rule binding upon all master butchers. But he thought that this case was put on a different footing by the fact that the appellant was a party to an agreement by which he gave up certain rights, and it would seem that the real reason for his decision enforcing the award was that he regarded the proceeding rather as the enforcement of an agreement than of a common rule. As to that, it is submitted that the appellant was not an assenting party, because he sent in his resignation before the award, and though sec. 9 of the Act rendered his resignation ineffectual, the award was really made *in invitum*. At any rate, he was not a member at the time of the breach. But, apart from this, he could not be bound by an agreement or award dealing with matters over which the Court had no jurisdiction. If the award was in excess of jurisdiction, the fact that appellant was a party to the agreement upon which the award was based can make no difference in this case. The penalty was claimed in respect of the breach of an award, as is clear from the summons and the accompanying affidavit, but the decision of the Arbitration Court was based upon the fact that appellant was a party to the agreement. But the Court, upon that summons, had no jurisdiction to deal with anything except a breach of the award. Therefore, whether the agreement was enforceable by that Court or not (and in this connection it is noticeable that there was no provision in the agreement for any penalty for breach of the conditions), if the award was in excess of jurisdiction no order could be made imposing penalties for its breach, and the appellant is entitled to a writ of prohibition. I contend that the subject-matter of clause 4 of the agreement is not an industrial matter, and that, therefore, the Court had no jurisdiction to deal with it in any way, and certainly not to make it part of an award and enforce it against the appellant. In

Sylvester's Case, reported in (1903) A.R., 385, the President held that this matter could not be made the subject of a common rule, and his judgment in this case shows that he was even then of the opinion that it was not an industrial matter, for he says that masters who are members of the association will be bound by the award making the clause a common rule, but that those who are not members will not be bound, and will be able to keep their shops open till 6 p.m., the hour allowed by the *Early Closing Act*.

[O'CONNOR, J.—The question whether the appellant is bound by the agreement or not depends upon whether the parties to it had authority to bind him, and they only have authority to bind him upon an industrial matter.]

The whole case turns upon that. In considering the meaning of the term "industrial matters" I refer first to sec. 13 of the Act. That section shows the meaning of the words "industrial agreement," that it is an "agreement in writing relating to any industrial matters." Clearly therefore no other matters may be made the subject of an industrial agreement. Sec. 2 defines "industrial matters" as "matters or things affecting or relating to work done or to be done, or the privileges, rights or duties of employers or employés in any industry," with certain exceptions, and continues, "includes all matters relating to (*a*) wages, allowances," &c.; "(*b*) the hours of employment, sex, age," &c.; "(*c*) the employment of children," &c. This clause does not come within any of these groups. If it provided that the shops were to be shut at 9 p.m., only so far as the employés are concerned, it might come within the definition, but the clause does not say that, and even if it had said so there was no allegation or any evidence that employés were in the shop after that hour. On the other hand, taking the clause to mean what it says, that shops are to be closed whether employés are kept there or not, it is not an industrial matter within the meaning of the Act. Such a matter must have some reference to the mutual relationship of employer and employé. The definition of "industry" in the same section further strengthens this contention. After the relation of employer and employé has ceased to exist it cannot be said that the "work in the industry" as there defined, continues, and therefore the Court has no jurisdiction to interfere with the actions of employer

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or employé after that time. Otherwise it would be possible for the Court to prevent an employer from doing anything at all in his business after hours, even with his shop shut. The whole purview of the Act is the regulation of the actual conditions of employment and the relationship of employer and employé as such.

[GRIFFITH, C.J.—The learned President apparently thought that this was not a matter which could have been made the subject of a common rule.]

That is clear both from his judgment in this case and in *Sylvester's Case* (1903, A.R., 390). In the latter case he held that although there was a common rule, Sylvester was not bound by it, because he had not been a party to the agreement. As far as the rights under the agreement are concerned, whatever they were, they were not within the jurisdiction of the Arbitration Court. Sec. 26 strictly limits the Court's jurisdiction to industrial matters, and by sec. 32 there is no appeal from its decisions if acting within its jurisdiction. Sec. 37 provides that there can be no common rule except as to industrial matters. The Supreme Court really decided against the appellant on the ground of agreement, as appears from the judgment of *Owen*, J., 1903, 3 S.R. (N.S.W.), 592, at p. 596.

[BARTON, J.—A person may bind himself by an agreement and be liable in some way for a breach of that agreement in some Court or other, but unless the particular undertaking, of which enforcement is sought, is an industrial matter, the Court of Arbitration has no jurisdiction to enforce it against him.]

[O'CONNOR, J.—The ground of this decision seems to be that, though this is not strictly an industrial matter, still the parties treated it as such on the ground that the quantum of work for the employés might be affected by it, and that, therefore, it does relate to work done or to be done in an industry.]

That is practically allowing the parties to extend the jurisdiction of the Court by agreement. That cannot be done. There are many matters which, in some way, affect an industry, but are not within the definition of industrial matters. That definition only includes matters which affect or relate to the industry in certain ways, and clause 4 does not come within that class. A

consideration of the scope and intention of the whole Act shows clearly that it was never intended to give the Court jurisdiction to make awards which would interfere with the businesses of employers beyond the extent necessary for the purpose of regulating their relations with their employés.

Piddington, for the respondent union and J.J. News. Prohibition will not lie from the Supreme Court to the Court of Arbitration. We rely on secs. 32 and 41. These sections make it clear that the legislature intended that the Court of Arbitration should be independent of the other Courts of the realm. The former can only be taken to mean that the legislature took the risk attached to the establishment of a Court responsible to nobody but themselves. Although the words in the first part of the section that "proceedings in the Court shall not be removable to any other Court by *certiorari* or otherwise," have been held not to oust the jurisdiction of the superior Court to issue a writ of prohibition where the statutory Court has acted in excess of or without jurisdiction, there are words used later on in the section which are new and never have been used in any Statute. These words must be given their full meaning, and that cannot be done if the Court holds that prohibition will lie.

[GRIFFITH, C.J.—Suppose the Court entertained an action for defamation?]

That would be an extreme case. It must be assumed that the Court would not attempt to wilfully transgress the limits of its jurisdiction. It is essential that a Court dealing with such matters as come before the Arbitration Court should not be subject to prohibition. The delay of appeals would interfere too seriously with the businesses concerned in its decisions.

[BARTON, J.—But surely there must be some way of preventing it from arrogating to itself the jurisdictions of all other Courts.]

In the *Caterers' Case*, (1903) 3 S.R. (N.S.W.), 19, the Acting Chief Justice, in holding that prohibition would lie, made a distinction between preventing the Court from making an order and attacking an order already made. The legislature could not have used words more appropriate for conferring upon the Court absolute independence of the control of all other Courts. Sec. 39 even gives it power over other Courts.

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[GRIFFITH, C.J.—On your view, what is there to prevent that Court from going so far as to stay proceedings in the Supreme Court?]

That is very unlikely, and, whatever risk there is, the legislature has restricted to six years, when the Court expires by effluxion of time. The word "challenged" has no technical meaning, but I contend for its common meaning.

[O'CONNOR, J.—Must it not be taken that in the case of all these words there is an implied limitation that the Court keeps within its jurisdiction?]

By this section, the legislature has declared its intention clearly. It has power to control the jurisdiction of the Supreme Court, and, therefore, to appoint a statutory Court, which the Supreme Court shall not prohibit. If the words used here do not effect this, no words ever can do so. To apply for a writ of prohibition is to "call in question" within the meaning of the section. They are not technical words, and must have their natural meaning. On the appellants' contention the words are superfluity. Words in a Statute are not to be treated as superfluous unless it is perfectly clear that they are. Again, that a writ of prohibition should lie to the Court is inconsistent with sec. 41. Under that section the Court may issue a mandamus or prohibition to the Registrar of the Court. The result, therefore, might be that the Supreme Court could issue a prohibition directed to the Court of Arbitration and Registrar, to prohibit them from doing a certain thing, and at the same time the Court of Arbitration could issue a mandamus to its Registrar commanding him to do that very thing. There would then be a conflict of authority. It cannot be supposed that the legislature intended that such a conflict as this should be possible.

[GRIFFITH, C.J.—Is there any judicial duty imposed upon the Registrar that would make prohibition applicable?]

Yes, by secs. 4 and 8. In *R.* v. *Whitmarsh*, 14 Q.B., 803; 15 Q.B., 600, mandamus was issued to the Registrar of a company to compel him to register shares. [On this point he referred also to *Shortt on Mandamus and Prohibition*, 1887 ed., p. 256].

[O'CONNOR, J.—But there would still be the same question of jurisdiction. If the matter was outside the jurisdiction of the President, his writ would be futile.]

Again, from the policy of the Act shown in the preamble and sec. 34, it is clear that the legislature intended to make the Court independent. The intention was to put an end to the natural right to strike or lockout, and for that to substitute the arbitrament of the Court as the only way to secure industrial peace. That peace can never be secured if the Court's decision can be attacked. The delay that would inevitably follow otherwise would defeat the intention of the Act by making all uncertain. A single Judge may make an order for prohibition at any time, and he might make such an order and compel the parties to wait until the Full Court could review his decision, and in the meantime the people concerned would be uncertain as to their position. This might be disastrous to business.

[BARTON, J.—It may be admitted that the policy of the Act was to protect the Court from interference in dealing with all matters entrusted to it, but what is there in the Act to show that power was given to it over anything but industrial matters ?]

They are given power to decide what are industrial matters.

[BARTON, J.—Then no line can be drawn round their jurisdiction.]

That is a risk that the legislature has deliberately taken. A Supreme Court Judge is made President of the Court. There is no precedent of a prohibition to a Supreme Court Judge, except *Ex parte Cowan*, 3 B. & Ald., 123.

[GRIFFITH, C.J.—Yes. In England it has been the practice for years to issue prohibition to the Railway Commissioners, one of whom is a Judge of the High Court of Judicature.]

[BARTON, J.—The appointment of a Supreme Court Judge is merely for the purpose of securing a fit and proper person.]

[O'CONNOR, J.—As soon as appointed he loses his identity as a Judge and becomes President of the Court.]

On the main point. This is an industrial matter, and can be made the subject of industrial agreement. So long as it affects one side, employer or employé, in relation to their work, it is immaterial whether it concerns the other side in that way. A master has the right or privilege by Common Law to carry on his business as long as he pleases. As was put by *Cohen*, J., the masters gave up this right which the *Early Closing Act* had

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allowed them, of keeping shops open until 6 p.m., and so it must be taken to be a matter affecting their industry.

[GRIFFITH, C.J.—But surely the matter must be one affecting the mutual relationship of employer and employé, not one affecting one side only.]

The agreement stamps it as a matter affecting both sides. But assuming for the moment that it is not an industrial matter in itself, it is made so by the agreement. There are mutual concessions, and the masters get an exchange of something that is industrial for something that in itself might be extra-industrial; but the fact of its being the subject of agreement is proof that it is in the nature of an industrial matter. It is part of the consideration, and bears upon the industry.

[GRIFFITH, C.J.—But, if it is only by virtue of the agreement that it becomes an industrial matter, how can the appellant be bound, since the union have only authority to bind him upon matters that are industrial, and have no authority to embrace any other matters in the agreement, so as to make them "industrial."]

The unions regard closing of shops as an industrial matter, and who is to say that they are wrong? In New Zealand that view is taken, and that was the basis of the decision in *In re Sylvester*, (1903) A.R., 390. The bulk of the agreement dealt with matters admittedly industrial, and the inclusion of others does not make the whole invalid. It is sufficient that the consideration for the concession is industrial. There is nothing to restrict agreements absolutely to industrial matters. Moreover, the union is negotiating as the agent of the members, and therefore, when acting in their interests can bind them even upon matters outside their express authority. But apart from the agreement the closing of shops is an industrial matter in itself in this way. If the conditions of trade are made uniform it is possible for employers as a whole to give better terms to employés as a whole; see *Ex parte Walker*, (1903) A.R., 207. So if there is a restriction upon some butchers from keeping their shops open after 5 p.m., the Court, on the ground that the whole trade must be affected, and in order to prevent others who are not subject to this restriction from profiting by the loss of those who are, and so defeating the whole purpose of the arrangement, may deal

with the matter as industrial, and make the restriction binding upon all employers. It therefore affects the privileges or rights of employers, and the work done or to be done in the industry by the employés. It is immaterial whether rights and privileges affected are rights and privileges in relation to employés, so long as they are "in the industry."

[GRIFFITH, C.J.—Your argument goes to this extent, that the control of every matter relating to an industry in any way is within the power conferred by the Act. The Court could say that butchers must deal for cash and not on credit.]

Without conceding as much as that, I contend that the evidence in this case showed that the matter closely affected the industry, because it was proved that there was dissension between employers on this very question of closing shops.

[GRIFFITH, C.J.—But does not the use of the word "employer" in the section connote the existence of employés, and the relationship of one class to the other?]

Yes, in a sense. But a man may be an employé whether actually engaged in an employment or not—as for instance, when on a holiday. Sec. 36 seems to imply that a person may be an employé within the meaning of the Act when he is not actually engaged in work.

Again, this is a matter or thing affecting or relating to "work done or to be done." It is most important for the Court of Arbitration to decide whether the men who have contracted with the employers shall have all the work that the employers can give them. (See judgment of *Owen*, J., on the "quantum of work" available.) Difficulties might easily arise on this point, and the peace of the industry be disturbed thereby. For instance, the employers might think fit to employ other men to do the work remaining after the ordinary hour for ceasing work. "Wages and allowances" would also be affected. The wages fixed by the agreement are arrived at on the understanding that the employés who are parties to it shall get all the work that the employers have to give. Again it affects the "modes, terms, and conditions of employment." It is a condition of employment, not of necessity, but as a matter of fact. It is a more favourable condition for the employé that the shops be closed at 5 than later.

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[GRIFFITH, C.J.—How does it affect his condition if he has left the shop?]

That argument was used against the provision in the *Early Closing Act* (No. 38 of 1899), that all shops should be closed at a certain hour. The object of that Act was not to close the shops, but to limit the hours of labour of shop assistants; see *Collman* v. *Roberts*, (1896) 1 Q.B., 457. The legislature considered that this could only be effected by compelling all shops to close. It is therefore a guarantee for the employés that their hours of labour will not be lengthened. If shops were allowed to remain open, it would soon happen that assistants would be found to work after hours. The shopkeepers employing them would thus gain an advantage over others who faithfully kept the spirit of the law, and the object of the Act would be defeated. It is the same with this clause in the agreement. The union has adopted the same means as the legislature to obtain the same end—namely, fixed hours of labour. The same policy has been adopted in New Zealand, and a similar term incorporated in the agreement. (*Dunedin Butchers' Case*, vol. II. of *Awards, Recommendations, Agreements*, &c., made under the *Industrial Conciliation and Arbitration Act*, N.Z., p. 262.) It is clear, therefore, that in the strictest sense this is an industrial matter. At any rate the Court of Arbitration was not clearly wrong in holding that it was an industrial matter, and, if this Court is of opinion that it is only doubtful whether the decision was wrong, it will not grant prohibition. (*Taylor* v. *Nicholls*, L.R., 1 C.P.D., 242, *per Brett*, J.)

Holman followed. This agreement was within the authority of the appellant's union to make. *Primâ facie* every agreement made between the unions as to the conditions of trade is industrial. If amongst a body of industrial matters you find something not industrial, the agreement is still good as an industrial agreement. Otherwise the word "exclusively" would have to be read into the Act after "relating." The question is, which part of the agreement gives character to the whole, the industrial or non-industrial? It is clear from sec. 13 that the inclusion of an extra-industrial matter does not make the whole agreement non-industrial, but that

the inclusion of industrial matter makes the whole industrial. If the agreement essentially and substantially relates to industrial matters, the incidental inclusion of non-industrial matters does not alter its general character. I admit that if the non-industrial matter could be severed from the rest, then that part should not be dealt with by the Court, but I contend that if the agreement is not so severable, then the whole must stand.

[BARTON, J.—Can the Court cover more ground by enforcing an industrial agreement than it could by merely making an award independent of agreement ?]

No, because the same principle would apply to an award as to an agreement. The mere presence of non-industrial matters in it would not necessarily invalidate it.

[GRIFFITH, C.J.—You must support this as an award, not as an agreement. It is a sort of consent decree. Consent cannot give jurisdiction. If you had sought to enforce this as an agreement under sec. 15, the procedure would have been different, and the redress granted also different.]

By sec. 37 any term of an agreement can be made a common rule. Evidently, therefore, it treats the agreement as still subsisting, even at the time of and after the award. There is no merger of agreement in award.

[BARTON, J.—Do not the whole rights of the parties in respect to this matter now rest upon the award, as they have exercised their option and proceeded for breach of award ?]

[GRIFFITH, C.J.—You could not have taken this proceeding but for the award, so that the whole question must turn on the validity of the award.]

But the agreement affects the matter still, not so as to give jurisdiction by consent, but because, by the terms of the Act, matters dealt with by parties in an industrial agreement become industrial matters. This clause is inserted as a sort of guarantee against extending the hours of labour. The employés say that if the shop is kept open they cannot be sure that the employers will keep within the prescribed hours of employment. The clause is on the same footing as that prohibiting employés from lodging with employers. Such a guarantee clearly relates to the "work done or to be done," and to the "rights and privileges" of

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employers and employés. It must therefore be treated as an "industrial matter" within the meaning of the Act.

Delohery, for the Court of Arbitration. I do not contend that the Supreme Court has no power to prohibit. The Court of Arbitration is a statutory Court, and must keep within the jurisdiction conferred upon it by the Statute. There can be no dispute that, where an inferior Court acts in excess of jurisdiction, it encroaches upon the Crown prerogative, and can be restrained by the High Court of Judicature; *Worthington* v. *Jeffries*, 32 L.T., 606; L.R. 10 C.P., 379; *Lord Mayor of London* v. *Cox*, L.R. 2 H. of L., 239. This right of the higher Court to interfere can only be taken away by express words or necessary implication, and that is not the case here; *Jacobs* v. *Brett*, 32 L.T., 522; L.R. 20 Eq., 1; *Bridge* v. *Branch*, L.R. 1 C.P.D., 633. This is an industrial matter. "Industry," as defined by sec. 2, means "business, &c.," "in which persons are employed for hire or reward." The industry does not cease to exist when the employés have left the place of employment, but continues to exist as such, even if a man carries on the work by himself without his employés. The Act therefore contemplates industry as something continuing or persisting, whether the employés are on the premises at the time or not. An "industrial matter" is a matter relating to work done or to be done in any industry. Any work therefore done or to be done in any industry is included. Taking the industry to continue after the cessation of work by employés, the work done by the appellant in selling, is work done or to be done in the industry, and is included in the definition. It is immaterial that it is done by the employer himself.

[GRIFFITH, C.J.—"Work" may mean only work done or to be done by employés.]

A consideration of the whole section shows that that is not so. Again, "privileges or rights" mean privileges or rights in the industry, even if they are enjoyed by employers or employés merely as men and not as employers or employés. An employer may have a privilege or a right in an industry, though it is not a privilege or a right as against his employés. There are no

words in the Act to limit the meaning to privileges and rights enjoyed by employer *quâ* employer, and employé *quâ* employé. Every employer has by law the privilege or right to keep his place of business open until the hour fixed by the *Early Closing Act*, and therefore clause 4, as it affects this privilege or right, relates to an industrial matter, and can be enforced by the Court of Arbitration. As to the *Early Closing Act*, this Court is asked to say how far the Court of Arbitration may go in dealing with the hours of labour without coming into conflict with that Act.

Gordon, K.C., in reply. The Supreme Court has power to grant prohibition to the Court of Arbitration. In *Ex parte Bradlaugh*, L.R. 3 Q.B.D., 509, it was held that sec. 49 of 2 & 3 Vic., c. 71, taking away the right to *certiorari*, did not apply to the case of the inferior Court acting altogether without jurisdiction. [He referred also to *Mayor of London* v. *Cox*, L.R. 2 H. of L., 239, judgment of *Willes*, J., at p. 254; *Worthington* v. *Jeffries*, L.R. 10 C.P., 379; and to the judgment of *Stephen*, J., in *Ex parte Caterers and Restaurant Keepers Association*, (1903) 3 S.R. (N.S.W.), 19, at p. 23].

[GRIFFITH, C.J., referred to *Hardcastle on Interpretation of Statutes*, 307, 308].

As to the contention that owing to sec. 41 conflicting writs might be directed to the Registrar, there could be no such conflict, because the writ of the Supreme Court would go to the President and Members, not to the Registrar. The question whether this is an industrial matter has been complicated by the confusion of the rights of the parties under the agreement with the jurisdiction of the Court to make an award in respect of it. For the purposes of this case the agreement need not be considered at all. It has been swept away by the award. If that is invalid, the liability of the parties on other grounds is immaterial. The award is intended to bind not only parties to the agreement but all persons mentioned in it. The clause was made a common rule. If it is not good as a common rule, it is because it deals with matters outside the jurisdiction of the Court, and therefore the question of party or non-party does not arise. It cannot be contended that the agreement takes its colour from the industrial matters

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contained in it. It is either wholly industrial, in which case it comes within the jurisdiction of the Court, or *not* wholly industrial, in which case the Court has no power to deal with it. The fact that the non-industrial ingredient is subsidiary or incidental can make no difference. It should not be there at all. The clause to be enforced, however unimportant, if extra-industrial, cannot shelter itself behind the industrial portions of the agreement. The argument that the industry is continuing, and that work done by the employer after his employés have gone is included in the definition, would lead to the absolute control of business by the Court, and would apply to the leisure time of the employés as well as of employers. The "privileges and rights" intended are mutual privileges and rights, as between employer and employé.

Cur. adv. vult.

28th March.

GRIFFITH, C.J. This is an appeal from an order of the Supreme Court of New South Wales discharging an order *nisi* for a prohibition directed to the Arbitration Court and the present respondents. It was sought to prohibit them from proceeding upon an order of the Arbitration Court imposing a fine upon the appellant for a breach of an award of that Court. That award contains a clause to the effect that all shops of the class to which that kept by the appellant belonged should be closed at 1 p.m. on Wednesdays, 9 p.m. on Saturdays, and 5 p.m. on other days. It was objected by the respondent union that no prohibition lay from the Supreme Court to the Arbitration Court. This objection was founded upon sec. 32 of the *Industrial Arbitration Act* 1901, which provides that—"Proceedings in the Court shall not be removable to any other Court by *certiorari* or otherwise, and no award, order, or proceeding of the Court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature on any account whatsoever." It is said that this section altogether excludes the jurisdiction of the Supreme Court to interfere with the proceedings of the Arbitration Court in any way.

There are two answers to this contention, one being that similar

sections taking away the right to *certiorari* and other remedies have always been construed as not extending to cases in which a Court with limited jusisdiction has exceeded its jurisdiction. It has often been held that when the legislature uses words in this well-known form they must always be taken to have intended the enactment to be subject to the rule I have mentioned. The other answer is that where different parts of a Statute are apparently contradictory, such a construction must, if possible, be put upon them as will render them all consistent with one another. In this case it will be found that the legislature has carefully defined and limited the jurisdiction of the Arbitration Court. Sec. 16 provides for the appointment of the Court in these words:—"There shall be a Court of Arbitration for the hearing and determining of industrial disputes and of references and applications under this Act. The Court shall be a Court of record and shall have a seal which shall be judicially noticed. The Court shall consist of a President and two members." Sec. 26 provides that—"The Court shall have jurisdiction and power" as to several matters, all of which are carefully defined. Then, the jurisdiction of the Court having been so defined, sec. 28 says:—"No matter within the jurisdiction of the Court" (words which recognize the existence of a limit to the jurisdiction) "may be referred to the Court, nor may any application be made to the Court except by an industrial union or by any person affected or aggrieved by an order of the Court," and then proceeds to prescribe the manner in which such persons and unions may bring such matters before the Court. Thus not only is the jurisdiction of the Court itself restricted, but even the persons entitled to invoke its aid are limited and enumerated in detail. To hold in the face of these provisions that sec. 32 prevents the Supreme Court from checking any excess of jurisdiction would be in effect to give the inferior Court unlimited jurisdiction. For these reasons I have no doubt that the Supreme Court had jurisdiction to grant a prohibition.

The question for consideration now is whether the Arbitration Court in making the order against the appellant has exceeded its jurisdiction, and in considering that point it is necessary to examine closely what the actual proceeding was, because there

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seems to have been some misunderstanding on the point, and different views have been expressed at different stages of the case. It appears that at some time before 3rd February, 1903, an industrial dispute arose between the Butchers' Shop Employés Union and the Master Butchers Association, and on 3rd February an order or award was made by the Arbitration Court which states:—"The Court of Arbitration having taken into consideration the matter of the above-named dispute . . . . and the industrial agreement entered into between the claimants and respondents herein on 28th January, 1903, &c., doth order and direct that . . . . the terms and conditions set out in the aforesaid agreement . . . . shall be a common rule" binding upon all persons engaged in the butcher's business within a certain area, "and doth hereby further order and declare that any breach of the terms, conditions, and provisions set out in the said agreement . . . . by the said Union or any member thereof, or by the said Association or any member thereof, or by any any person not a member of the said Association carrying on business within the aforesaid area shall constitute a breach of this award."

Another clause of the award was to the effect that if any member of the association or the union should commit a breach of the award he should be liable to a penalty not exceeding £5 for every breach thereof, and that any person, not a member of those bodies, who should commit a breach thereof should be liable to a penalty not exceeding £5, such penalty to be payable to the union or the association as the case might be, or to the secretary or registered officer. The agreement in question appears to have been made on 28th January, 1903, between the parties pending litigation, as a basis of settlement, and it was adopted by the Arbitration Court and embodied in its award, as was often done in such cases. The award having been made, on 3rd June, 1903, a summons was taken out—there were in fact three summonses—against the appellant, calling upon him to show cause why he should not pay the respondent, James John News, the registered officer of the respondent union, the sum of £5, being a penalty for a breach committed by him of the order of the Court of Arbitration of February 3rd, 1903. An affidavit of James John News, filed in

support of the summons, alleged that one of the terms of the agreement embodied in the above-mentioned award was to the effect that all shops kept by members of the Association, of whom the appellant was one, should close at 5 p.m. on Monday, Tuesday, Thursday and Friday, 1 p.m. on Wednesday, and 9 p.m. on Saturday, and that a breach of the award had been committed by the appellant in that he did on Saturday, May 30th, keep his shop open till 9.30 p.m. There can be no doubt that the summons was for a breach of the award, and if the award was invalid, that is, if it was not within the jurisdiction of the Court to make an award upon the point in question, the summons disclosed no offence, and the Court had no jurisdiction to punish the appellant for doing that which was not a breach of any valid award. The summons was heard before the Arbitration Court, and the learned President appears, in his judgment (1903 A.R., 388), to have treated the matter not as the question of a breach of an award binding upon all persons as a common rule, but as a breach of an industrial agreement by a party to it. In his judgment, after pointing out the powers of the Court, he said "In my opinion, however, the case is altogether different when an employer by agreement gives up a right or privilege that the law has conferred upon him;" and he added later on—"Seeing that the industrial union, of which the respondent is a member, was a party to the industrial agreement, the breach of which is complained of, he must be bound by it as strongly as if it had been his own personal agreement." He evidently treated the matter as if it were a breach of the agreement already mentioned. *Owen*, J., also appears to have been impressed to some extent with the same view, though he did not altogether base his judgment upon it. The learned President, when asked, in another case that came before the Court, to enforce an award upon a similar matter (*In re Sylvester*), refused to do so, on the ground that in his opinion the award could not have any effect except as an agreement, and therefore could not bind persons who were not parties. It is desirable to point out that proceedings for the breach of an agreement are very different from proceedings for breach of an award. An award is an order of the Court. It is true that sec. 15 provides that—"An industrial agreement as between the

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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 the proceedings would have to be taken for penalties due as a matter of contract, not as consequent upon a breach of an order of the Court. Further, upon an application to the Court to enforce an agreement against any person, he would be entitled to show that he was not a party to it. Before he could be bound by it it would have to be shown either that he was a party to the agreement, or that it had been made on his behalf by someone who had authority to bind him, and the question then would always be whether the matter to which the agreement referred was one upon which the agent had authority to bind the members of the union, his principals; and that would depend on the question whether the matter was an "industrial matter" within the meaning of the Act. If the matter did not come within the words of the Act the union would have no power to bind its members, and the agreement would be altogether inoperative. The question, therefore, is always the same, whether the matter of the agreement was or was not an industrial matter within the meaning of the Act, and in the case of an industrial agreement there is this additional question, whether the particular person against whom the agreement is sought to be enforced was a party to it. In this case the proceeding was for the breach of an award, and the question is whether the Court had jurisdiction to make the order complained of. The answer to this depends upon sec. 16, which empowers the Court to "hear and determine industrial disputes and references and applications under this Act," taken in connection with the definition of "industrial disputes" and "industrial matters," in sec. 2. An "industrial dispute" is defined as a dispute in relation to industrial matters between an employer or industrial union of employers on the one part, and an industrial union of employés or trade-union or branch on the other part, and includes any dispute arising out of an industrial agreement. "Industrial matters" are defined to mean matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employers or employés in any industry, with certain limitations

not necessary to mention. "Industry" is defined to mean business, trade, manufacture, undertaking, calling or employment in which persons are employed for hire or reward, including the management of certain public concerns, but not including employment in domestic service. The question, therefore, is whether the particular term in the agreement, as to which the dispute arose, relating to the closing of shops, referred to a matter that comes within that definition, for if the dispute does not relate to an industrial matter it is not an industrial dispute and the Court has no jurisdiction to deal with it. 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. It was contended very forcibly that the definition of "industrial matters" in the Act was large enough to cover this case. Certainly if there were no definition in the Act the words might be taken in one sense to include all matters or things affecting or relating in any way to an industry. The respondents' contention went as far as that, but those are not the words of the Act. There are intervening words in the Act which were intended to be words of limitation, so that "industrial matters" should not include all matters affecting or relating to any industry, but only certain classes of those matters. The words "privileges, rights or duties of employers or employés in any industry," clearly refer to matters of mutual obligation. They imply *ex vi termini* that there are two parties, one of whom owes a duty or possesses a right as against the other. The argument was pressed on behalf of the respondents that the matters in question fell within the meaning of the words "affecting or relating to work done or to be done in an industry," and that view seems to have been adopted by *Owen*, J., in the Supreme Court. He seems to have thought that the agreement should be treated as a whole, and that the parties, by assenting to the inclusion of the term in question in the agreement, had treated it as an "industrial matter," in the sense of being a matter that related to the industry; and he gave instances of the way in which the time of closing shops might affect

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"work done or to be done." In his judgment (p. 597), he says: "Suppose, for instance, that a butcher engaged his employés to cut up joints and meat till 9 p.m., and then dismissed them, but kept his shop open after that hour to deliver the meat either personally or with the assistance of his children, or his wife, or himself cut up the meat for customers without any assistance. His employés might consider that such conduct diminished the quantum of work of the shop assistants and their wages, and, therefore, ought to be regulated by specific agreement." It does not follow, however, that it would on that account be an industrial matter. He then goes on to say.: "I therefore see that the agreement for all shops to close at the same hour may have been insisted on by the employés as affecting them in relation to the employers in the way I have indicated, and may have formed an integral part of the agreement into which both unions entered in order to settle the dispute. If that be so, then the term in question became as much an industrial matter as any of the terms in the agreement." I turn then to the section to see whether the words of the definition go as far as that. In one sense this case may fall within the words of the section, but if that view is adopted I do not see how any matter affecting an iudustry could be excluded, because every matter affecting or relating to an industry must directly or indirectly relate to the "work done or to be done" in that industry—that is, to the work which would ultimately have to be done by the employés in that industry. Evidently some limitation of the meaning is necessary. In what sense, then, is the word "work" used in the Act? In the same section "employer" is defined as meaning "a person, firm, company, or corporation employing persons working in any industry." Under the definition of "lock-out," I find the words "the closing of a place of employment or the suspension of work by an employer," *i.e.*, the employer in that case takes away from the employé the opportunity of doing work in the industry. In the definition of "strike" are the words "the cessation of work by a body of employés acting in combination." The word "work" in the Act always means work done by an employé; and I am clearly of opinion that the words "work done or to be done" mean work actually done by the employé or actually provided by

the employer to be done, that is, such as he thinks fit to provide, but that they do not in any way refer to the quantity of work which the employer is to provide for the employés. If it were so, the Arbitration Court would have a new power not suggested by any words of the Act, a power to regulate the carrying on of an industry at large, that is, to require the employer to employ a particular number of employés, and to provide a sufficient quantity of work for them, and enable them to earn a maximum or minimum wage, conditions which it would be impossible for the employer to fulfil unless he had sufficient capital. I think therefore that the expression "work done or to be done" means actual and not hypothetical work, such work as shall be provided; and that they have nothing to do with prescribing what work shall be provided by an employer. There is nothing in this provision to give the Arbitration Court jurisdiction to interfere with the employer during his own spare time; but after the relationship of employer and employé has ended the employer is free to do as he pleases. He retains his common law right to dispose of his own time as he thinks fit without reference to anyone else, and the Arbitration Court has no power under the Act to interfere with the exercise of this right.

I should advert to another argument used on behalf of the appellants, viz., that the agreement and award were in conflict with the *Early Closing Act*. I do not think so at all. The fact that the duration of the business hours was limited by some other Act was not at all inconsistent with an arrangement that work should cease and shops be closed before the hour fixed by that Act. But I think that the stipulation dealing with the matter in question was not one relating to an "industrial matter" within the meaning of the Arbitration Act, even upon the most liberal interpretation of its provisions, and that the Arbitration Court had therefore no jurisdiction to embody that stipulation in its award, and that the Supreme Court ought, consequently, to have granted the prohibition restraining the respondents from proceeding upon the order made by the Arbitration Court in respect of a breach by the appellant of that term of the award.

BARTON, J. I am of the same opinion. It is quite unnecessary

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for me to traverse in detail the ground which the *Chief Justice* has so fully dealt with. In its essence the question hinges upon the interpretation of the definition of "industrial matters" in sec. 2 of the Act, and I do not think that this was a matter affecting the "work done or to be done" within the meaning of that definition. I think that the words in the section refer only to actual work done or to be done by the employé.

O'CONNOR, J. I entirely concur with the opinions expressed by the other members of the Court. With regard to the question of jurisdiction, I think that it is particularly important in applying an Act which gives new and very extensive rights and remedies, and, in a sense, creates relations altogether new to the law, that the power of the Supreme Court to see that all inferior Courts keep within the jurisdiction which the law has allotted to them should be preserved, unless the legislature has given clear indication of a contrary intention. It is within the power of the legislature, if it thinks fit, to make the Arbitration Court the sole judge of the extent of its own jurisdiction, but for the reasons given by the *Chief Justice* it is perfectly clear, on reading the Act, that the legislature has indicated no intention to give the Court such unlimited power. There is another view which makes it impossible to say that the jurisdiction of the Supreme Court to prohibit was taken away. The rule is clearly expressed by *Sir G. Jessel*, M.R., in *Jacobs* v. *Brett*, L.R. 20 Eq., at p. 6, in these words: "In the next place, I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a superior Court of law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but, at all events, it must be done clearly. It is not to be assumed that the legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied. There is another principle, which is that the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament." He then refers to a case on the same subject, and proceeds: "Now here the subject has a right, and it is a valuable right, of having the question of the jurisdic-

tion of a local Court determined in the superior Court, and is it to be assumed that that right was to be taken away, and that he was to be compelled to submit the question of jurisdiction to the inferior Court itself? I think that is very unlikely." I do not know of any legislation in which the community generally are more concerned than this, and it is the right of every person to call attention to the fact that any Court is exceeding its jurisdiction. It would be entirely contrary to these well established rules of interpretation to hold that this Act has taken away the right of the Supreme Court to interfere by prohibition. I am clearly of opinion that this right has not been taken away. I do not think that the respondents' argument is strengthened by the words of sec. 32 referred to by Mr. Piddington, simply because that section uses words that are not found in other Acts. All such words must be read as applying only to matters which are within the jurisdiction of the Court. In the case of the *Caterers' Association* (1903), 3 S.R. (N.S.W.), 19, the law was laid down correctly.

As regards the main matter I am of opinion that the jurisdiction of the Arbitration Court cannot be invoked to enforce an agreement unless that agreement comes within the meaning of sec. 13. These industrial Unions are under sec. 7 made corporations, and they have as large powers of agreement as other corporations. It is not necessary for me to say how far these powers are affected by the Act. It is clear that if they seek the help of the Arbitration Court they must bring themselves within the provisions of the Act. Whether it is sought to enforce an agreement or an award of the Court the same considerations arise. The whole question is narrowed down to this, is the matter in dispute an "industrial matter" or not? The section defining "industrial agreements" must be read in the sense that every stipulation in the agreement must refer only to "industrial matters." It was contended by Mr. Holman for the respondents that so long as part of the subject matter of an agreement dealt with industrial matters, the agreement was an industrial agreement, even if other parts of it dealt with matters that were not industrial. I do not think that that is a correct interpretation of the Act. To hold that it was would be to hand over to the parties themselves power to give jurisdiction to the Court over matters

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that were not intended by the Act to come under its operation. The requirement that it is an industrial matter must extend to every stipulation in the agreement. When you seek to enforce it the question arises—is it an agreement in writing relating to an industrial matter, as defined by sec. 13? The consideration of that question brings us back to the definition of "industrial matters" in sec. 2. It is contended that the words "matters or things relating to work done or to be done" must be taken in connection with the words "in any industry," and it is pointed out that "industry" means "business, &c., calling or employment in which persons of either sex are employed for hire or reward." It is then urged that, taking these words together, it must be inferred that the legislature intended to give power to the Arbitration Court to deal with an industry generally altogether apart from the relations of employer and employé, that after work for the day was over, although the employés had left for the day, the employer had no right to work in the shop for himself, and that all that scope outside the relations of employer and employé was included in the term "industry." It seems to me impossible to construe the Act in that way. I shall only give one instance in illustration of the result of such a construction. Under the head "industry" in sec. 2, after the words I have read, follow these words:—"And includes the management and working of the Government Railways and Tramways, the Sydney Harbour Trust, the Metropolitan Board of Water Supply and Sewerage, and the Hunter River and District Board of Water Supply and Sewerage." Now if the argument is good in regard to a butcher's business, it is good in regard to the carrying on and management of the Government Railways. It is well known that new kinds of labour-saving apparatus are continually being invented and adopted, for instance the automatic fuel feeder. The Railway Commissioners might think it right, in order to reduce expenses in the working of their furnaces, to introduce apparatus of that kind, and it is quite clear that its introduction would very largely affect the amount of work to be done by employés. Could it be contended for one moment that there was jurisdiction in the Arbitration Court to prohibit the use of such apparatus on the ground that it affected the

work to be done by the employés, or that it had power to direct what kinds of machinery should be used by the Railway Commissioners in the working of the railways, or in any other of those large businesses that are included in this section. The consideration of such a case brings us to this point, that it is impossible to construe the words of the section in such a way as to include within the "industrial matters" there defined everything that is in any way "relating to an industry." The construction of the section must be controlled by the subject-matter, and the general intention of the Act. The subject-matter is to regulate the relations between employers and employés. Every section of the Act deals with this. If we confine the effect of the sections to matters directly affecting industries, its scope and intention can be carried out. But once we begin to introduce and include in its scope matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part. I am of opinion that the proper interpretation of the words "industrial matters" excludes the matter dealt with in clause 4 of the agreement, which was embodied in the award, that there is no power to enforce it by the steps taken in the Court below, and, as that Court clearly went beyond its jurisdiction, it should be restrained by prohibition.

Appeal allowed. Order of the Supreme Court discharging the Rule Nisi for prohibition discharged. Rule Nisi made absolute with costs. The respondent union to pay the appellant's costs of the appeal. Deposit to be repaid.

Attorneys, for the appellant, *Perkins & Fosbery.*
Attorneys, for the respondents, *Brown & Beeby.*