[HIGH COURT OF AUSTRALIA.]

THE WESTERN AUSTRALIAN AMALGAMATED SOCIETY OF RAILWAY EMPLOYÉS UNION OF WORKERS . } APPELLANT;

AND

THE COMMISSIONER OF RAILWAYS FOR THE THE STATE OF WESTERN AUSTRALIA . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905.

MELBOURNE, *Nov.* 15, 16.

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

Practice—Mandamus—Refusal of Court to deal with matters brought before it—Hearing still proceeding—Special leave to appeal—Industrial Conciliation and Arbitration Act 1902 (1 & 2 *Edw. VII. No.* 21), (*W.A.*), *secs.* 107-109.

Where an inferior Court has announced its intention not to deal with certain of the matters brought before it in a particular proceeding, or refuses to admit a particular class of evidence, a mandamus will not lie while the proceeding is still pending to compel that Court to deal with those matters, or to admit that particular class of evidence.

Under the *Industrial Conciliation and Arbitration Act* 1902 (W.A.) a union of workers registered under sec. 108 (*a*) of that Act, alleging a dispute between itself and the Commissioner of Railways, instituted proceedings in the Court of Arbitration to regulate the wages of practically all workers in the employment of the Commissioner of Railways. Certain classes of the members of that union were members of other unions registered under other sections of the Act, and the Commissioner of Railways alleged that he had entered into industrial agreements with those other unions. The Court of Arbitration ordered that all such classes of members should be struck out of the proceedings, and, having announced that it would not consider the question of the wages or condition of employment of those classes, proceeded with the hearing of the matter:

Held, that, the hearing of the matter being still pending, mandamus would not lie to compel the Court of Arbitration to hear and determine the matter so far as it related to those classes of persons, or to reinstate such classes of persons in the proceedings, and, therefore, the Supreme Court having refused an order *nisi* for a mandamus, special leave to appeal was refused.

MOTION for special leave to appeal.

The Western Australian Amalgamated Society of Railway Employés Union of Workers (hereinafter called "the society") applied by motion to the Supreme Court of Western Australia for an order calling upon the Court of Arbitration to show cause why a mandamus should not issue to compel the said Court of Arbitration to hear and determine an industrial dispute between the society and the Commissioner of Railways for the State of Western Australia, and especially so far as such dispute related to or concerned workers of the classes coming under the headings of wagon and coach-builders, iron and brass-moulders, engineers and carriage-builders, who had by the said Court been struck out of the proceedings, and to reinstate such workers in such proceedings.

The motion, which was heard by the Full Court on 31st October, 1905, was supported by the affidavit of Edgar Harold Casson general secretary of the society, the material paragraphs of which were as follow:—

2. The society was registered pursuant to sec. 108 (*a*) of the Statute 1 & 2 Ed. VII. No. 21, and comprises Government railway employés exclusively.

3. The society comprises, amongst other railway employés, persons coming under the headings of wagon and coach-builders iron and brass-moulders, engineers and carriage-builders.

4. The society has an industrial dispute, now properly before the Court of Arbitration established under the said Statute, in which all the conditions and formalities of the said Statute have been complied with, and in which it is sought, amongst other things, to regulate the wages of persons in the employment of the Commissioner of Railways of the classes mentioned in the preceding paragraph 3 hereof, &c.

5. There are industrial unions of workers, comprising the persons mentioned in paragraph 3 hereof, registered under the said Statute, but not registered pursuant to sec. 108 thereof, and a large number of persons of the classes mentioned in such paragraph 3 hereof are members of the society.

6. The Commissioner of Railways, acting pursuant to sec. 108 (*a*) of the said Statute, has made industrial agreements with the

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industrial unions of workers referred to in the preceding paragraph 5 hereof, (which said unions are general unions registered under the said Statute) and, although there are some of the members thereof employed by the Commissioner of Railways, yet a great many of the persons in the employment of the said Commissioner of Railways, elegible to become members of such unions, are members of the said society, and one of the said unions, to wit, the Amalgamated Society of Engineers, has its head office in England, and is a world wide union of workers.

7. Upon the industrial dispute referred to in paragraph 4 hereof coming on to be heard before the Court of Arbitration on the 27th October, 1905, the Commissioner of Railways raised the preliminary objection that, owing to the making of the industrial agreements mentioned in paragraph 6 hereof, the employés of the same classes as the members of the said industrial unions could not be included in the proceedings, and that no award could be made with regard to such employés, and applied to have such employés struck out of the proceedings.

8. The society objected to the application so made by the Commissioner of Railways as aforesaid, and the matter was argued, and the President of the Court of Arbitration in delivering the decision of the Court said that, by reason of the existence of the said industrial agreements, there was and could be no dispute between the classes of persons in the employment of the Commissioner of Railways who belonged to the society of the same classes as those included in the said alleged industrial agreements, and the said Court ordered that all such classes of persons, that is to say, wagon and coach-builders, iron and brass-moulders, engineers, and carriage-builders, should be struck out of the proceedings, and refused to consider the question of their wages or the conditions of their employment.

It also appeared that, at the time the motion for a mandamus was heard, the arbitration was still pending before the Court of Arbitration.

The Supreme Court having refused to grant an order *nisi*, application was now made to the High Court for special leave to appeal.

Ewing for the applicant. The motion for a rule *nisi* for a mandamus was not premature. It is not necessary to wait for a decision before applying for a mandamus. Where a Court proceeds to adjudicate prohibition will lie before it has adjudicated. So where a Court denies jurisdiction as to, or refuses to deal with, some of the matters submitted to it, mandamus will lie before the decision is given. [He referred to *R.* v. *Judge of Southampton County Court and Fisher & Son Ltd.* (1); *R.* v. *Harwood* (2); *R.* v. *Registrar of Greenwich County Court* (3).]

The judgment of the Court was delivered by:—

GRIFFITH C.J. This is an application for special leave to appeal from the Full Court of the Supreme Court of Western Australia refusing to grant a rule *nisi* for a mandamus to require the Court of Arbitration to proceed to hear and determine an industrial dispute between the applicant society and the Commissioner of Railways, especially so far as such industrial dispute relates to or concerns workers coming under the headings of wagon and coach-builders, iron and brass-moulders, engineers, and carriage-builders, and to reinstate in the proceedings relating to such dispute all parties coming under such headings. That is the form in which the order refusing the rule is drawn up, but it does not accurately state what took place. The Western Australian *Industrial Conciliation and Arbitration Act* 1902 allows disputes between the Commissioner of Railways and his employés to be referred to the Court of Arbitration, special provisions in that respect being made by secs. 107 to 109. The applicant society is said to include all the working officers of the railway department except railway engineers. It presented to the Court of Arbitration what is called a petition, under the special procedure laid down as to disputes between the Commissioner of Railways and a union of his employés, by which it asked that the whole of the internal arrangements of the railways might be settled, and all trades and all work whatever in that department might be regulated by that Court. The Act, sec. 109 (3), requires

(1) 65 L.T., 320. (2) 22 L.J.Q.B., 127.
(3) 54 L.J.Q.B., 392.

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the petition to set forth "the particulars of the matters in dispute." That matters are in dispute is a condition precedent to the exercise of the jurisdiction of the Court of Arbitration. When the petition came before the Court of Arbitration it is not surprising that the Court should have inquired as to the extent of the dispute which was said to require the settlement by the Court of the wages and conditions of labour of the whole department—whether the whole of those matters were in dispute. In respect of the classes of workers coming under the headings of wagon and coach-builders, iron and brass-moulders, engineers and carriage-builders, the Commissioner of Railways alleged that there was no dispute at all. The Court then asked for further information on the subject, and some agreements entered into between the Commissioner of Railways and some industrial unions comprising workers of those classes were produced. What else took place does not exactly appear, except that it is stated that the Court was of opinion that, "by reason of the existence of those agreements, there was and could be no dispute between those classes of persons in the employment of the Commissioner of Railways who belonged to the society of the same class as those included in such alleged industrial agreements, and the said Court ordered that all such classes of persons, that is to say, wagon and coach-builders, iron and brass-moulders, engineers, and carriage-builders, should be struck out of the proceedings, and refused to consider the question of their wages or the conditions of their employment." Of course that is not an accurate statement of what was done. Those persons were not struck out of the proceedings. They were not parties to the proceedings. The only parties to the proceedings were the applicant society and the Commissioner of Railways, and the only thing that was done was that the Court intimated its intention not to inquire into the wages or the conditions of employment of those classes of workers. It might be regarded from another point of view as a striking out of those particulars from the petition, which, as I have said, is required to set forth the particulars of the matters in dispute. It may be that there was in fact no dispute with those classes of workers. It may be that those classes of workers were content that the matter should rest on the construction of those agree-

ments. Or it may be that by their conduct those classes of persons allowed the Court to suppose that there was no dispute with them. Mr. Ewing contends that it is sufficient for the petitioning society to allege that there was a dispute with that society. We know nothing more as to what took place, except that the Court is said to have come to the conclusion, whether as a matter of fact or as a matter of law we do not know, that there was not, and could not be, any dispute with those classes of persons, and said it would not consider the matter of their wages or the conditions of their employment. An application was then made to the Supreme Court to compel the Court of Arbitration to deal with these matters. In the meantime the Court of Arbitration went on with the hearing of the petition, and, so far as appears, may be going on with it still; at any rate, the hearing was not concluded when the application was made to the Supreme Court.

Now, who ever heard of a mandamus issued to a Court during the hearing of a matter requiring it to deal with that matter or to admit a particular class of evidence? Such an application is entirely novel. No appeal lies from a final award or order of the Court of Arbitration, and certainly an appeal does not lie in interlocutory proceedings. The Court, so far from refusing to hear the petition, proceeded to hear it, and may still be hearing it. It is said that the Court may give an incomplete decision. Perhaps it will, but you cannot get a mandamus *quia timet* because you think the Court is going to give a wrong decision. At common law when an arbitrator by his award omitted to deal with an important part of the matters submitted to him for arbitration, the award might be set aside. Possibly, if the Court of Arbitration does not decide all the matters submitted for its determination, mandamus may lie to compel it to deal with the matters which it has omitted. It will be time enough to determine that question when it arises. But at common law you must wait until the award is given. By Statute certain questions of law may now be raised while the arbitration proceedings are pending, but there is no practice of which we are aware by which a mandamus can be issued to a Court during the hearing of a matter to take into its consideration certain matters which it has indicated its intention not to deal with. The

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matter determined by the Court of Arbitration was in part at least a preliminary matter of fact. If it was purely a matter of fact clearly no appeal lies. If it was a mixed question of fact and law it is very doubtful whether an appeal lies. If the Court declined to entertain certain matters upon an erroneous view of the law, possibly mandamus will lie, but the time for determining that question has not arrived. It is, we think, extremely improbable that the Court has come, or will come, to the conclusion, as a matter of law, that an agreement between the Commissioner of Railways and a small body of employés is conclusive evidence that there is no dispute between the Commissioner of Railways and the whole body of employés. If the Court does so decide, then it will be time enough to consider whether the Supreme Court can interfere. At present we see no reason to grant special leave to appeal.

Special leave to appeal refused.

Solicitors, *Norman K. Ewing & Co.*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

BERTOLINI . . . . . APPELLANT;
PLAINTIFF,

AND

GIANINI . . . . . RESPONDENT.
DEFENDANT,

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PERTH, *Oct.* 12, 13.

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

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA (McMILLAN J.)

The case turned solely on questions of fact.

The judgment of the Supreme Court of Western Australia (17th April, 1905), was affirmed.

Appeal dismissed with costs.

Solicitors, for appellant, *Harney & Harney.*

Solicitors, for respondent, *Smith & Lavan.*

H. E. M.