[HIGH COURT OF AUSTRALIA.]

THE COLLIERY EMPLOYÉS FEDERATION OF THE NORTHERN DISTRICT, NEW SOUTH WALES (INDUSTRIAL UNION OF EMPLOYÉS) . . . . . } APPELLANTS;

AND

JOHN BROWN AND WILLIAM BROWN . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 15, 18, 19, 22.

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

Industrial Arbitration Act (*N.S.W.*) (*No.* 59 *of* 1901), *secs.* 2, 26, 28—*Industrial dispute—Powers of Industrial Union to refer—Jurisdiction of Arbitration Court—Prohibition.*

The Arbitration Court has no jurisdiction to entertain an application by an industrial union of employés to have the conditions of employment in the industry regulated by the Court, unless there is in existence an industrial dispute as to those conditions between employés who are members of the union, and their employers.

The Supreme Court of New South Wales granted a prohibition restraining the Industrial Arbitration Court from further proceeding with a certain application, on the ground that it had no jurisdiction to deal with it. The High Court, on appeal, being of the opinion that the prohibition was properly granted as to the substantial matters involved in the application, but that it could not be supported as to certain minor matters, to which the attention of the Supreme Court had not been directed as a ground for limiting the prohibition, and the inclusion of which in the prohibition had not been urged by the appellants as a ground for granting special leave to appeal, amended the order of the Supreme Court by limiting the prohibition to those matters which were outside the jurisdiction.

Decision of the Supreme Court: *Ex parte Brown*; *The Colliery Employés Federation, Respondents*, (1905) 5 S.R. (N.S.W.), 412, varied and affirmed as varied.

APPEAL from a decision of the Supreme Court.

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The appellants on 15th October, 1903, duly referred to the Court of Arbitration an industrial dispute that had arisen between certain of its members, who were employés of the respondents, and the respondents, and made a claim for an award in respect of the conditions of the employment. On 28th June, 1905, a summons was taken out in the Court of Arbitration by the appellants, calling upon the respondents to show cause why the original claim should not be enlarged so as to include certain fresh matters. At the hearing of the summons on 5th July it appeared that the relationship of employer and employé had ceased to exist between the respondents and the members of the union. Objection was taken on behalf of the owners that the Court had no jurisdiction to make the order asked for or to entertain the original claim. The Court overruled the objection, and made an order enlarging the claim.

The Full Court on 7th July granted a rule *nisi* for a prohibition restraining the appellants and the Arbitration Court from further proceeding, on the grounds, (I.) that the Court of Arbitration had no jurisdiction to hear and determine the claim for the reasons, amongst others, (*a*) that there was no contract of employment between any member of the appellant union and the respondents, (*b*) that there was no longer an industrial dispute between the appellants and the respondents; (II.) that the members of the appellant union had been guilty of a breach of sec. 34 of the Act, and had thereupon ceased to have any *locus standi* as claimants in that Court.

On 31st July the rule was made absolute for a prohibition: *Ex parte Brown, The Colliery Employés Federation, Respondents* (1). From this decision the present appeal was brought by special leave.

The facts are sufficiently set out in the judgment of *Griffith* C.J.

Shand and *Watt*, for the appellants. Under the *Arbitration Act* an industrial union of employés has the right to initiate an industrial dispute with an employer in the industry, and refer it to the Court, notwithstanding that no members of the union are engaged in that particular employment, and although there is in

(1) (1905) 5 S.R. (N.S.W.), 412.

fact no dispute in the ordinary sense between the employés and the employer. [They referred to sec. 26 sub-secs. (*a*), (*d*), and (*f*).] Nowhere in the Act are employés treated as possible parties to litigation.

[GRIFFITH C.J.—But surely they may be parties to a dispute?]

The disputes dealt with in the Act are industrial disputes; that is, not disputes in the ordinary sense, but the conflicting claims which give rise to litigation under the Act.

The union is the only person or body which is brought into relations with the employer, in respect of rights in litigation, probably because the legislature thought the interests of employés would be best safeguarded in that way. Individual employés have no *locus standi* in litigation under the Act. It is for the union to raise the dispute whenever it deems it expedient or in the interests of employés, whether they are members or not. The check upon the abuse of this power is that the Court may dismiss matters that are trivial, and compel the union to pay costs. Moreover the union cannot act except in pursuance of a resolution of the majority of its members: sec. 28. It must consist of persons concerned in an industry: sec. 4; and must be one to which employés can conveniently belong: sec. 5. When the union makes a demand and the employer refuses to concede it, there is a dispute which may be referred to the Court, provided that the dispute relates to industrial matters as defined by sec. 2. A refusal by an employer to employ unionists would amount to an industrial dispute, and yet there might be no members of the union in the employment: sec. 2, sub-sec. (*c*). [They referred to *Clemson* v. *Hubbard* (1).] The Arbitration Court is the tribunal to decide whether the circumstances have arisen to justify its interference. It is no objection to its jurisdiction, that such circumstances have not arisen. The Court may dismiss the claim.

Once a dispute has been properly instituted and referred to the Court, it cannot be terminated except by the consent of the parties, or by a decision of the Court. So here there was in the beginning a dispute properly referred to the Court, and, even if the subject matter of the dispute disappeared, the Court has power to deal with the matter. The jurisdiction does not come

(1) 1 Ex. D., 179.

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to an end. It may be that circumstances have arisen which afford an answer to the claim, and that the Court will have to dismiss it, but it has still jurisdiction to proceed, and, if necessary, give effect to the defence, so far as it is good. In the present case it has jurisdiction to deal with the matters out of which the original dispute arose, and make a retrospective order as was done in *Lithgow District Smelters and Workers* v. *Great Cobar Copper-Mining Syndicate* (1). Moreover the Court had jurisdiction to inquire into the question of fact whether the employment still continued. There was a conflict of evidence on this point, raising an issue of fact for the Arbitration Court to decide. Having power to consider the relations between the parties, the Court had jurisdiction to make an order as to the future relations of employer and employé. The real party was the union, and no individual action by its members, *e.g.*, in ceasing work, could affect its *locus standi*. The members can only move the body in accordance with sec. 28. There is no necessity that the contract of service should be subsisting at the time of the hearing in order that there may be a dispute: *Charles* v. *Mortgagees of Plymouth Works* (2); *R.* v. *Proud* (3).

[BARTON J. referred to *Grainger* v. *Aynsley* (4).]

But even if the Arbitration Court had no power to deal with all the matters involved in the claim, it cannot be assumed that the Court would make an improper award or exceed its jurisdiction. The respondents mistook their remedy. It was not a case for prohibition, but for the raising of the special matter as a defence on the hearing, not as a plea to the jurisdiction.

The ground as to the members of the union being on strike is no objection to the jurisdiction. The commission of an offence might possibly be a contempt, but it could not oust the jurisdiction of the Court. The question whether there was or was not a strike would be one for a jury, not for the Supreme Court on a motion for prohibition.

Gordon K.C. (with him *Edmunds*), for the respondents. The Arbitration Court has not a general power to settle the affairs of

(1) 2 Arb. Rep. (N.S.W.), 130.
(2) 60 L.J., M.C., 20.
(3) L.R., 1 C.C., 71.
(4) 6 Q.B.D., 182.

an industry as between employer and employé. It can only act under certain conditions, and upon matters brought before it in a certain way. An industrial union has no power to create an industrial dispute by making a claim of its own motion for the purpose of having it settled by the Arbitration Court. There must first be an actual dispute. The mere refusal by an employer to submit to the claim of a union does not constitute an industrial dispute. The employés may be perfectly satisfied with the conditions of their employment. Here there could be no foundation for the action of the union; the relationship of employer and and employé had ceased at the date of the summons. Admitting that there was a properly instituted matter in the first instance over which the Arbitration Court had complete jurisdiction, that jurisdiction was ousted either wholly or in part by the termination of the relationship of employer and employé. It may be conceded that the Court had jurisdiction to consider the original claim, and if necessary, to make a retrospective award, but that would have been purely academic, because the claims based on that were settled in another way. The substantial objection to the summons was that the Court had no jurisdiction to entertain the claim as to the future conditions of the employment. That was the substantial ground taken before the Supreme Court, and the only one seriously argued or dealt with by that Court in its decision. The Arbitration Court has assumed jurisdiction to deal with the whole matter, because it has enlarged the claim notwithstanding the respondents' objection. The application for a prohibition was not premature.

[GRIFFITH C.J.—There is this difficulty, that this was an interlocutory proceeding in the Arbitration Court, an application to amend a proceeding already instituted.]

If the Court has no jurisdiction to consider the matter on its merits, it may be prohibited at any stage of the proceedings, if it assumes jurisdiction. The subject matter of the new claim was wholly outside the Court's jurisdiction. The union is merely the representative of its members. When the members terminated the employment, the interest of the union in the dispute ceased.

[O'CONNOR J.—The relationship of employer and employé might

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have ceased, and yet the Court might have jurisdiction to deal with the rights of the parties before its cessation.]

That point was treated all through as of slight importance, and should not now be treated as vital. It was only used by the appellants as founding an argument that, because the Court of Arbitration had jurisdiction over part of the claim, it had therefore jurisdiction to deal with the whole. [He referred to *Deane* v. *City Bank of Sydney* (1), and *Mackay* v. *Commercial Bank of New Brunswick* (2).

GRIFFITH C.J.—The point was not referred to on the application for special leave to appeal. There the wider ground only was pressed.]

The jurisdiction of the Arbitration Court only arises where the conditions prescribed by the Act are satisfied. There was no longer an industry for the purpose of this claim. There could be no industrial dispute, and therefore there could be no foundation for litigation in the Court. [He referred to sec. 26 of the Act.] It is not enough that the claim by the union refers to industrial matters. There is no issue until there has been a dispute, in the ordinary sense, as to industrial matters, between the employés and an employer. It is just as essential that there should be an actual dispute as that the subject matter of the dispute should be industrial. Otherwise the Court becomes a Board of Trade rather than a Court of Arbitration.

The order of the Supreme Court should if necessary be corrected. It may be too large in that it is not restricted to matters affecting the future, but it should not be treated as bad because it is incorrect as to unimportant matters, especially when the matter has arisen owing to the conduct of the parties in treating those matters as immaterial. A prohibition may be limited to part of the proceedings contemplated. [He referred to *Shortt on Mandamus and Prohibition*, 1887 ed., pp. 452, 453.]

[GRIFFITH C.J. referred to the judgment of *Brett* L.J. in *South Eastern Railway Co.* v. *Railways Commissioners* (3), where *Lush* v. *Webb* (4) is cited.

OCONNOR J. referred to *Kerkin* v. *Kerkin* (5).]

(1) 2 C.L.R., 198.
(2) L.R. 5 P.C., 394, at p. 409.
(3) 6 Q.B.D., 586, at p. 605.
(4) 1 Sid., 251.
(5) 3 El. & Bl., 399.

Shand, in reply. If the prohibition is too large it is owing to the mistake of the respondents, and the appellants are entitled to the benefit of it. The appellants succeed if they show that the order as a whole is bad. The Supreme Court assumed that the Arbitration Court intended to exceed its jurisdiction, whereas it had only decided to allow the application to be made. In such a case prohibition will not lie, unless it is manifest on the face of the proceedings that the inferior Court intends to exceed its jurisdiction. [He referred to *South Eastern Railway Co.* v. *Railway Commissioners* (1); *Hallack* v. *University of Cambridge* (2); *Reg.* v. *Twiss* (3); *Shortt on Mandamus and Prohibition*, 1887 ed., p. 456.]

As to the cessation of work by the members of the union, that difficulty is overcome by the return of one member to the employment.

[GRIFFITH C.J.—That was a question of fact which was all along treated as settled in one way. There was never any serious dispute as to the termination of the relationship between the respondents and the members of the union.]

Even if there were no members of the union in the employment, the Arbitration Court has jurisdiction over all persons engaged in the industry, and all matters affecting their condition as employés or as employers. The power to make a common rule is an example of this.

[BARTON J.—Does not the fact that special power is given by the Act to declare a common rule imply that without such a power only parties to an award could be bound by it ?]

The definition of industrial matters in the Act (sec. 2), is wide enough to include all matters that affect the conditions of employment of any employés at any time, and the Court of Arbitration has power to deal with any such matters that may be referred to it. The purpose of the Act, as appears from its preamble, is to give to the Court this extensive power over all industrial matters, and the words of the Act are sufficient to effect that purpose.

Cur. adv. vult.

(1) 6 Q.B.D., 586.
(2) 1 Q.B., 593.
(3) L.R. 4 Q.B., 407.

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GRIFFITH C.J. This is an appeal from an order of the Supreme Court making absolute a rule *nisi* for a prohibition to the Industrial Arbitration Court and the appellants, restraining them from further proceeding in the matter of the industrial dispute between the appellants and the respondents. The question arises in this way. The respondents are the owners of a coal mine, and the appellants are the Colliery Employés Federation of the Northern District of New South Wales, an industrial union of employés, registered under the *Arbitration Act* 1901. On 15th October, 1903, disputes having arisen between the respondents and their late employés in the mine, a dispute was regularly referred to the Arbitration Court by the appellants, relating to the general conditions of employment of the respondents' employés in the coal mine.

On 14th November, 1903, an answer was filed by the respondents disputing all the claims. A long delay ensued for reasons to which it is not now necessary to refer. In December, 1904, the appellants filed a new claim, asking that some other matters might be included in the original claim, and took out a summons on 27th February, 1905, calling on the respondents to show cause why the scope of the original claim should not be extended so as to include certain fresh disputes which had arisen. This summons lapsed, according to the practice of the Arbitration Court, and the employment continued for some months, various suspensions of work occurring from time to time, and finally on 15th June, 1905, all the miners in the employ of the respondents went out without notice and did not return to work. The case put to us by Mr. Gordon for the respondents was that there was no industrial dispute, and that the relationship of employer and employé had ceased to exist, except perhaps as to one member of the union who, according to the evidence, had left his employment and then, on his statement that he was not a member of the union, had been taken back. That he was the only member of the union in the employment is not in dispute. On 28th June the appellants took out another summons in the original claim, in the same terms as that taken out in December, 1904. That came on for hearing on 5th July. At that time all the members of the appellant union had left the employment of the respondents, with the possible

exception already mentioned, and the respondents were working the mine with a number of other men who were not members of the union. The objection was taken for the respondents that, as the relationship of master and servant had ceased to exist between the persons for whom the union was acting and the respondents, the Arbitration Court had no jurisdiction to entertain the application or the claim.

We have had some difficulty in determining exactly what took place before the Arbitration Court. The application made by the appellants was admittedly made for the purpose of regulating the future working of the colliery as between the respondents and their employés, who were strangers to the appellants, except perhaps as regards one man. The objection was that the Arbitration Court had no jurisdiction, at the instance of a union which had no concern with the employés, to regulate the management of the affairs of the employers. The substantial point taken by the appellants was that the Court of Arbitration, notwithstanding the cessation of the relationship of employer and employé, had jurisdiction to regulate the affairs of the employers for the future. That point was clearly taken.

Another point, as to which it is not quite clear how far it was taken, is whether the jurisdiction of the Arbitration Court to deal with the claim then pending was ousted by the cessation of the relationship of employer and employé, as between the persons on whose behalf it was acting and their former employés. Those two points are quite different. Whether the objection that the Arbitration Court could not determine the matters raised by the original claim was or was not a valid objection to the continuance of the action, as it would be termed at common law, there is no doubt that the determination whether the action should go on or be dismissed was within the jurisdiction of the Arbitration Court. It is not disputed that that Court had authority to inquire into any claims properly raised by the original dispute, to dismiss the application if it thought right to do so, and to adjust any rights that might have accrued during the pendency of the proceedings. It is also said to be doubtful whether the Arbitration Court asserted jurisdiction to deal with matters affecting the future, or merely said that they would go on with the hearing of

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the claim, and dismiss it if they thought they had no jurisdiction to deal with the matters brought before them. If there are before the Court several matters, some within and some without its jurisdiction, it is clear that a prohibition may go as to those matters which are beyond its jurisdiction if the Court assumes to deal with them. That is called prohibition *quoad*. It is also, no doubt, a general rule that, on an application of that sort under such circumstances, the Superior Court will not assume that the inferior Court intends to exceed its jurisdiction. It will say then that the application is made too soon, and that the applicant must wait and see whether the inferior Court really intends to exceed its jurisdiction.

In this case special leave to appeal was granted on the main ground, that is, the very important question whether an industrial union of employés is entitled to have litigated the conditions of employment existing under an employer who does not employ any of its members. Special leave was granted to raise that question. Now, in a Court of Appeal a matter ought to be treated on the same footing as in the Court from which the appeal is brought, and there is no doubt that in the Supreme Court the substantial matter was understood to be the very important question which I have stated. Nor is there any doubt that before that Court the jurisdiction of the Arbitration Court to deal with such matters was asserted; it was the only point really in controversy. The other matter, whether the Arbitration Court had jurisdiction to deal with the claim so far as it referred to matters connected with the former conditions of employment, was hardly adverted to in argument, and was not touched upon at all in the judgment of the Supreme Court. Under these circumstances I think we are bound to treat the matter as the Supreme Court treated it. What was the real point in issue depended on a question of fact of which they were the judges, and they treated the case on the footing that the Arbitration Court had asserted jurisdiction to deal with matters affecting the future.

Another incidental point was whether, if all the members of the union had ceased their employment and one of them had gone back, that would make any difference. I doubt whether it would. There is a slight conflict of evidence on that point, but it is a pure

question of fact, and in the Supreme Court it was treated as settled in one way. We are bound to deal with the substantial matter on the footing that the Arbitration Court had asserted jurisdiction to deal with a dispute instituted by a union against employers who employed none of the members of the union. If they did not intend to assert such jurisdiction, it is strange that the litigation should have gone so far without any suggestion being made to that effect. The members of the Arbitration Court are parties to the appeal, and, although of course members of an inferior Court in such cases do not generally appear as litigating parties, it is nevertheless strange that, if they did not intend to exercise this jurisdiction, they should not have said so. Nothing would have been easier than to inform the Supreme Court or this Court of that fact. It is necessary therefore to deal with the substantial question raised in the Court below. There is no dispute that, as regards dealing with the then pending dispute, the Court had jurisdiction in respect of that. The learned Judges of the Supreme Court did not apply their minds to that question at all. That is not the matter which we have to decide. The other point is one of very great importance. The proposition was put by Mr. Shand in the widest terms, that an industrial union can raise an industrial dispute with an employer, or union of employers, on its own initiative, and refer it to the Arbitration Court, although none of its members are employed by the employer, and although the employés actually engaged are quite satisfied with the terms and conditions of their employment.

In the case of *The Master Retailers' Association of N.S.W.* v. *The Shop Assistants' Union of N.S.W.* (1), which was decided by this Court about twelve months ago, we had occasion to consider the general functions of the Industrial Arbitration Court and the provisions of the Act. It was pointed out in the judgment of the Court in that case (2) that "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

(1) 2 C.L.R., 94. (2) 2 C.L.R., 94, at p. 107.

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examining the language of the Act, that the words used are always words apt to be used in speaking of a tribunal." And the legislature, starting from that basis, did not think it necessary to expressly define a tribunal, or to declare that the ordinary attributes of a tribunal should exist, but assumed that these were matters of common knowledge, and proceeded to establish this new tribunal, and give it jurisdiction over certain specified matters. Now, the first condition of a litigation is that there shall be a plaintiff, and the first condition of a plaintiff's right to sue is that he shall be interested in the matter to be decided. That is a condition which governs the proceedings of all courts of justice. Are the present appellants interested in this matter? It is said that they are. The argument was based almost entirely on the interpretation of sec. 2 of the Act. When I use the word interest, I mean interest in the legal sense, not in the sense that a person would like to have the matter determined, but in the sense in which it is used in Courts of justice and in legislation. The provisions of the Act with respect to litigation are very meagre. The Act assumes the ordinary attributes or conditions of a Court of justice to exist. Sec. 26 declares the Court's jurisdiction. It says: "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—(i.) 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; (*b*) to make any order or award or give any direction in pursuance of such hearing or determination;" and to do certain other things necessary for the carrying out of those powers. Sec. 28, which is negative in terms, provides that "no matter within the jurisdiction of the Court may be referred to the Court, nor may any application to the Court be made except by an industrial union or by any person affected or aggrieved by an order of the Court." Sec. 2 defines an industrial dispute as a "dispute in relation to industrial matters arising 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." And an industrial dispute may not be referred to the Court

except in pursuance of a resolution of the members of the union arrived at under prescribed circumstances. It is said that it is to be inferred from those provisions that a union can refer to the Court for settlement any industrial dispute that it pleases. In order to ascertain the nature of an industrial dispute we have only to refer to the interpretation section, and if we find that there is a dispute in the strict and literal meaning of that section, there is a power at once for any union to refer it to the Court, and so to give rise to the exercise of the Court's jurisdiction. As to that we remark, first of all, that the industrial union, as a collective body in the nature of a corporation, has no individual relation with the employer at all. A union as such does not contract with the employer. It represents in a corporate sense the individual members of the trade. We again remark that sec. 28 is negative. It assumes certain things. And from the definition in sec. 2 it appears that the parties to an industrial dispute must be an employer on the one side and an industrial or trade union on the other. Unless there is an industrial dispute a matter cannot be referred to the Arbitration Court. What follows from that? It follows that an industrial dispute between an employer and employés cannot be referred to the Arbitration Court except by an industrial union—except possibly under other powers contained in the section—but it cannot be referred under the words which I have read. But does it follow that any claim that an industrial union may make in the abstract is an industrial dispute? Before there can be an industrial dispute, it is a truism to say there must be a dispute, and it must be a dispute relating to industrial matters. Industrial matters are matters relating to the terms and conditions of employment between employer and employé in an industry. So that, until employer and employés differ as to the terms and conditions of employment, there is no industrial dispute. Otherwise there is nothing to settle. But so soon as a dispute arises an industrial union may take it up and refer it to the Arbitration Court. But if the union has nothing to do with the particular employés who are parties to the dispute, what interest, in the legal sense, has it in the dispute? How can it be said that it as plaintiff has any legal interest in the matter? Here are employers and employés going along in

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perfect amity. A union outside the employés altogether is dissatisfied with the conditions of peace and quietness which exist, and wishes to have an industrial dispute, and the contention is that it is entitled to interfere and invoke the aid of the Arbitration Court, not to quiet an existing dispute, but to create one and get it settled. I cannot think that that was the intention of the legislature. It certainly does not fall within the ordinary meaning of the terms used in the Act, and I do not think that it follows as a necessary inference from the language relied upon by the appellants. That was the view of the Supreme Court, and in that I think they were quite right. I think that the union was not entitled to create an industrial dispute between an employer and employés with whom they have no connection.

So far, therefore, as in this case the Arbitration Court has assumed to deal with the questions raised by the union as to the conditions which should govern the relationship between the respondents and their employés for the future, I think that they have gone beyond their jurisdiction, and that, for the reasons given at the outset, the matter was properly raised before the Supreme Court.

With respect to the minor matter, that the Arbitration Court had jurisdiction to deal retrospectively with the claims raised in October, 1903, and December, 1904, it is admitted that the prohibition is too large. That however is not a matter affecting the real and substantial question in this case.

I think, therefore, that the Supreme Court was substantially right, and that, though the rule should be modified so as to correct so much of it as was made by the Supreme Court *per incuriam*, owing to their attention not having been drawn to the point, the appeal substantially fails.

BARTON J. and O'CONNOR J., concurred.

Order of the Supreme Court varied by inserting the words "as regards matters