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deprive the subject of the right of appeal against a judgment of the State Court, and no other section gives such authority."

Their Lordships also concur in what the same learned Judge says at the end of his judgment (1):—

"If the Federal legislature had passed an Act which said that hereafter there shall be no right of appeal to the King-in-Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of the Federal legislature, and, in my opinion, it is outside their power to do that very thing in a roundabout way."

Their Lordships will therefore humbly advise His Majesty that the petition presented by the Commonwealth of Australia for a dismissal of the appeal on the ground of its incompetency, ought to be dismissed.

There will be no order as to the costs of the appeal as between the appellant and the respondent. The Commonwealth must pay the appellant's costs of the intervention.

[HIGH COURT OF AUSTRALIA.]

PRESIDENT AND MEMBERS OF THE COURT OF ARBITRATION (W.A.) . . APPELLANTS;

AND

JOHN NICHOLSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 24-25.

Griffith C.J., Barton and Higgins JJ.

Mandamus, when will lie—Conclusive jurisdiction—Counsel or solicitor—Right of appearance and audience—Industrial Conciliation and Arbitration Act (*W.A.*), (*No.* 21 *of* 1902), *secs.* 51, 71, 73, 87.

During proceedings before the Industrial Arbitration Court, Western Australia, a solicitor applied to be allowed to appear and conduct the case on

(1) (1905) V.L.R., 463, at p. 469; 26 A.L.T., 198, at p. 200.

behalf of a party to the proceedings whose duly appointed agent he was. The Court heard his application and argument thereon, and decided against him, considering that they were bound by the Act not to allow solicitors to appear before them as agents unless with the consent of all parties. The solicitor obtained from the Supreme Court of Western Australia a writ of mandamus to compel the Court to allow him to appear and be heard as the agent of a party to the proceedings.

Held, that the right of a particular person to appear as an advocate before the Arbitration Court was a question involving the interpretation of the *Arbitration Act*, which that Court had full jurisdiction to decide. The decision they pronounced was not a refusal to exercise their jurisdiction, but an actual exercise of jurisdiction, so that mandamus would not lie.

By sec. 87 of the *Industrial Arbitration and Conciliation Act* (No. 21 of 1902), proceedings of the Arbitration Court were made not liable to be "challenged, appealed against, reviewed, quashed or questioned on any account whatsoever."

Held, that the decision of the Arbitration Court being one made within the competence of the Court, mandamus could not be resorted to as an indirect method of obtaining the appeal which the Act had denied.

APPEAL from the Supreme Court of Western Australia.

In a proceeding held in the Court of Industrial Arbitration in Western Australia the parties were certain unions of employés and employers in the timber industry, including the Timber Corporation Ltd., a certain foreign corporation. Respondent, a solicitor in Perth, Western Australia, produced a power of attorney from the Timber Corporation Ltd., empowering him "to sue and be sued or otherwise appear to be impleaded in any Court in any civil or criminal proceedings whatsoever or before any arbitrator or person having by law or consent of parties authority to hear evidence," and claimed the right to appear and be heard on behalf of the corporation. The *Industrial Arbitration Act* (W.A.) (No. 21 of 1902) provides by sec. 51 that in industrial disputes before Boards of Conciliation any party being an employer may appear in person or by his agent duly appointed for that purpose (sub-sec. 4), but (sub-sec. 7) no counsel or solicitor shall be allowed to appear or be heard before a Board unless all parties expressly consent. Sec. 71 provides that "subject to the provisions hereinafter contained," the proceedings before the Court of Arbitration shall be the same as proceedings before the Board of Conciliation, and the provisions respecting the appearance of parties before the Board should apply to proceedings

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before the Court. Sec. 73 enacts that any party to proceedings before the Court may appear personally or by duly appointed agent, or, with the consent of all parties, by counsel or solicitor. Respondent claimed the right to appear under sec. 73 as the agent of a party to the proceeding, and disclaimed any appearance in the legal capacity as solicitor or counsel. After argument and consideration the Court of Arbitration decided that respondent's character of solicitor debarred him from appearing in any capacity, even as an agent, unless with the consent of all parties.

The Full Court, after two arguments, held that respondent was an agent entitled under sec. 73 to appear and be heard before the Court, and made absolute a prerogative writ of mandamus directed to the President and Members of the Arbitration Court ordering them to recognize this right. Leave was obtained to appeal to the High Court.

Barker (Crown Solicitor for Western Australia), for the appellants. The decision of the Arbitration Court was a deliberate decision upon the true construction of the Act on which its jurisdiction is based. Such a decision was within the Court's jurisdiction, and sec. 87 of the Act makes the decision of the Court final and conclusive, and precludes all appeal. Mandamus will not lie to the Court to compel it to reverse its decision as to the right of a particular person to be heard before it. Mandamus never lies to a Court to compel it to allow or suffer a certain procedure to be followed: *Western Australian Amalgamated Society of Railway Employés Union of Workers* v. *Commissioner of Railways for Western Australia* (1). It lies only to compel a Court to hear and determine a cause, and this can only be where the Court either absolutely refuses to exercise jurisdiction or wrongly decides a matter strictly preliminary to a proceeding before it: *Shortt on Informations, Mandamus, &c.* (1887 ed., p. 295); *Shortt and Mellor's Crown Office Practice* (1890 ed., p. 20); *R.* v. *Cotham* (2); *R.* v. *Lords of the Treasury*; *In re Loxdale* (3); *R.* v. *Lord of Manor of Old Hall* (4); *R.* v. *Lords of the Treasury*; *In re Tibbits* (5); *R* v. *Brown* (6); *R.* v. *Justices of West Riding of*

(1) 3 C.L.R., 66.
(2) (1898) 1 Q.B., 802.
(3) 10 A. & E., 179.
(4) 10 A. & E., 248.
(5) 10 A. & E., 374.
(6) 7 El. & Bl., 757.

Yorkshire (1); *R.* v. *Richards* (2). There was no refusal to exercise jurisdiction here, nor even a wrong decision upon a preliminary question of jurisdiction, but an active exercise of jurisdiction after hearing the facts and the law.

Haynes K.C. and *Hensman*, for the respondent. The objection taken to the appearance and audience of respondent was a preliminary question which affected the whole jurisdiction of the Court over these proceedings. The Court must allow parties to appear personally or by their duly appointed representatives: *Re an Arbitration between London County Council and London Tramways Co.* (3). The Timber Corporation could not possibly appear otherwise than by an agent properly appointed; and respondent held the Corporation's power of attorney, and was their agent registered by law. The hearing is *coram non judice*, it is not a trial at all, if the Corporation are refused appearance or audience through the only person who could appear for them. The Arbitration Court therefore decided upon a preliminary question upon which their jurisdiction was founded; and they decided in a way which showed that they could not have applied their minds to the question.

[GRIFFITH C.J.—But under the power of attorney Nicholson was given power to appoint an agent in his place, and could have appointed an agent who was not a solicitor.]

It was a denial of justice if the Court decided erroneously that respondent should not be heard because he was a counsel.

[HIGGINS J.—If an appeal lay from this decision, you cannot proceed by mandamus; and if, by sec. 87, the "proceedings cannot be challenged or questioned," you cannot have a mandamus.]

Mandamus has been granted or treated as the appropriate remedy in numerous cases: *R.* v. *Mayor of London* (4); *Parker's Case* (5); *In re Barlow* (6); *R.* v. *Justices of London* (7); *R.* v. *Registrar of Greenwich County Court* (8); *R.* v. *Justices of London* (9). Respondent under the power of attorney became

(1) 5 B. & Ad., 1003.
(2) 20 L.J.Q.B., 351.
(3) 13 T.L.R., 254.
(4) 13 Q.B., 1.
(5) 1 Vent., 331.
(6) 30 L.J.Q.B., 271.
(7) (1896) 1 Q.B., 659.
(8) 15 Q.B.D., 54.
(9) (1895) 1 Q.B., 616, at p. 627.

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the Corporation in person, and was a party who was refused audience.

[GRIFFITH C.J.—That would be a denial of natural justice, and would be matter for prohibition. But can a mandamus ever be used to compel an inferior Court to hear a particular person as advocate?]

We are bound to come to the superior Court at once. Prohibition would only doubtfully lie, and would be refused if we stood by and came in at the end of the proceedings. The inferior Court has no jurisdiction to dictate to the Corporation what agent it shall or shall not employ.

[GRIFFITH C.J.—It is true that in *R.* v. *Archbishop of Canterbury* (1) a mandamus was held to lie where an objector was refused a hearing before confirmation of an election on a *congé d'élire*. But that was a refusal to carry out the main function of the tribunal of confirmation, *i.e.*, to hear objectors.]

It is not a hearing at all, where the Arbitration Court refuses to hear a party's only representative.

In *R.* v. *Cloete* (2) a mandamus was granted where the justices refused to adjudicate owing to an erroneous construction of a section of the Act constituting their jurisdiction. It was the function of the Arbitration Court to hear parties, and it is a refusal of jurisdiction to exclude one from audience: *Legal Practitioners Act* 1893 (57 Vict. No. 12), secs. 46, 47; *R.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (3).

Barker in reply. In *R.* v. *Justices of London* (4) the question was as to the extent of the jurisdiction conferred by the law on the inferior Court. The Arbitration Court has the statutory function of deciding all questions arising in industrial disputes, including the construction of the *Arbitration Act* in its bearing upon all interlocutory and incidental questions arising before it. The matter in dispute was within the power of the Court to decide, and mandamus cannot be resorted to in place of the appeal which sec. 87 has taken away. The mandamus granted in *R.* v. *Cotham* (5) was due to the erroneous opinion then pre-

(1) 11 Q.B., 483.
(2) 64 L.T., 90.
(3) (1891) 1 Q.B., 378.
(4) (1895) 1 Q.B., 616. at p. 627.
(5) (1898) 1 Q.B., 802.

vailing that licensing justices were not a tribunal, so that no certiorari lay, and mandamus seemed to be the only remedy available to cure a case of gross injustice. That opinion was corrected by *R.* v. *Johnson* (1). *Parker's Case* (2) was only a case regarding the rights of an office; *see Viner's Abridgment* (*Tit. Office*). So also *R.* v. *Registrar of Greenwich County Court* (3) was placed upon the ground of a solicitor's personal right of audience as an officer of the High Court of Justice. The Arbitration Court had power to determine the right of the solicitor to appear; it exercised this power in its control of the procedure, in which connection this question must first be raised and decided.

Oct. 25.

GRIFFITH C.J. This is an appeal from a decision of the Full Court making absolute a rule *nisi* for a mandamus directed to the President and members of the Arbitration Court to compel them to allow the respondent to appear before the Arbitration Court in a proceeding before that Court, and to be heard on behalf of the Timber Corporation Ltd. who were parties to the proceeding. Nicholson is a legal practitioner of this Court, and is also the attorney under power of attorney for the Timber Corporation, which is an English corporation registered in England, and also registered under the local law in Western Australia, Nicholson being their registered agent. By the *Industrial Conciliation and Arbitration Act* 1902 provisions are made as to the appearance of parties in litigations before that Court. Sec. 51 lays down rules as to the appearance of parties before Boards of Conciliation, one of which is that "an employer, being a party to a reference, may appear in person or by his agent duly appointed in writing for that purpose" (sub-sec. 4). Another provision is that "no counsel or solicitor shall be allowed to appear . . . unless all the parties to the reference expressly consent thereto" (sub-sec. 7). Sec. 71 provides that "Subject to the provisions hereinafter contained . . . the provisions herein contained as to the appearance of parties before a Board shall apply to proceedings before the Court." Sec. 73 is in these words:—"Any party . . . may appear personally or by agent,

(1) (1905) 2 K.B., 59. (2) 1 Vent., 331.
(3) 15 Q.B.D., 54.

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or, with the consent of all parties, by counsel or solicitor." Nicholson, relying on the fact that he was agent under power from the company, claimed to appear and represent them in the proceedings. The Arbitration Court refused to allow him to do so, holding he could not appear as counsel without the consent of the other parties, which was not given, and, further, that being a counsel or solicitor, he was disqualified from acting as agent. Upon that Nicholson obtained a rule *nisi* for a mandamus. The application, probably, ought to have been made by his principal. However, no point is made here of that objection. The Court, after two arguments, made the rule absolute. As I understand, they were clearly of opinion that Nicholson was entitled to appear as a duly appointed agent, and that the fact of his being a legal practitioner did not disqualify him; but they also expressed their opinion upon another question, that is, whether upon a proper construction of secs. 51, 71 and 73, parties may appear by counsel, if the Court sees fit to hear them, and they were of opinion that counsel were not disqualified from being heard if the Court thought fit to hear them. This appeal is brought from that decision. At the outset of the argument the question arose whether mandamus will lie to the Arbitration Court at all, and, if so, whether it lies in this case. If it will not, although it may be very satisfactory to the Arbitration Court to have the opinion of a superior Court, which, indeed, was invited by the Arbitration Court in this case, yet I am inclined to adopt the words of *Patteson* J. in the case of *The King* v. *Justices of West Riding of Yorkshire* (1):—"I do not say what my opinion would have been upon the point raised on the Act of Parliament, but I will not encourage parties to obtain the opinion of the Court on speculative points." But the question whether mandamus will lie to the Arbitration Court is not a speculative point; it is a point which must be determined, and is one of very great importance. The 87th section of the *Arbitration Act* provides that:—"Proceedings in the Court shall not be impeached or held bad for want of form, nor shall the same be removable to any Court by certiorari or otherwise; and no award, order, or proceeding of the Court,

(1) 5 B. & Ad., 1003, at p. 1010.

. . . shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature on any account whatsoever. The legislature has thereupon stated in the plainest language its intention that the decisions of the Arbitration Court shall be unimpeachable, and shall not be subject to appeal to any Court whatever, or be subject to review by any Court whatever. There is one exception, which as a matter of construction is always attached to provisions of this sort, that is to say, that the decision in question must be within the jurisdiction of the Court. It has always been held that any decision of an inferior Court may be challenged on the ground of want of jurisdiction. As pointed out by Lord *Denman* C.J., in the case just mentioned, (1) if the Court were by way of mandamus to attempt to correct an erroneous decision on a matter of law within the jurisdiction of the Arbitration Court, that would be, in effect, to repeal the 87th section, which says that the decision of the Arbitration Court is to be final. The only question in this case then is whether the decision of the Arbitration Court to refuse to allow Nicholson to appear to represent his principals in the Arbitration Court was within its jurisdiction. Had they jurisdiction to decide the question? If a Court of limited jurisdiction or any inferior Court exceeds its jurisdiction, or attempts to deal with matters beyond its jurisdiction, the Supreme Court will interfere by prohibition. On the other hand, if it declines to exercise its jurisdiction when duly invoked, and so denies justice to a person entitled to invoke its jurisdiction, the Court will grant a mandamus. But I do not know of an instance of such a mandamus except where an inferior Court has declined to exercise jurisdiction. The distinction is pointed out by *Coleridge* J. in the case of *Reg.* v. *Richards* (2):—"If the inferior Court abstain from entering upon the merits in consequence of their arriving at a wrong decision upon a preliminary point, this Court will set them right. This is perfectly well understood with regard to Courts of Quarter Sessions. In this case, the first thing to be considered is, whether there has been an adjudication upon the merits, or an abstaining from decision in consequence of a preliminary

(1) 5 B. & Ad., 1003, at p. 1008.

(2) 20 L.J.Q.B., 351.

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objection having been sustained." There is no doubt that, in this case, the Arbitration Court did not decline jurisdiction to hear and determine the case; on the contrary they have gone on and heard it. What they did was to exercise a power they supposed they had, and to decline to hear the particular representative of one of the parties. No doubt, as pointed out by *Parke* J., in the case of *Collier* v. *Hicks* (1) (cited by *McMillan* J.) no person is in general entitled to act as an advocate without leave of the Court except under some Statute. In this Arbitration Court, therefore, apart from any statutory provisions to the contrary, the Court would have to determine for itself who shall appear before it; but the legislature has laid down certain rules which that Court is bound to follow. Then the question arises had they jurisdiction to interpret those rules? It is clear that the Court must determine, when a man claims to be an agent, whether he is an agent in point of fact. Why should they not also determine whether he is an agent within the meaning of the Statute? The legislature has laid down a certain rule as to who may be agents; the Court must ascertain, when the question is raised before it, whether the person claiming to be an agent is such an agent. If they come to the conclusion that he is not, surely they are entitled to decline to hear him. In doing so, they are not declining jurisdiction, they are exercising jurisdiction although their decision may possibly be erroneous in point of law or fact. So that this case cannot be put on the ground that the Arbitration Court declined to exercise jurisdiction. If it can be supported at all it must be on another ground, that is, that a party has been deprived of some statutory right which is not the subject of adjudication by the Arbitration Court. The case of *The Queen* v. *Registrar of Greenwich County Court* (2) would, at first sight, appear to have some bearing on the case from this point of view. In that case an application was made by a solicitor to be allowed to appear in the Greenwich County Courts in Bankruptcy to examine the debtor, and the Registrar, sitting as the Court, refused to allow him to do so because he had no authority in writing. The learned Judges of the Court of Appeal doubted very much whether a solicitor was entitled to make such

(1) 2 B. & Ad., 663.

(2) 60 L.T., 248; 37 W.R., 132.

an application, but they held that in any event the solicitor was not entitled to succeed. The point that a mandamus would not lie was not taken, possibly because it was assumed that, as the solicitor was an officer of the Court, a mandamus would lie to restore a man to an office of which he had been unjustly deprived; or it may have been considered—and I think this is the more probable view—that in that case the party for whom the solicitor appeared was by the action of the Registrar of the County Court deprived of bringing his case before the Court at all; he was refused audience; he was entitled to appear as a litigant, and the Court excluded him. That would be declining jurisdiction; declining to exercise in his favour the jurisdiction which he was entitled to invoke. In another case, *R.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (1), a mandamus was granted to an Assessment Committee to hear an agent; but in that case the objector was entitled to invoke the jurisdiction of the Committee, and to be heard by an agent, and the Committee had refused to hear him. That, again, may be regarded as a case of declining jurisdiction in refusing to hear a person entitled to invoke it. In the present case, whatever the Arbitration Court have done, they have certainly not done that. They, as far as we know, were willing to hear the Timber Company; but they were entitled to inquire whether the respondent was their agent or not; they came to the conclusion that he was not, and therefore they declined to hear him. I think a decision on that point is a decision which falls within the terms of sec. 87, and that it is not appealable to the Supreme Court or elsewhere. If the Arbitration Court came to a wrong decision on that point it is for the legislature to put it right. On the main point on which the learned Judges expressed their opinion I offer no opinion whatever. In my view the appeal must be allowed.

BARTON J. I am of the same opinion.

HIGGINS J. I am of the same opinion. As the case has several phases, I should like to put clearly how it appears to my eyes. I have all the less hesitation in expressing my view as the grounds

(1) (1891) 1 Q.B., 378.

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upon which we decide were not, to say the least, fully discussed before the Full Court. The question is, Was the Full Court right in issuing a mandamus to the Court of Arbitration to hear Mr. Nicholson? Mr. Nicholson is counsel and solicitor, and he holds a power of attorney from the Timber Corporation for certain purposes; but I do not want to be taken as deciding that the power of attorney authorizes him to appear as agent before the Court of Arbitration, and to present the corporation's case. I merely assume that he has the power, for the purposes of the present decision. Under sec. 51 (4) an employer may appear in person, or by agent duly appointed in writing. Under sec. 51 (5) an industrial union may appear by its chairman or secretary or person appointed in writing, or person appointed under the rules; and under sec. 51 (7) no counsel or solicitor shall be allowed to appear or be heard before the Board unless all the parties to the reference expressly consent thereto. Then comes sec. 71, which says that the provisions in the Act contained as to the appearance of parties before a Board shall apply to the proceedings before the Court itself. Then comes sec. 73 which affirmatively says that any party appearing before the Court may appear personally or by agent, or, with the consent of all the parties, by counsel or solicitor. Some difficulty arises, no doubt, as to sec. 73, in view of secs. 51 and 71. It is certain that in this case there has been no consent to appear by counsel or solicitor; and the question has arisen whether the meaning of sub-sec. 7 of sec. 51 is that no person who is a counsel or solicitor shall be allowed to appear by virtue solely of his retainer, or whether it means to exclude any agent who happens to be a counsel or solicitor. That is a question of interpretation of the Act. If one takes this with secs. 74 and 84, which prescribe that the Court is to decide without regard to technicality and according to equity and good conscience, it may well be said, as has been urged, that it means to exclude a person who happens to be a counsel or solicitor from acting as agent. The Court of Arbitration says that he is excluded, and the Full Court says not. It is a difficult question; but our point is this:—The Court of Arbitration has decided the question and the Full Court has no power to interfere with that decision, and the High Court has no power either. Now, we decide essentially upon the meaning of

sec. 87, that no award or proceeding of the Court shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of jurisdiction on any account whatsoever. In fact, the words are as strong and as broad as can be. I take it that the Court of Arbitration is to be the final interpreter of the law so long as it keeps within the ambit of the jurisdiction conferred by the Act; and this is an Act which really allows the Court of Arbitration to create new rights, even to legislate, as between employer and employé; and the legislature gives the Court its confidence, not only in the creation of such new rights, but in the interpretation of the Act. The Arbitration Court has the right to decide and to decide finally. The legislature seems to have regarded it as better to have finality with an occasional error rather than accuracy with additional expense. If the Court of Arbitration mistake the intention of the legislature, it is for the legislature to intervene and express its intention more clearly, or to take away the immunity of the Court of Arbitration from appeal. I wish to say also that I do not want to deal at all with the grave difficulty which has been discussed as to a mandamus lying to hear a particular agent or counsel. It seems at first sight to have no precedent for it. Nor do I want to deal with the difficulty which arises from the fact that the application is made by the agent and not by the principal; for Mr. Barker has assisted the Court by waiving that objection, so as to allow the Court to deal with the application on its merits.

Appeal allowed. Order nisi discharged. Order appealed from discharged.

Solicitor, for appellants, *Barker* (*Crown Solicitor*).
Solicitors, for respondent, *Nicholson & Hensman.*

N. G. P.