[HIGH COURT OF AUSTRALIA.]

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

AND

CROCKETT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 9.

Griffith C.J., Barton and Isaacs JJ.

Industrial Arbitration Act 1901 (*N.S.W.*), (*No.* 59 *of* 1901), *secs.* 12, 26—*Enforcement of Order of Court—Order for payment of fine payable under rules of Union—Attachment for non-payment—Power of Court—Prohibition.*

Sec. 12 of the *Industrial Arbitration Act* 1901 provides that the President of the Court of Arbitration may on application duly made order the payment by any member of an industrial union of any fine, penalty or subscription not exceeding £10, payable under the rules of the Union, and by sec. 26 the Court has power to make rules regulating the practice and procedure of the Court, with reference, *inter alia*, to the enforcement of its orders.

Held, that the Arbitration Court had no power under sec. 26 to enforce by attachment an order made by the President under sec. 12. The failure to obey an order for payment of money is not a contempt in the face of the Court, such as an inferior Court of record could punish by imprisonment, and there are no words in the *Industrial Arbitration Act* from which it can be inferred that the legislature, in giving the Court a general power to make rules for the enforcement of its orders, intended to confer upon it the power to compel obedience to its orders for the payment of money by imprisonment.

Decision of the Supreme Court: *Ex parte Crockett*, (1907) 7 S.R. (N.S.W.), 143, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales making absolute a rule *nisi* for a prohibition to the Court of Industrial Arbitration.

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The respondent, a member of the appellant Union, became liable under the rules of the Union to pay certain fines. On the application of the Union he was ordered by the Deputy-President to pay the fines in question. He failed to do so and the Deputy-President ordered writs of attachment to issue against him under rule 75. The Supreme Court granted a prohibition against the enforcement of the attachment: *Ex parte Crockett* (1), and from that decision the present appeal was brought by special leave.

Further reference to the facts, and a full statement of the rule in question and the material sections of the Act will be found in the judgments hereunder.

Gordon K.C. and *Windeyer*, for the appellant Union. Rule 76 authorizes the issue of a writ of attachment, and rule 75 provides for an application by summons to show cause why a writ should not issue. The power given by sec. 26 (*n*) of the *Industrial Arbitration Act* 1901 includes a power to attach for disobedience to an order of the Court. The words are general and unrestricted, and the Court has full discretion as to the method of enforcement. The order in this case was made under sec. 12. It is not suggested that this is a punishment for contempt of Court, it is merely a means of enforcing the Court's order for the payment of money. There is no reason why such a power as this should not be conferred upon the Court. The District Court can enforce payment of money under its orders in a similar way. The Deputy-President has the same powers in this connection as the President.

J. A. Browne, for the respondent. No doubt the order for payment is one which the Court has power to enforce under sec. 26 (*n*), but the powers of enforcement are limited to the methods provided in sec. 37. There is no warrant in the Act for interference with personal liberty for the purpose of compelling payment of money payable under an order of the Court. If the legislature had intended to confer power to imprison for debt, it would have done so by clear words. The general power of the Supreme Court to enforce judgments for the payment of moneys

(1) (1907) 7 S.R. (N.S.W.), 143.

by attachment was abolished by 10 Vict. No. 7, and limited to the cases expressly provided by the Statute. The power conferred upon the District Court, the Bankruptcy Courts, and the Probate Court are clearly defined by the Statutes, not left to inference. See *District Courts Act* (No. 4 of 1901); *Bankruptcy Act* (No. 25 of 1898), sec. 134 (6); *Probate Act* (No. 13 of 1898), sec. 149. [He referred also to *Small Debts Recovery Act* (No. 13 of 1899), secs. 34, 35; the *Companies Act* 1899, sec. 127; Equity Rule 211.] The Court will not hold that such power is conferred in the absence of clear and express provision.

Gordon K.C., in reply, referred to *In re Smith*; *Hands* v. *Andrews* (1); *Poyser* v. *Minors* (2); *In re Edgcome*; *Ex parte Edgcome* (3); *In re Gent*: *Gent-Davis* v. *Harris* (4).

[ISAACS J. referred to *Stonor* v. *Fowle* (5); and *In re Watson*; *Ex parte Johnston*; *Johnston* v. *Watson* (6).]

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GRIFFITH C.J. The 12th section of the *Industrial Arbitration Act* provides that the President of the Arbitration Court, on the application of an industrial Union, may order payment by any member of the Union of any fine, penalty, or subscription payable in pursuance of the rules, provided that such subscription shall not exceed £10.

In the present case the respondent, who was a member of the appellant Union, committed breaches of the rules, for which several fines of £10 were inflicted upon him. Application was made to the Deputy-President of the Arbitration Court for an order for payment, and an order was duly made. The money was not paid. Thereupon the appellants applied to the Court on summons, for leave to issue writs of attachment against him for non-payment, relying upon rule 75 of the rules made under the Act, which provides that the Court, or President, on summons taken out by any person affected by such breach of non-payment, may order that a writ of attachment issue. The second paragraph provides that this shall apply "where a person fails to pay money ordered by the Court or President to be paid, and the Court or

(1) (1893) 2 Ch., 1.
(2) 7 Q.B.D., 329, at p. 333.
(3) (1902) 2 K.B., 403.
(4) 40 Ch. D., 190.
(5) 13 App. Cas., 20.
(6) (1893) 1 Q.B., 21.

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President, as the case may be, is satisfied that he has means to pay such money, or is evading or attempting to evade payment."

The short result is that, if this summons can be granted and that rule is valid, the breach of the domestic rules of the Union may be enforced by imprisonment. That may be the law, but the person alleging it to be the law may fairly be asked to show where the legislature has indicated any such intention. It has been settled by this Court that the Industrial Arbitration Court is an inferior Court, and there are certain recognized rules applicable to inferior Courts. One settled rule is that a Court of inferior jurisdiction, although a Court of record, and therefore having power to punish for contempt, cannot commit for a contempt not committed in the face of the Court. That is clearly pointed out in the case of *The Queen* v. *Lefroy* (1).

But it is said that they have power to enforce non-payment of a judgment debt. Sec. 26, sub-sec. (*n*), is relied upon for that contention. That section enumerates all the powers of the Court. Sub-sec. (*c*) gives power, subject to the approval of the Governor, to make rules regulating the practice and procedure of the Court, and more especially but not so as to limit the generality of its powers in the premises with reference to:—(i.) the times and places of sitting; (ii.) the summoning of parties and witnesses; (iii.) the persons by whom and conditions upon which parties may be represented; (iv.) the rules of evidence; (v.) the enforcement of its orders; (vi.) allowances to witnesses, costs, court fees; (vii.) generally regulating the procedure of the Court; (viii.) appeals under this Act; (ix.) the reference of any matter.

It is contended that when a judgment or order of the Court is to be enforced it is merely a matter of form whether it should be enforced by execution against the goods or person of the debtor, and that, if it thinks fit to issue execution against the person of the judgment debtor, it is within its power to do so.

Is that so? The distinction between a superior and an inferior Court in this respect is pointed out in *The Queen* v. *Lefroy* (1), by *Cockburn* C.J., who, in drawing the distinction between superior and inferior Courts, and referring to the power claimed by an inferior Court to exercise jurisdiction to punish for contempt

(1) L.R. 8 Q.B., 134.

not committed in the face of the Court, said (1):—"No case is to be found in which such a power has ever been exercised by an inferior Court of record, or, at all events, upheld by a decision of the Superior Courts. Finding, therefore, this distinction, that the Superior Courts have exercised the power from time immemorial, and that no such power has ever been known to be exercised by an inferior Court, that would be sufficient to dispose of this case."

I apply that to the present case. The power of enforcing judgments of the superior Courts for payment of money by execution against the person was exercised by Superior Courts in England from time immemorial, but not by any inferior Courts that I know of—certainly not in Australia. Sixty years ago the legislature of New South Wales abolished the right of execution against the person of a debtor, except in certain cases, and that has been the law of New South Wales ever since, and they have never conferred upon an inferior Court the right to enforce payment of a judgment debt by taking the person of the debtor except under carefully limited conditions.

Primâ facie, then, it is not likely that the legislature would entrust this newly created Court with a power which leaves it open to reintroduce a system that has been abolished for nearly 60 years, and which has never been exercised by any inferior Court. It would require very strong words to lead me to hold that the authority of the Court extends to the enforcement of its orders by imprisonment. If it does, what consequences would follow? Are the old laws relating to *ca. sa.* to be introduced? Is the debt taken to be discharged as soon as the debtor is arrested, or is he to be treated under some new system? How long is he to be kept in prison? Under the old system he might be kept there indefinitely. What is to be the rule? Is it to be supposed that the legislature intended to go back to the old law of 60 years before by such general words as are used here?

All probabilities are against it, and I think, taking into consideration the history of legislation, and what has been done in other cases, that the legislature cannot have intended to confer any such power upon an inferior Court.

(1) L.R. 8 Q.B., 134. at p. 137.

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The particular process in this case is called a writ of attachment, sometimes spoken of as a form of execution under the *Judicature Act*. But attachment is in reality a proceeding for contempt of Court, and, regarded from that point of view, this is an attachment for contempt for the non-payment of money, which is certainly not a contempt committed in the face of the Court.

On all these grounds it seems to me that the authority contended for is not conferred upon the Court by the legislature.

BARTON J. I concur, and adopt the reasons that the learned Chief Justice has expressed. Further, I wish to express my agreement with the Chief Justice of the Supreme Court when he says (1) that if it had been intended by the legislature that the Arbitration Court should possess this enormous power of committing a man to gaol because he has not paid a fine, or obeyed the order of the President, or Deputy-President, that he must pay a sum of money—a power of interfering with a man's liberty and sending him to imprisonment for an indefinite period —the power would have been given in express terms, and not left to be inferred. I think we are asked to draw too strong an inference from the words used in the Act, having regard to the legislative history of inferior Courts.

ISAACS J. I agree with what has fallen from my learned colleagues, but would like to say in addition how the matter strikes me.

This Arbitration Court is a new tribunal, exercising a new jurisdiction over new causes of quarrel. The powers of that Court must be found in the Statute either in express words or by necessary implication. The appellants' contention, which has been very ably presented by Mr. *Gordon*, amounts to this: That under sec. 26, sub-sec. (*n*), you find express words by which the Court has jurisdiction and power to deal with all offences and to enforce all orders under this Act. And the argument is that those words are plain, that the legislature has placed no limitation upon the method of enforcement, and therefore the Court is at liberty to enforce any order in any manner it thinks fit.

(1) (1907) 7 S.R. (N.S.W.), 143, at p. 147.

While there may be enactments in which the word "enforce" may be legitimately extended to that point, it all depends on the intention of the legislature, and on the whole Statute, and the question is, is that the meaning here? There was a case before the Privy Council—*Buckley* v. *Edwards* (1) in which the question at issue was the meaning of words giving the Executive power to appoint Judges in New Zealand: "Such other Judges as His Excellency . . . . shall from time to time appoint." It was urged there that these words were unqualified. Lord *Herschell* in delivering the judgment of the Privy Council, after referring to certain weighty considerations that had been advanced why that power should not be unqualified, said (2):—"Nevertheless, weighty as these considerations are, if the natural meaning of the general words used be to confer the power contended for, and if there be no other provisions in the Act showing that this was not the intention of the legislature, effect must be given to the enactment without regard to the consequences. But it cannot be disputed that it is legitimate to read every part of an Act in order to see what construction ought to be put upon any particular provision contained in it."

Applying that rule to this case, what do we find? That the Court is a Court to settle industrial disputes, and its powers must be taken to be ancillary to that object. It is not a Court of the ordinary type. It consists of a Judge and two laymen. If the powers are to be stretched to the extent contended for, then they are not only as great, but more absolute, than those of any other Court, for this reason—that by sec. 26, sub-sec. (*a*), its jurisdiction is to hear and determine according to equity and good conscience. Under sub-sec. (*p*) it has power to demand and "call for such evidence as in good conscience it thinks to be the best available whether strictly legal evidence or not."

By sec. 32 no power exists of appeal or review of its decisions, always supposing, of course, they are within its jurisdiction and not contrary to natural justice. When all those considerations are taken into account, is it not in the highest degree improbable that the legislature intended to incorporate in the powers that were expressly given to it the old doctrine of the Courts of

(1) (1892) A.C., 387.

(2) (1892) A.C., 387, at p. 397.

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Westminster—that non-payment of money costs was a matter in the nature of a contempt to be met by imprisonment, by the arrest of the person?

I do not think it a fair conclusion to arrive at, and I think, looking at rule 75 along with rule 76 and Form 22, it was clearly intended that the process applicable to rule 75 was not one in the nature of contempt. Therefore I can find no indication, so far, that the meaning contended for was intended to be given to the word "enforce" by the legislature.

But I do find in the Act what seem to be indications to the contrary. I shall mention some of them. Wherever you find penalties mentioned in the Act the reference is to money penalties. There is nothing that has been pointed to, or that I can find, where the Court has power to impose a penalty, under any circumstances by way of imprisonment, except that which may be necessarily implied in the case of a breach of injunction. Injunction would be absolutely nugatory unless the Court had power of enforcing its orders in such a way.

Sec. 37 provided the mode of obtaining satisfaction for penalties and fines, but so far as I can see, there is nothing to be found on the face of that section beyond the power given to sue for the recovery of fines and penalties.

Sec. 40 provides that where an award or order of the Court, or an industrial agreement, binds specifically a corporation, &c., "any property . . . shall be available to answer such award, order, or agreement, and any process for enforcing the same," and then it provides for contribution by members, and limits the amount of personal contribution. No member is to be liable for more than £10, a very significant limitation protecting him from payment of a greater amount than £10. The same thing is to be found in sec. 12, under which this order is made. In sec. 45, where the Governor is given power to make regulations, sub-sec. (*j*) provides that penalties may be fixed by regulations, and the penalty for breach of them must not exceed £20, and that is to be recovered in a summary way in the Court of Petty Sessions, and nowhere can you find express power of imprisonment. I attach a great deal of importance to sec. 31 where power is given the Court, or on the written authority of the Court, to "enter any

building," and so on, to inspect and inform the Court for the performance of its functions, and any person who hinders or obstructs—which is ordinarily looked upon as contempt of Court—is liable to a penalty.

That is the place where you might expect to find imprisonment. The legislature has said here that "any person who hinders, or obstructs the Court shall for every such offence," and then provides the prescribed punishment. He shall be liable to a penalty not exceeding £5. Well, if in a case of that kind, where there is a direct hindrance of the Court in the performance of its functions, and that hindrance or obstruction is stigmatized as an offence, there is no penalty of imprisonment, and you find in sec. 26, sub-sec. (*n*), that the legislature has contented itself with a monetary penalty, how can you, then, say that it is a legitimate deduction, or necessary implication in sec. 26, sub-sec. (*n*) that any person who simply fails to pay money, whether he is able to pay or not, may be punished with indefinite imprisonment? I cannot see that myself.

I, therefore, come to the conclusion—from the nature of the Court, the nature of its functions, the express provisions of the Act, contenting itself with references to penalties of a pecuniary nature, and the absence of express power of imprisonment—that imprisonment was not intended as a means of enforcing an order for payment of money. On those grounds, concurring as I do in what has fallen from my learned brothers, I agree that the judgment appealed from was right, and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Pigott & Stinson.*
Solicitor, for respondent, *R. J. M. Foord.*

C. A. W.