[HIGH COURT OF AUSTRALIA.]

HENRY BAXTER . . . . . APPELLANT;

AND

NEW SOUTH WALES CLICKERS' ASSOCIATION, WILLIAM DANIEL CLARK, AND THE HONOURABLE CHARLES GILBERT HEYDON, JUDGE OF THE INDUSTRIAL COURT . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 20, 23, 25, 26, 27; *Nov.* 19, 22; *Dec.* 17.

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

Practice—Appeals from Supreme Court—Special Leave—Question not likely to arise again owing to fresh legislation—Question depending on construction of particular document—Rescission of special leave.

Prohibition—Excess of jurisdiction—Court of limited statutory jurisdiction—Statute taking away prohibition—Construction—Industrial Arbitration Act (*N.S.W.*), 1901 (*No.* 59 *of* 1901), *sec.* 32—*Industrial Disputes Act* (*N.S.W.*) 1908 (*No.* 3 *of* 1908), *secs.* 8, 52.

The High Court will not grant special leave to appeal in cases which do not raise questions of general importance likely to arise in the future or (in general) in cases depending upon the terms of particular documents.

Sec. 32 of the *Industrial Arbitration Act* 1901 (which expired in 1908) provided that proceedings in the Court of Arbitration should not be open to *certiorari*, and that no award, order or proceeding of the Court should be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of Judicature on any account whatever. On the expiration of that Act, the *Industrial Disputes Act* 1908 came into operation, establishing Wages Boards and an Industrial Court, with jurisdiction generally similar to that of the Court of Arbitration, and containing, in sec. 52, provisions of the same general effect as those of sec. 32 of the *Industrial*

Arbitration Act, with the addition of the words "and the validity of any decision" of the Industrial Court "shall not be challenged by prohibition or otherwise." Sec. 8 of the Act of 1908 provided that proceedings pending in the Court of Arbitration at the expiration of the *Industrial Arbitration Act*, for penalties for breaches of awards, &c., might be continued and should be heard and determined by the Industrial Court, and that for that purpose the provisions of the *Industrial Arbitration Act* should continue in force and apply *mutatis mutandis* to the hearing and determination in the Industrial Court and to the enforcement of any order or determination.

A summons issued out of the Court of Arbitration against an employer, to recover penalties for breaches of an award of that Court in paying to apprentices less than the minimum wage prescribed by the award, was pending at the expiration of the Industrial Arbitration Act, and came on for hearing in the Industrial Court. The employer was convicted and fined. The indentures of apprenticeship purported to have been made under the *Apprentices Act* 1901, and were dated before the date of the award. An application to the Supreme Court for a prohibition on the ground that the Industrial Court had no jurisdiction to entertain the summons was refused on the ground that by sec. 52 of the *Industrial Disputes Act* prohibition would not lie to the Industrial Court.

Special leave to appeal from that decision having been granted :

Held, *per totam curiam*, that, as the question of jurisdiction depended, in part, upon the terms of the particular indentures, and in part upon a point of construction which, owing to the course of legislation, could not arise again, the special leave to appeal should be rescinded.

Per Griffith C.J., *Barton* and *O'Connor* JJ. (*Isaacs* J. dissenting).—In dealing with proceedings under sec. 8 of the *Industrial Disputes Act* the Industrial Court was exercising the same powers as would have been exercised by the Court of Arbitration in a similar case, and subject to the same limitations and restrictions, and, therefore, the question whether prohibition would lie to the Industrial Court in such a case depended upon the construction of sec. 32 of the *Industrial Arbitration Act*, and according to the decision in *Clancy* v. *Butchers' Shop Employés Union*, 1 C.L.R., 181, that section did not exclude prohibition for excess of jurisdiction. The relationship of master and apprentice under the *Apprentices Act* 1901, or at common law, is not an industrial matter within the meaning of the *Industrial Arbitration Act*.

Semble, *per Griffith* C.J., *Barton* and *O'Connor* JJ., that, notwithstanding the concluding words of sec. 52, prohibition would lie in respect of any order or determination of the Industrial Court, which on the face of it dealt with what was not an industrial matter within the meaning of the Act ; but that that Court had jurisdiction to decide without appeal or challenge any question of law, including the construction of a Statute, arising in the course of a case, which on the face of the proceedings appeared to relate to an industrial matter.

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But *quære*, *per Griffith* C.J., whether a decision of the Industrial Court as to the construction of the Act conferring jurisdiction would be thus free from challenge.

Per Isaacs J.—Sec. 52 excludes prohibition as to any decision of the Industrial Court on any ground whatever, so long as the power of that Court is exercised *bonâ fide* for the purpose for which it is conferred. Sec. 8 merely continues in the Industrial Court the pending proceedings referred to, gives that Court power to deal with them, and continues in force as to them those provisions of the *Industrial Arbitration Act* which relate to the mode of hearing and determination and the enforcement of orders; but the question whether decisions of the Industrial Court in such proceedings may be challenged by prohibition depends upon sec. 52 alone. The relationship of master and apprentice is an industrial matter within the meaning of both Statutes, and the date of the indentures does not affect the jurisdiction of the Industrial Court to deal with the parties any more than in the case of any other contract of employment.

Special leave to appeal from the decision of the Supreme Court: *Ex parte Baxter*, 9 S.R. (N.S.W.), 201, rescinded.

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

The appellant, a boot manufacturer carrying on business in New South Wales, was proceeded against by the respondent Union in the Industrial Court on a summons to recover penalties for a breach of an award or Common Rule made by the Industrial Arbitration Court 3rd April 1908 under the *Industrial Arbitration Act* 1901. That Act expired by effluxion of time on 22nd June 1908, and on its expiration the *Industrial Disputes Act* 1908 came into force, which by sec. 8 continued proceedings for penalties for breaches of awards that were pending at the expiration of the earlier Act, and gave the Industrial Court power to deal with them. The terms of that section sufficiently appear in the headnote and judgments. The proceedings against the appellant had been begun before 22nd June 1908 and were pending on that date. The award in question was made a Common Rule in all factories in the boot, shoe, and slipper manufacturing industry outside the metropolitan area. The breach alleged was that the appellant during a period when the award was in operation had paid to certain of his employés less than the minimum wage prescribed by the award. On the summons

coming on for hearing before the Judge of the Industrial Court it was not disputed that the appellant was one of the persons to whom the Common Rule applied, or that he had paid the amounts alleged to have been paid to the employés in question, and it was proved that those persons were apprenticed to the appellant under indentures dated before the making of the award, and purporting to be made under the *Apprentices Act* 1901, and that the indentures had been *bonâ fide* entered into on the dates appearing therein, in the ordinary course of business. In view of these facts objection was taken on behalf of the appellant (1) that the relation of employer and employé did not exist in the case of apprentices duly apprenticed under the *Apprentices Act* 1901; (2) that, the indentures having been entered into in accordance with the *Apprentices Act* 1901 before the award or Common Rule, neither the Court of Arbitration nor the Industrial Court had jurisdiction to alter or vary their terms; and (3) that neither the award nor Common Rule had any operation as regards apprentices whose indentures had been entered into before the making of the award or Common Rule, and, therefore, the Court had no jurisdiction to determine the complaint. The learned Judge of the Industrial Court overruled the objections and found the charges proved, ordering the appellant to pay the difference between the wages actually paid and the minimum wage prescribed by the award, in addition to a penalty and costs. The appellant moved the Supreme Court for a rule *nisi* for a writ of prohibition restraining the respondents from further proceeding upon the order of the Industrial Court. A rule *nisi* was granted, but on motion for the rule to be made absolute was discharged by the Supreme Court (*Simpson* Acting C.J., *Cohen* J., and *Pring* J.) by majority (*Cohen* J. dissenting) (1).

From that decision the present appeal was brought by special leave, with leave to move for a writ of *certiorari* if the Court should be of opinion that that was the proper remedy.

Wise K.C. (*Pickburn* and *Betts* with him), for the appellant. If the Industrial Court had no jurisdiction to entertain the matter, prohibition will lie. Sec. 32 of the original Act No. 59

(1) 9 S.R. (N.S.W.), 201.

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of 1901 was held not to exclude prohibition for excess of jurisdiction: *Clancy* v. *Butchers' Shop Employés' Union* (1). Sec. 52 of the *Industrial Disputes Act* 1908 does not carry the matter any further. Such a provision should be construed as not applying to prohibition for excess of jurisdiction unless the contrary intention is clearly shown. It was clearly the intention of the legislature to limit the jurisdiction of the Court. [He referred to *Colonial Bank of Australasia* v. *Willan* (2); secs. 13, 42, 43, 45, 47 of the Act No. 3 of 1908.] The word "decision" should be construed as meaning a decision on a matter within the Court's jurisdiction. The last clause of sec. 52 does not necessarily exclude prohibition for excess of jurisdiction, and can be given a sensible meaning which will not contravene the general rule against such exclusion. Prohibition may be read as meaning statutory prohibition under the Acts relating to justices. (See *Justices Act* No. 27 of 1902, sec. 112, consolidating the provisions of 14 Vict. No. 43, 17 Vict. No. 39, &c.; Act No. 3 of 1908, sec. 49). There is also another recognized ground for prohibition at common law, viz., that the decision is contrary to natural justice. [He referred to *Purcell* v. *Perpetual Trustee Co.* (3); *Ex parte Shakespeare* (4).]

[ISAACS J. referred to *Ex parte Story* (5).]

If the legislature had intended to override *Clancy* v. *Butchers' Shop Employés' Union* (1), they would have inserted after "challenged" the words "for excess of jurisdiction." But whatever may be the effect of sec. 52 of the Act of 1908, the rights of the appellant depended on the original Act of 1901, and were not taken away by the later Act: sec. 8 of No. 3 of 1908; *Colonial Sugar Refining Co.* v. *Irving* (6). If sec. 52 was intended to cut down the Supreme Court's power to grant prohibition to an inferior Court it was unconstitutional. The powers of the Supreme Court are conferred by Imperial Statutes: 9 Geo. IV. c. 83, sec. 3; 5 & 6 Vict. c. 73, sec. 53; 18 & 19 Vict. c. 34, secs. 2, 42. [He referred also to *Supreme Court and Circuit Courts Act* No. 35 of 1900, sec. 16; 6 Wm. IV., No. 12, sec. 1.] By the

(1) 1 C.L.R., 181.
(2) L.R. 5 P.C., 417, at p. 423.
(3) 15 N.S.W. L.R., 385.
(4) 15 N.S.W. L.R., 477.
(5) 12 C.B., 767.
(6) (1905) A.C., 369.

Colonial Laws Validity Act 28 & 29 Vict. c. 63, sec. 2, all Colonial Acts repugnant to Imperial Acts applying to the Colony are invalid to the extent of such repugnancy. Sec. 52 of the Act No. 3 of 1908 is repugnant to the provision of the Imperial legislature that the Supreme Court is to have the same powers to restrain an inferior Court by prohibition as are possessed by His Majesty's Court at Westminster, and is therefore invalid. A local Act cannot take away the prerogative right vested in the Supreme Court by Imperial Statute.

[ISAACS J.—The 18 & 19 Vict. c. 34, gives the local legislature power to make laws affecting older laws. If they act upon that power how can the legislation be repugnant to Imperial law?]

The power was not exercised before 1865, and at that date the *Colonial Laws Validity Act* in effect took away the power.

Sec. 47 of No. 3 of 1908 implies that prohibition will lie to the Industrial Court for excess of jurisdiction. Sec. 52 should, if possible, be read consistently with it. If sec. 52 included all kinds of prohibition there was no necessity for sec. 50, sub-sec. (3). The presumption against the restriction of the Supreme Court's jurisdiction can only be rebutted by strong words. [He referred also to Act No. 3 of 1908, secs. 19, 20, 27, 34, 45, 47, 48, 49, 51, 57, 58, 61, as amended by Act No. 24 of 1908].

This is not merely a case of the Court being wrong in law as to a matter within its jurisdiction. It had no power to deal with existing apprenticeships.

It may be that the Court has jurisdiction to decide whether it has jurisdiction over the particular subject matter where that depends upon matters of fact, but this is a preliminary question of law. In *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (1) there was a question of fact to be decided. Here the facts are admitted. The Court cannot give itself jurisdiction by an erroneous decision. [He referred to *Colonial Bank of Australasia* v. *Willan* (2); *Mayor, &c., of London* v. *Cox* (3); *Heyworth* v. *Mayor of London* (4); *Thompson* v. *Ingham* (5)]. As soon as it appeared that the indentures were

(1) 5 C.L.R., 33.
(2) L.R., 5 P.C., 417, at p. 443.
(3) L.R., 2 H.L., 239, at p. 282.
(4) Cab. & El., 312.
(5) 14 Q.B., 710.

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entered into before the original dispute the jurisdiction was ousted. The award either did not apply to such apprentices, or, if it purported to do so, was to that extent void. [He referred to *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1); *Ex parte Corrigan* (2)]. Prohibition is the proper form of remedy, not mandamus.

[ISAACS J. referred to *Reg* v. *De Rutzen* (3).]

The Court had no power to deal with the relationship of master and apprentice constituted under the *Apprentices Act*, No. 41 of 1901. This is not an industrial matter within the meaning of the *Industrial Arbitration Act* 1901 or the *Industrial Disputes Act* of 1908. There is no relation of employer and employé between the master and the apprentice. The agreement is between the master and the parent, who is not before the Arbitration Court. [He referred to *Industrial Arbitration Act* 1901, secs. 2, 26; and also to *Reg.* v. *Nunneley* (4); *In re Bailey* (5); *Elston* v. *Rose* (6); *Farquharson* v. *Morgan* (7); *In re Caterers' and Restaurant Keepers' Association* (8).

G. S. Beeby, for the respondent Association and W. D. Clark. The words of the Act show that the intention of the legislature was to make the decisions of the Industrial Court free from review by any other authority whatever, and to confer upon it exclusive power to control the Wages Boards in the exercise of their jurisdiction. The relation of the Industrial Court to the Boards is practically the same as that of the Supreme Court to the inferior Courts under the general law. The amendments made by the Act No. 24 of 1908 make the intention clearer still. That Act was passed after the decision in *Ex parte Newcastle Coal Co. Ltd.* (9). The power of the legislature to establish a Court free from control cannot be disputed. The Industrial Court has been entrusted with uncontrolled power, but it is assumed by the legislature that it will not exercise its power in such a way as to work injustice or wrong. In personnel the Court is not inferior

(1) 7 App. Cas., 178, at p. 186.
(2) 3 Arb. Rep. (N.S.W.), 156.
(3) 1 Q.B.D., 55.
(4) El. Bl. & El., 852.
(5) 3 El. & Bl., 607.
(6) L.R. 4 Q.B., 4.
(7) (1894) 1 Q.B., 552.
(8) 3 S.R. (N.S.W.), 19.
(9) 8 S.R. (N.S.W.), 335; 6 C.L.R., 466.

to the Supreme Court, and it is no more likely to abuse its powers. [He referred to secs. 24, 38, 42, 43, 44, 50, 52 of the Act No. 3 of 1908.]

[GRIFFITH C.J. referred to *Gould* v. *Gapper* (1).]

In the cases relating to the Act of 1901 the Court relied on specific provisions clearly limiting the jurisdiction: *Clancy* v. *Butchers' Shop Employés' Union* (2); *Master Retailers' Association of N.S.W.* v. *Shop Assistants Union of N.S.W.* (3). [He referred also to *Taylor* v. *Nicholls* (4).] Sec. 52 of the Act of 1908 should at any rate be construed as making the decisions of the Court unchallengeable as to matters which are on the face of them industrial, and where there is nothing in the nature of a denial of justice. Sec. 45 has not the effect of making the decisions there referred to subject to appeal, &c., under the *Justices Act*. The matters come directly before the Industrial Court and are saved by sec. 52. The only matters dealt with by justices and appealable are those which come under sec. 50. "Prohibition" in sec. 52 cannot be limited to statutory prohibition against proceedings under secs. 45, 49-50. "Appeal" includes statutory prohibition, and prohibition means prohibition at common law generally.

This was a matter within the jurisdiction of the Court. It was necessary for the Court to inquire whether the apprentices were employés within the meaning of the Act, otherwise it could not deal with the whole of the industry in which youthful labour plays an important part. Even if on this question the Court came to an erroneous decision, its decision cannot be reviewed: *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (5). Unquestionably the Court has power to interfere with rights under existing contracts in relation to other classes of labour. There is no principle on which apprenticeship contracts can be excluded. If subsequent legislation has rendered those contracts impossible of performance the parties can obtain relief by applying for cancellation. The fact that the indentures relate also to other matters than wages and conditions of employment does not take them out of industrial matters. [He referred to *Manley Smith, Law of Master and Servant*, 6th ed., p. 48;

(1) 5 East., 345, at p. 365.
(2) 1 C.L.R., 181.
(3) 2 C.L.R., 94.
(4) 1 C.P.D., 242.
(5) 5 C.L.R., 33.

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Minimum Wage Act, No. 29 of 1908.] If the Court has power to deal with such agreements the date of the agreement is immaterial.

Sec. 8 of the Act No. 3 of 1908, does not mean that the rights of the parties to pending proceedings are to be determined according to the provisions of the original Act, but merely that the proceedings shall not abate, as they otherwise would on the expiration of that Act. The machinery is kept going for the purpose of litigation already begun. In sec. 52 "any" decision includes any decision given after the passing of the Act, whether under sec. 8 or not.

Dr. Cullen K.C. (*Blacket* with him), for the Judge of the Industrial Court, respondent. The legislature has departed from the policy of the original Act, allotting the arbitral function to the Wages Boards, and the examining function, which formerly belonged to the Supreme Court, to the Industrial Court. Under the old Act there was no appeal from awards, &c. Now there is an appeal to the Court, whose jurisdiction in regard to these matters is purely appellate. [He referred to secs. 26, 27, 30, 47, 50, 61 (k) of the Act, No. 3 of 1908.] The words of sec. 52 are plain. It is a reasonable construction of sec. 52 that any order made by the Court, sitting in a proceeding brought under the Act, and *bonâ fide* attempting to keep within its jurisdiction, cannot be challenged. [He referred to *Ex parte Newcastle Coal Co.* (1).]

[ISAACS J., referred to *Free Church of Scotland* (*General Assembly*) v. *Overtoun* (*Lord*) (2); *Sharpley* v. *Surdan* (3).

GRIFFITH C.J., referred to *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (4).]

It cannot be urged that the Industrial Court is not a fit Court to have exclusive power to control the tribunals which deal with industrial matters. Serious limitations have been imposed on the right to prohibition in respect of decisions of certain inferior Courts in England: *Chadwick* v. *Ball* (5); *Payne* v. *Hogg* (6); *Hawes* v. *Paveley* (7); *Manning* v. *Farquharson* (8); *Cox* v.

(1) 8 S.R. (N.S.W.), 335; S.C. on appeal, 6 C.L.R., 466.
(2) (1904) A.C., 515, at pp. 695, 702.
(3) 1 Flipping, 472.
(4) 21 Q.B.D., 313.
(5) 14 Q.B.D., 855.
(6) (1900) 2 Q.B., 43.
(7) 1 C.P.D., 418.
(8) 30 L.J.Q.B., 22.

Mayor of London (1). [He referred also to *Garnsey* v. *Flood* (2); *Moses* v. *Parker* (3); *Théberge* v. *Laudry* (4).] At the most the error of the Industrial Court was in the construction of Statutes which incidentally came in question in a matter within the Court's jurisdiction. That is not a matter for prohibition: *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (5). Whatever may have been the position under the Act of 1901, sec. 52 has settled the question by express terms. [He referred to *Tilonko* v. *Attorney-General of Natal* (6).]

The *Colonial Laws Validity Act*, 28 & 29 Vict. c. 63, does not prevent the legislature from cutting down the power of the Supreme Court. Its object was not to curtail the power of local legislatures but to make Imperial laws prevail where there was a conflict. [He referred to *In re The Queen* v. *Marais, Ex parte Marais* (7).]

Wise K.C., in reply, referred to *Thompson* v. *Ingham* (8); *Reg.* v. *Bolton* (9); *Peacock* v. *Bell* (10). If the appeal is allowed the Industrial Court should be ordered to pay costs as it has appeared by counsel. [He referred to *Ex parte Cox* (11); *Ex parte Rebello* (12).

GRIFFITH C.J.—The general rule is that costs are not given against a judicial officer except in a case of misconduct. Sometimes counsel for a judicial officer is instructed by the Crown and in such cases costs may be allowed, practically against the Crown, but never against the officer if he has merely made a mistake.]

Cur. adv. vult.

Nov. 19, 22.

The Court subsequently heard further argument on certain questions as to the effect of special terms contained in the indentures of apprenticeship.

Wise K.C. (*Pickburn* and *Betts* with him), for the appellant. The covenants as to lost time do not relate to the apprentice.

(1) 32 L.J. Ex., 282; 2 H. & C., 402; L.R. 2 H.L., 239.
(2) (1898) A.C., 687.
(3) (1896) A.C., 245.
(4) 2 App. Cas., 102.
(5) 3 Nev. & Macn. Ry. Cases, 442.
(6) (1907) A.C., 461.
(7) (1902) A.C., 51.
(8) 14 Q.B., 710.
(9) 1 Q.B., 66.
(10) 1 Wms. Saund., 96.
(11) 12 W.N. (N.S.W.), 172.
(12) 10 W.N. (N.S.W.), 60.

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His statutory rights are not interfered with. The special covenants do not involve such a departure from Schedule II. of the Act as to take the indenture out of the operation of the Act: see sec. 13 of No. 41 of 1901. [He referred to *Cuming* v. *Hill* (1); *Learoyd* v. *Brook* (2); *Branch* v. *Ewington* (3); *Encyclopædia of Laws of England*, sub. tit. "Apprentice," 2nd ed., vol. I., pp. 434, 438.] In any case the provision is for the benefit of the apprentice. Secondly, if the deed is not within the Act it is a valid indenture of apprenticeship at common law. It is, on the whole, advantageous to the infant: *Leslie* v. *Fitzpatrick* (4); *De Francesco* v. *Barnum* (5); *Green* v. *Thompson* (6); *Evans* v. *Ware* (7).

[ISAACS J. referred to *Clements* v. *London and North Western Railway Co.* (8).]

Even if the covenants are onerous to the infant the deed is only voidable at the option of the infant: *Pollock on Contracts*, 4th ed., p. 51. It is good until set aside by a competent tribunal. If the indenture is valid either by Statute or at law it is outside the jurisdiction of the Industrial Court. It is not a contract of employment. [He referred to *Farnham* v. *Atkins* (9); *Phillips* v. *Clift* (10); *Learoyd* v. *Brook* (11); *Zouch* v. *Parsons* (12); *Petersdorff's Abridgment*, vol. II., sub. tit., "Apprentice"; 20 Geo. II., c. 19, sec. 4; 4 Geo. IV., c. 29; *Walter* v. *Everard* (13).

[ISAACS J. referred to *Baylis* v. *Dineley* (14).]

G. S. Beeby, for the respondents. The lost time covenant is to the prejudice of the infant; the "above-said parties" include him. It is a clause added for the benefit of the employer, and renders the deed void as an indenture of apprenticeship: *Reg.* v. *Lord* (15); *Meakin* v. *Morris* (16). The *Apprentices Act* 1901 contains the whole law as to apprenticeship, and if the indenture is not within it it is not a valid indenture of apprenticeship, though it may be enforceable as a contract of service. If the

(1) 3 B. & Ald., 59.
(2) (1891) 1 Q.B., 431, at p. 433.
(3) 2 Doug., 518.
(4) 3 Q.B.D., 229.
(5) 45 Ch. D., 430.
(6) (1899) 2 Q.B., 1.
(7) (1894) 3 Ch., 502.
(8) (1894) 2 Q.B., 482, at p. 495.
(9) 1 Siderfin, 446.
(10) 4 H. & N., 168.
(11) (1891) 1 Q.B., 431.
(12) 3 Burr., 1794.
(13) (1891) 2 Q.B., 369.
(14) 3 M. & S., 477.
(15) 12 Q.B., 757.
(16) 12 Q.B.D., 352.

indenture is outside the Act, the Industrial Court had jurisdiction to deal with it. The variations from the Schedule are all to the disadvantage of the infant.

Wise K.C., in reply. Any indenture of which the main purpose is to provide instruction in trades is an apprenticeship deed for all purposes: *Petersdorff's Abridgment*, vol. II., p. 16; *R.* v. *Inhabitants of Laindon* (1); *R.* v. *Hindringham Inhabitants* (2). This is a contract for necessaries and therefore binding: *Walter* v. *Everard* (3).

Cur. adv. vult.

The following judgments were read:—

December 17.

GRIFFITH C.J. This was an appeal by special leave from a refusal of the Supreme Court to grant a writ of prohibition, to be directed to the Judge of the Industrial Court constituted under the *Industrial Disputes Act* 1908, to prohibit any future proceedings in respect of a conviction for breaches of a Common Rule made by the late Court of Arbitration on 4th June 1908. Proceedings against the appellant to recover penalties for the alleged breaches, which consisted in not paying wages at the minimum rate provided by the Common Rule, had been begun in the Arbitration Court on 12th June. The Supreme Court held that a prohibition will not lie against the Industrial Court in any case whatever.

The *Industrial Arbitration Act* 1901 expired on 30th June 1908, and the Arbitration Court then ceased to exist, but the *Industrial Disputes Act*, which came into force on 1st July 1908, provided that any proceedings for penalties for breach of an award or industrial agreement pending in that Court at the expiration of the *Arbitration Act* might be continued, and that such matters should be heard and determined by the Industrial Court. (sec. 8). That Court accordingly heard the complaint, and on 14th October convicted the appellant.

The substantial ground on which the prohibition was asked for was that the relationship between the appellant and the persons in question was not one within the cognizance of the

(1) 8 T.R., 379. (2) 6 T.R., 557. (3) (1891) 2 Q.B., 369.

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Arbitration Court, and that the Common Rule was, therefore, if and so far as it purported to affect that relationship, *ultra vires* and void upon its face, that the Arbitration Court had consequently no jurisdiction to entertain the complaint, and that the transference of jurisdiction to hear the complaint to the Industrial Court did not confer any new or more extended jurisdiction. The respondents maintained that the Common Rule was valid, and that, whether it was or no, the jurisdiction of the Industrial Court cannot under any circumstances whatever be challenged by prohibition.

The Common Rule of 6th April 1908 adopted, with some variations, the terms of an award relating to the industry of boot manufacture in which the appellant is engaged, and prescribed minimum wages to be paid to apprentices. The persons in respect of whom the complaints now in question were made were lads who had before the making of the Common Rule been apprenticed to the appellant by indentures of apprenticeship purporting to be made under the *Apprentices Act* 1901, which was in part a re-enactment of the provisions of earlier Statutes that had been in force in New South Wales for a long period.

That Act provides that any father, if resident in New South Wales, of any child not under 14 years of age, or if the father is dead his mother if so resident, or if the child has no parents his guardian or two justices, may by indenture bind the child to a master to be instructed by him in any trade or business or manual occupation (sec. 9). Other similar provisions are made relating to the apprenticing of children inmates of Government institutions of an eleemosynary nature. Sec. 13 enacts that the indenture shall, with a counterpart, be entered into, signed and sealed by the apprentice as of the first part, by the parent, guardian, superintendent of the institute or justices, of the second part, and by the intended master of the third part, and "shall specify the particular trade, art, business, or occupation in which the apprentice is to be instructed, and the period for which he is to serve, and shall be in the form, as nearly as may be, set out in the second Schedule," and that every such indenture shall be binding both on the master and on the apprentice in like manner as if the apprentice had been of full age at the date of the

indenture. The prescribed form contains an agreement by the master to instruct the apprentice and to pay him wages at rates to be set out in the indenture, but no minimum rate is mentioned. Sec. 17 provides that any difference or dispute between master and apprentice arising under an indenture shall be settled by justices, who may make such order upon the difference or dispute "as in their discretion equity and right requires," and may impose a fine not exceeding £10 on either master or apprentice for misconduct or breach of contract. The justices may also, if they think fit, cancel the indenture and discharge the apprentice. The Act contains other provisions applicable to the subject matter to which I need not refer.

The *Arbitration Act*, which was passed in the same session of Parliament, five weeks later than the *Apprentices Act*, broke quite new ground in industrial legislation in New South Wales.

The jurisdiction of the Arbitration Court was limited to "industrial matters," which term is defined as meaning "matters or things affecting or relating to work done or to be done, or the privileges rights, or duties of employers or employés in any industry," including various matters specially mentioned concerning persons employed in industry and the prices to be paid in respect of such employment, and in particular "the employment of children or young persons in any industry." The term "employer" was defined as a "person, firm, company, or corporation employing persons working in any industry," and the term "employé" as "a person employed in any industry." The Act nowhere mentioned apprentices *eo nomine*.

The appellant maintains that the provisions of this Act, under which the powers of the Court could only be invoked by an industrial union, are so distinct in their scope from the provisions of the *Apprentices Act*, to which it does not in any way refer, and which were left upon the Statute Book, that it ought to be held that the jurisdiction of the Arbitration Court did not extend to the relationship of master and apprentice under that Act, at any rate when the relationship existed before the powers of the Court were invoked. In my opinon this argument is sound. I think that the mutual obligations of master and apprentice under such indentures, which might involve the

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status and prospects in life of wards of the State, were not "industrial matters" within the meaning of the *Arbitration Act*, to which alone the jurisdiction of the Court extended. The Common Rule in question had therefore no effectual application to apprentices already bound by indenture under the Act, and I think it should be construed as not purporting to refer to them. If, on the other hand, it is construed as referring to them the reference must be regarded as inoperative, being to a matter outside the jurisdiction of the Court.

The complaint in the present case was not formulated technically, but the material facts were set out on affidavit, and it must, I think, be taken that the actual facts appeared upon the face of the proceedings.

If, therefore, the charge was in substance a charge of employing an apprentice indentured under the *Apprentices Act* in contravention of the Common Rule, the Court would have had no jurisdiction, and might have been restrained by prohibition, as this Court held in *Clancy's Case* (1). Whether the Common Rule, on its face, did or did not refer to such apprentices, the Court would have been equally without jurisdiction.

What then was the effect of the transfer of the jurisdiction of the Arbitration Court to the Industrial Court, created by the *Industrial Disputes Act* (No. 4 of 1908)?

Sec. 8 of that Act, already referred to, goes on to provide that for the purpose of carrying out the provisions as to matters pending in proceedings for penalties before the Arbitration Court the enactments of that Act "shall continue in force, and shall, *mutatis mutandis*, apply to the hearing and determination of any such matter by the Industrial Court, and to the enforcement of any order or determination of such Court." The mode of enforcement under the *Arbitration Act* was either by execution issued from the Arbitration Court itself and executed by the sheriff or bailiffs of other Courts, or by action of debt in the Court of Petty Sessions under the *Small Debts Recovery Act* (sec. 37).

I think that when the powers of a Court of limited jurisdiction are directed to be exercised by another Court by way

(1) 1 C.L.R., 181.

of substitution, it is to be inferred that the limits of the transferred jurisdiction were not intended to be altered either by way of enlargement or diminution. If, for instance, the powers of a Court of record were on its abolition conferred as to pending cases on a Court which had not before any such powers, the necessary powers would be conferred by implication. And *vice versâ*.

If, then, there were no more in the case, it would, I think, be clear that the same proceedings which could have been taken to keep the Arbitration Court within the limits of its jurisdiction, could also be taken with respect to the Industrial Court acting in its place.

The respondents, however, rely on sec. 52 of the *Industrial Disputes Act* which is as follows:—

"Any decision of the Industrial Court shall be final, and shall not be removable to any other Court by *certiorari* or otherwise; and no award, order, or proceeding of the Court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature on any account whatsoever, and the validity of any decision shall not be challenged by prohibition or otherwise."

Except for the concluding sentence this section is substantially the same as sec. 32 of the *Arbitration Act* 1901 which was interpreted in *Clancy's Case* (1). The respondents contend that the effect of that sentence is to deny to the Supreme Court the power to grant a prohibition to the Industrial Court for any cause whatever, even although it should appear on the face of the proceedings that the matter is one with which the Court cannot under any circumstances have any concern.

Before examining this contention I will say a few words as to the jurisdiction of the Industrial Court in the exercise of which its decisions are pronounced. I have already referred to the jurisdiction more particularly in question in this case, in the exercise of which the Court acts under the expired Act and not under the new Act.

The jurisdiction of the Court does not purport to be unlimited

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as to subject matter, but is conferred by express enactments dealing with specific matters. By sec. 14 the Court is empowered to recommend to the Minister the appointment of Boards in connection with different industries. These Boards have very large powers with respect to industrial matters. An appeal lies from their award to the Court, and may be brought on the ground of [want of] jurisdiction, or as to the locality of operation of the award, or on the law or on the facts. The Court may confirm or modify the award appealed from, or quash it, or make a new award (sec. 38). It may rescind or vary awards made or amended by itself, or awards made by the Arbitration Court (sec. 39). It may enforce payment of wages fixed by an award (sec. 41). The proceeding for this purpose is in the nature of an action, and the judgment is enforced by execution.

Sec. 42 imposes heavy penalties for any act in the nature of a strike or lockout. Sec. 43 imposes penalties for breaches of awards of Boards, or of awards or orders of the Arbitration Court, which may be enforced by imprisonment. This provision supersedes the provisions of sec. 37 of the *Arbitration Act* already referred to. Sec. 44 imposes penalties upon employers for dismissing employés for certain specified reasons. Sec. 45 provides that proceedings for any offence against the provisions of the three preceding sections, 42, 43, 44, shall be taken before the Industrial Court, and shall be heard and determined according to the practice observed in summary proceedings before justices. Sec. 46 confers subsidiary powers for enforcing payments of penalties, and sec. 55 confers jurisdiction to order payment of fines, penalties or subscriptions of members of trade unions registered under the Act. This exhausts the list of the powers of the Court, and it is in reference to them that the word "decision" in sec. 52 must *primâ facie* be read.

Having regard to the nature of the jurisdiction thus conferred, and to the language of sec. 8 already quoted, I am of opinion that sec. 52 does not apply to the decision now under consideration. I think that the section only applies to decisions given under the Act itself, and does not apply to decisions given under the jurisdiction to exercise the powers of the former Court in proceedings pending at the expiration of the *Arbitration Act*, the

provisions of which are expressly kept in force with respect to them.

It is therefore unnecessary to decide the larger question raised as to the meaning of the concluding sentence of sec. 52. But as it has been fully argued I will add some observations on the subject.

I have great difficulty in accepting the argument that every order purporting to be a decision of the Judge of the Industrial Court is unchallengeable for want of jurisdiction. If, for instance, he asserted a jurisdiction to try indictable offences, or to grant probate, or administer the trusts of a deed or will, it might very well be contended that an order made in the exercise of such an asserted jurisdiction was not a "decision" within the meaning of sec. 52. On the other hand, the jurisdiction of a Court to decide a case is not limited to the decision of questions of fact, but extends to the decision of questions of law, including the construction of Statutes, and if no appeal lies, the decision, however erroneous, is final between the parties. But there is a distinction in this respect between Statutes conferring jurisdiction and Statutes relating to matters within the jurisdiction of the Court. As said by *Brett* L.J. in the case of *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1), the general rule is that misconstruction of a Statute as to a point of jurisdiction is matter of prohibition, but misconstruction of an Act of Parliament upon a matter within the jurisdiction is matter of appeal. A grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms. Effect must be given to the whole Statute.

The case of *Chadwick* v. *Ball* (2) relied upon by *Dr. Cullen* does not, in my opinion, touch the point. An enactment that if want of jurisdiction (in the case of a Court of limited jurisdiction) be not pleaded the Court shall have jurisdiction, in effect enlarges the jurisdiction of the Court to all cases in which the defendant submits himself to it, and his failing to take the objection in the prescribed way is conclusive evidence of such submission. But sec. 52 of the *Industrial Disputes Act* does not on its face

(1) 3 Nev. & Macn. Ry. Cases, 442. (2) 14 Q.B.D., 855.

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purport to extend the jurisdiction of the Court to cases not already within it. I cannot doubt that an order made by the Judge purporting to be a decision of the Court would, if made with respect to a matter outside his jurisdiction, be void, or that any person who endeavoured to enforce it would do so at his peril, and would have no defence to an action of trespass. Possibly it was intended that this should be the only mode of raising the objection. But I do not think that it can be inferred from sec. 52 that the jurisdiction of the Court has no limits except those which it thinks fit to impose upon itself.

I am at present disposed to think that an order or determination of the Industrial Court, which appeared on the face of it to be made with respect to a matter not within the purview of the Act, ought not to be regarded as a "decision" within the meaning of sec. 52.

On the other hand, I think that it is clear that the legislature intended that that Court should have jurisdiction to decide without appeal or challenge any question of law (including the construction of a Statute) arising incidentally in the course of a case which on the face of the proceedings appears to relate to an industrial matter, and that if a question so arising was one that could ordinarily be raised by proceedings in prohibition, that remedy should not be open.

But whether this absolute authority extends to deciding questions of jurisdiction arising upon the construction of the Act conferring the jurisdiction of the Court is quite a different question, on which I prefer to hold my judgment in suspense. I do not think that any such case is likely to arise.

It results from what I have said that the question now to be determined is not that which was passed upon by the Supreme Court, but is whether the Arbitration Court would, if it had continued in existence, have had jurisdiction to entertain the complaint against the appellant. And this, as already pointed out, depends on the true nature of the complaint.

When this case was first argued it was assumed on all hands that the indentures of apprenticeship in question were valid indentures under the *Apprentices Act*. The Court, however, directed the case to be set down for re-argument on a further

point, which arises in this way: The statutory form of indenture, after mutual agreements between the apprentice and the master, concludes with these words:—"And the said and , each for himself, his executors and administrators, covenants and agrees with the other, and his executors and administrators, that he shall in all respects well and faithfully observe and perform all the covenants and agreements contained in these presents on his part to be observed and performed." In the indentures in question the blanks are filled up with the names of the parent and the master, whereas it is suggested they should have been filled up with the names of the apprentice and the master. The indenture also contains stipulations that "lost time shall be deducted from whatever cause," and that in the event of the master successfully prosecuting the apprentice for any breach of covenant all costs incurred and fines paid for such prosecution shall be deducted from the wages of the apprentice; and it was suggested that the addition of these stipulations, which, it is said, are manifestly to the prejudice of the infant apprentices, renders the indentures void. The Court accordingly directed the case to be set down for re-argument on the question whether, having regard to these three matters, the indentures were valid indentures of apprenticeship under the *Apprentices Act*.

Two views were presented to the Court, one, that the indentures depart so substantially from the form in the Act that they cannot be said to be within it, and (which is perhaps the same point in another form) that they are so manifestly to the prejudice of the infant apprentices as to be void on common law principles, and that every Court before which they are brought is bound to treat them as nullities; the other, that the indentures are, in any case, not void but voidable only, and then only at the option of the apprentice, and that the Arbitration Court would have had no jurisdiction, on a complaint by an industrial union, to entertain the question of their validity. The question whether the indentures are void or voidable is a mixed question of law and fact, depending in great part on the terms of the particular documents. The question of the jurisdiction of the Arbitration Court to decide that question is one that cannot arise in future, since the Court has

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ceased to exist, and the examinability of the jurisdiction of the Industrial Court, before which in future such questions must be brought, stands, as already shown, on a different footing.

It is not the practice of this Court, which in this regard follows the practice of the Judicial Committee, to grant special leave to appeal in cases which do not raise questions of general importance likely to arise in the future, or (in general) in cases depending upon the terms of particular documents.

If the case had been presented to the Court in this light when special leave to appeal was granted I think that leave would have been refused, and I think that it should now be rescinded.

BARTON J. The *Industrial Arbitration Act* (N.S.W.) (No. 59 of 1901) expired on 30th June 1908, and the *Industrial Disputes Act* (No. 3 of 1908) came into operation on the following day. During the currency of the first-named Act, namely, on 12th June 1908, the respondent association took out of the Court of Arbitration a summons calling on the present appellant to show cause why he should not be penalized for breach of an award and Common Rule of that Court. It appeared by the affidavit of the respondent Clark, the secretary of the respondent association, on which the summons was based and to which the summons refers for its grounds, and it appeared as well by the evidence in support of the summons, that the alleged breaches consisted in the appellant's failure to pay to two apprentices the minimum wage fixed by the award, on which was founded the Common Rule extending it with some variations to the whole of New South Wales. The award fixed the minimum wage for apprentices, and its provisions as to wages were adopted in the Common Rule. Though returnable on 22nd June 1908, the summons was not heard until October of that year, after the *Arbitration Act* had expired and the functions of the Arbitration Court had determined. It came before the Industrial Court; Baxter was convicted of the alleged breaches, and was ordered to pay a penalty in respect of them. The Industrial Court, by its order inflicting this penalty, declared the breaches to be those alleged in the secretary's affidavit, of which mention has been made as the basis of the summons. The Industrial Court's authority to continue

the proceedings before the Arbitration Court and to hear and determine the case, was derived from the 8th section of the *Industrial Disputes Act*, which deals with "any matter pending" in proceedings instituted previously to the expiration of the *Arbitration Act*, in the Arbitration Court, to recover penalties for breach of an award or of an industrial agreement. It enacts that "such proceedings may be continued and such matters shall be heard and determined by the Industrial Court," and contains other provisions to be quoted presently. The appellant had paid his apprentices at the rates fixed by their indentures, and these were less than the minimum wage fixed by the Common Rule. The indentures were made in 1903, five years before the award. The appellant maintains that they were made in conformity with the provisions of the *Apprentices Act* (No. 41 of 1901); that whether they so conformed or not, the Arbitration Court had no power to rectify or vary them, or to alter the contracts embodied in them so long as the indentures subsisted; that as soon as the facts of the relationship established by them appeared, whether on the face of the proceedings or in evidence, the Arbitration Court was without jurisdiction in that behalf; and that *quacunque via* the proceedings and the conviction were in excess of jurisdiction. The award of the Arbitration Court was, he urged, *ultra vires* so far as it purported to affect the relationship of master and apprentice, and the Common Rule founded upon it fell with it to the same extent. He contended that the Industrial Court was exercising merely the jurisdiction of the Arbitration Court, and that any excess of that jurisdiction could be restrained by prohibition. On the other hand, the respondents contested all these positions, and contended, above the heads of all of them, that, even if the Industrial Court had exceeded the jurisdiction specifically conferred on it by the Act of 1908, the Supreme Court was debarred by that Act from granting either in this or in any other case a prohibition to confine the jurisdiction within the limits assigned by the Statute. This proposition naturally divides into two: the first is that prohibition will not lie where the proceedings have been begun under the *Arbitration Act* and have been carried on under the *Industrial Disputes Act*; the second is that it will in no case lie if the pro-

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ceedings have been wholly under the new Act. As the second proposition is not involved in the determination of this case, it is not necessary to say whether it is or is not in our opinion correct. It appears to me that the establishment of it is a matter of considerable difficulty, but I shall make some observations on it before concluding.

I address myself first to the consideration of the proposition that a prohibition such as was sought from the Supreme Court in this case—namely, the "prerogative" writ—cannot be granted against a decision of the Industrial Court founded upon a proceeding instituted under the old Act and carried on under the *Industrial Disputes Act*. The respondents say that even if the excess of jurisdiction were established, sec. 52 of the *Industrial Disputes Act*, which I need not quote again, is a complete bar to an applicant for prohibition. The contention is based on a comparison of this section with sec. 32 of the *Industrial Arbitration Act*. The first portion of it, down to the words "final and," takes the place of the opening words of that section, which were merely "proceedings in the Court," so that the provision for finality is new. On that alteration not much reliance is placed. From that point the two sections are in identical words, save that at the end of the new section words are added which forbid the challenging of any decision of the Industrial Court "by prohibition or otherwise." The respondents say that the new words make all the difference; that the new sec. 52 is substituted for sec. 32 of the old Act even where the proceedings have been initiated before the passing of the *Industrial Disputes Act*; that no prohibition of any sort can be issued on any decision of the Court; and that sec. 52 therefore renders a want of jurisdiction immaterial to the present case. The appellant maintains that the matter rests on sec. 32 of the old Act; and even if this were not so, that sec. 52 of the new Act does not, any more than the other, prevent a common law prohibition from issuing as in *Clancy's Case* (1). Now the question whether this case is governed by sec. 32 of the *Industrial Arbitration Act* or by sec. 52 of the *Industrial Disputes Act* depends on the effect of sec. 8 of the latter when we examine the relevant enactments together. Sec. 8

(1) 1 C.L.R., 181.

transfers to the Industrial Court the hearing and determination of "matters pending"—that is, controversies in progress—in the Court of Arbitration at the time its authority expired, where they were the subject of proceedings before that Court for breach of one of its awards or of an industrial agreement; and to admit of such hearing and determination the continuance of such proceedings was authorized. Then the section goes on to say that "for the purpose of carrying out the above provisions, the enactments of the first mentioned" (that is the Arbitration) "Act shall continue in force, and shall, *mutatis mutandis*, apply to the hearing and determination of any such matter by the Industrial Court, and to the enforcement of any order or determination of such Court," (that is, when adjudicating on the proceedings kept on foot). On its face, does this section apply merely to such provisions of the *Industrial Arbitration Act* as regulated the procedure for complaints, hearing, and the consequence of convictions? Jurisdiction is essential to the validity of any of them, and the phrase "the enactments of the first mentioned Act shall continue in force and shall, *mutatis mutandis*, apply to" hearing, determination and enforcement, is so clearly intended to preserve all sections of the Act applicable to any of these, and essential to their validity, that I cannot but think it includes sec. 26, defining the jurisdiction, and sec. 32, restricting in part, but otherwise leaving untouched, the common law in its relation to all proceedings in excess of jurisdiction.

It seems to me that the whole effect of sec. 8 is to provide a new tribunal for the cases it deals with, in substitution for the defunct Court; to give that tribunal the same powers and jurisdiction as the tribunal originally invoked could have exercised; and for the rest, to make no inroad on the common law applicable to the exercise of jurisdiction. This construction of sec. 8 is consistent with the ordinary inference from the class of enactment to which it belongs. The powers to be exercised by the new Court in cases within sec. 8 are those of the old Court. If their limits are not extended by the new legislation (and sec. 8 does not extend them) it is to be inferred that they remain identical so far as the outstanding cases, to which the powers are to be applied, are concerned. But if sec. 26 of the old Act remains operative

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for this purpose, I cannot see how sec. 32 of the same Act can be held not to be also in operation *pro tanto*. And I must conclude that the powers remain just as they were in this class of cases and subject in their exercise to just so much control by the superior Courts as is left untouched by sec. 32 of the old Act, unless I find in sec. 52, or elsewhere in the *Industrial Disputes Act*, an intention which rebuts this inference and removes or impairs the control. Such an intention must either be expressed or be very clearly deducible. *Jessel* M.R. said, in the case cited to us of *Jacobs* v. *Brett* (1), that nothing was better settled than that an Act of Parliament which takes away the jurisdiction of a superior Court of Law must be expressed in clear terms. "It is not to be assumed," he says, "that the legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied." His Lordship goes on to state another principle, which is that the general rights of the subject are not hastily to be assumed to be interfered with or taken away by Acts of Parliament. Among these he instances "a right, and it is a valuable right, of having the question of the jurisdiction of a local Court" (the Court in question in that case) "determined in the superior Court." Now when this controversy was begun under the *Industrial Arbitration Act* the parties had clearly a right to invoke the intervention of the Supreme Court to correct any excess of jurisdiction on the part of the Arbitration Court, and to confine that Court within the limits assigned to it by the Act of 1901. That right continues to exist as to the Court to which the functions of the Arbitration Court were allotted on its dissolution, unless on the construction of sec. 52 we are to conclude that the legislature has taken the certainly unusual course of intervening in the very course of existing litigation to extend the limits of the jurisdiction, or, leaving it within its former limits, to render a party to it, under the oppression of a judgment transgressing the powers of the Court, impotent to invoke the assistance of the proper tribunal to keep the Court within the field which the law has assigned to its operations. It would take unmistakeable expressions to justify us in imputing to the legislature the intention so to invade the arena of pending litigation.

(1) L.R. 20 Eq., 1, at p. 6.

If such a construction be open, and another less startling be also open, then that one is to be adopted which does not destroy any right that existed when this litigation was instituted.

I turn then to sec. 52. Even if all the force claimed be given to it within its proper ambit, I think that its ambit is entirely clear of the sections of the old Act preserved by sec. 8 for the purposes expressed in that section. What are the decisions the validity of which is not to be challenged by prohibition or otherwise? I do not see why they should be taken to include decisions under sec. 8 unless they are necessarily part of its subject matter. There are a number of provisions in the Act by which the Industrial Court is empowered to deal, originally or on appeal from a Board, with matters arising under the Act itself, irrespective of the *Industrial Arbitration Act* (see secs. 14, 16, 26, 38, 39, 41, 42, 43, 44, 45, 46, 50, 55 and 60). I think the "decisions" meant in sec. 52 are those which are given by virtue of these sections, and which do not involve the determination of controversies existing before the Act was passed. Such a construction satisfies the meaning of the term in sec. 52, and with this subject matter for its operations it is not necessary to construe, and unless of necessity I ought not to construe, the section as extending to proceedings instituted under the old Act. Thus the provisions are harmonized. A just and reasonable field of operation is given not only to sec. 52, but to sec. 8, and also, for the purposes of that section, to as many of the "enactments" of the *Industrial Arbitration Act* as would certainly have applied had the proceedings been carried to a conclusion before its expiration. I am of opinion, therefore, that in the present case the limits of the jurisdiction are those defined in the *Industrial Arbitration Act*, and that if they have been exceeded the Supreme Court has, and should have exercised, the power to maintain those limits which was held to belong to it in *Clancy's Case* (1).

A further question, involved in the argument as presented to the Court on behalf of the respondents, is whether the concluding words of sec. 52, when confined to decisions purely under the *Industrial Disputes Act*, are to bear the meaning claimed for them by the respondents. This is a question which in strictness it is not

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necessary to answer, and which, as already intimated, I do not propose to answer decisively. But as it was included in the broadest of the respondents' propositions it is as well that it should receive something more than a passing reference. The appellant's counsel contend that sec. 52 leaves intact the power of the Supreme Court to issue a prohibition for excess of jurisdiction; that, in effect, matters remain in this regard as they were under sec. 32 of the old Act. For the respondents it is pointed out that the additional terms found in sec. 52 cannot be regarded as meaningless, or treated as nugatory. The Statute was enacted after the judgment of this Court in *Clancy's Case* (1), and it is urged that the change in phraseology may reasonably be attributed to an intention to impose further restrictions on the common law power of superior Courts. Assuming this inference to be legitimate and correct, as I think it is, it does not follow that the contention for the respondents is justified to its full extent. For their argument goes to the length of asserting a practically uncontrolled jurisdiction in the Industrial Court. Mr. *Beeby*, when pressed, admitted that he could not suggest any line as drawn by the section short of that point. Yet such a line must surely exist. It would be strange if the legislature, after defining the powers of the Industrial Court in precise terms, extending over many sections, had given it licence to exceed those powers. If this is really what the section means, then the Industrial Court cannot be recalled to its lawful province, no matter what question, civil or criminal, it may have arrogated to itself the right to decide. The last person who would make such a claim is the learned Judge of that Court. The legislature has of course power to make an inferior Court the sole custodian of the extent of its own jurisdiction. But it is our duty not lightly to impute to it so extraordinary an intention, just as it is for us to carry its words into effect if they plainly and unmistakeably convey it. The true construction must be sought between the extreme limits of the opposing contentions, but I confess the difficulty of arriving at a satisfactory conclusion. If by using the form of a decision the Industrial Court purported to deal with a matter entirely foreign to the purposes of the Act, there might be ground for the

(1) 1 C.L.R., 181.

intervention of the Supreme Court, even by prohibition, since in truth there would be no decision at all to justify the execution of process. But not only where the matter decided is expressed or implied as a subject for decision, but also where any question of law decided is involved in, or incidental to, the determination of such a matter, it may be concluded that the legislature intended to prevent the intervention of the superior Courts from being invoked "by prohibition or otherwise," even on the ground of want of jurisdiction. If the question of law is the construction of a Statute, I do not see that the case is at all different. On the other hand, where that Statute is the *Industrial Disputes Act*, the Charter of the Court, and the decision upon its construction amounts to the assumption of a jurisdiction not given by that Act, the case may be very different. I do not feel justified in expressing a more positive opinion until it becomes necessary to decide this point.

What, then, was the jurisdiction which the *Industrial Arbitration Act* gave for the determination of cases arising under its provisions? Sec. 26 enacts that the Court shall have jurisdiction and power, on reference to it, to hear and determine any industrial dispute, and to make any order or award in pursuance of such hearing and determination. The full meaning of such a dispute can only be gathered by reference to the definitions in sec. 2 of "Industrial Dispute," "Employer," "Employé," "Industrial Matters," and "Industry." The relations of masters and apprentices are not expressly included, nor are apprentices mentioned, but the employment of children or young persons is within the term "industrial matters."

The summons in this case incorporates by reference the breaches stated in Mr. Clark's affidavit, which therefore, it seems to me, are in effect stated in the summons. They are the failure to pay to two apprentices, Taylor and McQuinn, the minimum wages fixed by the award and Common Rule, which are orders of the Court.

The award and Common Rule both deal with the wages of apprentices. Are the apprentices meant those who prior to and at the time of the award were under indentures pursuant to the Act of 1901? If not, the award does not affect them, and there

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was no jurisdiction in the Arbitration Court to entertain the summons, inasmuch as the wages of Taylor and McQuinn were not affected by the award or the Common Rule. But if the apprentices referred to in the award do include these persons, then had the Arbitration Court jurisdiction to deal with such apprentices by its award? If not, the subsequent proceedings are without jurisdiction, and *Clancy's Case* (1) applies.

I come then to the question whether the *Industrial Arbitration Act* does affect such apprentices.

The *Apprentices Act*, from which the material sections have already been quoted, became law on 5th November, and the *Industrial Arbitration Act* on 10th December 1901. There is not to be found in the latter Act any express repeal or amendment of any part of the former; nor is there even any reference to it. The whole purview of the one seems entirely distinct from that of the other, and I cannot find any indication of such an intention as would amount to an implication of the repeal of any part of the earlier Statute by the later one. Was it intended to give power to the Arbitration Court to alter or rectify contracts already embodied in indentures under the *Apprentices Act*—that is to say, is such a power, which cannot be said to be expressed, contained by implication? I think not. The essential of the contract of apprenticeship is the teaching a trade in return for service. At common law there might or might not be wages on the one hand or a premium on the other. It is a contract of which the essential factor, the teaching and learning of a trade, is not found in the contract to employ at wages and to work for wages. Although a sense exists in which the master is the employer and the apprentice the employé, that is not the primary sense of their agreement nor its primary purpose. Moreover, service under indentures of apprenticeship is a gradual acquisition of a status, and I cannot find in the *Industrial Arbitration Act* any evidence of intention on the part of the legislature to empower the Court to interfere during the process of its acquisition. It is plain that, if such a power exists as to the wages, it extends to other terms of the indentures, and I do not think that such interference or power of interference

(1) 1 C.L.R., 181.

with relationships once created under the *Apprentices Act* was intended by a Statute passed a few weeks afterwards, and which appears to have been enacted quite *alio intuitu*.

If then the indentures in this case case are within the *Apprentices Act* I do not think the Arbitration Court, or by consequence the Industrial Court, had power to deal with the wages of the apprentices, at any rate in proceedings instituted under the *Industrial Arbitration Act*.

But since our judgment was first reserved the position of the case has undergone a considerable change. A re-argument has taken place on points, which need not be re-stated, arising out of the form in which the indentures have been drawn up.

The matter as first presented to us amply justified the granting of special leave, and was worthy of the able and exhaustive arguments with which we were assisted on the appeal. But the question, as now altered, is whether, even if the Arbitration Court would have been without jurisdiction to deal with indentures in the form of the Schedule to the *Apprentices Act*, the departures from the form in the present indentures are not such as to deprive them of the shelter of that Act, and also to render the contracts prejudicial to the infants who are parties to them, and if so whether the *Industrial Arbitration Act* could not deal with the wages of the apprentices under such circumstances. It is contended on the one hand that these indentures are wholly void, and on the other that they are at most voidable by the apprentices, as such, if the contracts are prejudicial to them, as infants. Though much research has been expended on this new question, it is evident that it narrows the compass of the case so greatly that we are asked to decide it on grounds which do not necessarily govern indentures clearly adhering to the statutory form. Whether the Arbitration Court had jurisdiction in a case of departure from that form—that is, whether in such a case the assumed apprentices are anything but youthful employés in the full sense of that term as used in the expired Act—is a question not of sufficient public importance to justify this Court in pronouncing its judgment. So far as we know, there are no cases except these in which the point arises, and if so, the matter rests

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merely on their importance to the parties immediately affected. I therefore agree that leave should be rescinded.

O'CONNOR J. An award was made by the Industrial Arbitration Court in settlement of an industrial dispute in the boot manufacturing industry, and its terms were afterwards, with certain modifications which are immaterial in this case, made a Common Rule of the industry throughout the State. In fixing the minimum wages for different classes of employés the award specifically directed that apprentices should be paid a certain weekly wage in accordance with a scale set forth. The appellant was a boot manufacturer, and it was not denied that the Common Rule brought his business within the general scope of the award. In his employ were several apprentices bound to him under indentures of apprenticeship purporting to have been entered into in accordance with the *Apprentices Act* 1901. Amongst them was Thomas Francis Taylor. His indentures were made in 1903, and the parties were himself, his mother, Margaret Taylor, and his master, Henry Baxter, the appellant. The deed imposed on the master the usual obligation of instructing the apprentice, and the wages to be paid were on a scale ascending as the years of apprenticeship went on, but the highest rate payable was considerably less than the minimum rates directed by the award to be paid to apprentices doing the work at which the apprentice Taylor was engaged when proceedings in this case were initiated. After the Common Rule came into force the appellant continued to pay at the rate payable under the indentures, refusing to increase it to that fixed by the award, upon which the New South Wales Clickers' Association, which was the union directly interested in the observance of the terms of the award, proceeded against him before the Industrial Arbitration Court for breach of the Common Rule. These proceedings were pending when the *Industrial Arbitration Act* 1901 came to an end by effluxion of time. On the day following the *Industrial Disputes Act* 1908 came into force, and amongst its provisions was one which empowered the Industrial Court to continue, hear and determine proceedings so pending. The proceedings were accordingly brought before the Industrial Court and there continued, and the Court after

hearing adjudged the appellant guilty of a breach of the Common Rule and condemned him to pay a penalty and costs. In respect of that adjudication the appellant applied to the Supreme Court for a prohibition which was refused. Against that refusal he has appealed to this Court, which has now to determine whether under these circumstances the Supreme Court was right in declining to issue its writ of prohibition against the Industrial Court. The appellant challenges the validity of the order of the Industrial Court on the ground that in respect to his apprentice, the Common Rule which he was charged with disobeying did not bind him. He contended that his obligations to the apprentice were under the indenture, and not under the Common Rule; that in so far as the former and the latter are inconsistent the former must prevail, and that the Industrial Arbitration Court had no jurisdiction to make an award impairing rights conferred upon the master by indenture under the *Apprentices Act* 1901 at whatever date the indenture was entered into; and that the objection was particularly applicable when the indenture had been entered into before the date of the award. The respondents joined issue on these contentions; but they defended their position also on another ground, namely, that whether the order of the Industrial Court was within its jurisdiction or not, the appellant was prevented by the express provision of sec. 52 of the *Industrial Disputes Act* 1908 from questioning in this or any other form the validity of the decision. The latter ground raises a question of very general importance. In dealing with it I shall for the present refrain from inquiring whether on the true construction of sec. 8 the appellant's right to impeach the decision can be in any way affected by sec. 52. I shall assume that that section does apply, and that the fate of the appellant's application for a prohibition depends upon how much of his common law right of invoking the aid of the superior Courts to restrain excess of jurisdiction in an inferior Court has been left to him by sec. 52 when properly interpreted. Taking the words in their widest meaning they are, no doubt, capable of being construed so as to prevent the challenging of any decision of the Industrial Court on any ground whatever. Such a construction would, in effect, throw down all limits, and would constitute the Court itself the final arbiter

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of its own jurisdiction. It is, of course, open to the legislature to invest a tribunal with unlimited power, and should the enactment constituting it clearly express that intention, it would be the duty of this Court to give full effect to it. But where the words are not clear and express it becomes the duty of the Court to examine the whole enactment, its scope and purpose, in order to ascertain the object which the legislature intended to effect. In such circumstances the Court must also take into consideration the two principles adverted to by *Sir George Jessel*, Master of the Rolls, in *Jacobs* v. *Brett* (1), namely, that every subject has at common law the right to call upon a superior Court to determine whether an inferior Court of limited powers has exceeded its jurisdiction, and that a Statute will not be construed as depriving the subject of that right unless its language is reasonably capable of no other interpretation. In *Clancy's Case* (2) this Court held that sec. 32 of the *Arbitration Act* 1901, which is generally similar, but by no means identical, in its terms with sec. 52 now under consideration, did not deprive the superior Court of the jurisdiction to review proceedings of the Industrial Arbitration Court in cases where that tribunal had exceeded its jurisdiction. It was urged by the appellant's counsel that that decision substantially covered the present case. I cannot assent to that position. Sec. 52, as to the body of it, is no doubt merely a repetition of sec. 32 of the earlier Act. But at the beginning the following words have been added—"any decision of the Industrial Court shall be final," and at the end these words—"and the validity of any decision shall not be challenged by prohibition or otherwise." These expressions were no doubt added in order to emphasize the intention of the legislature to free the determinations of the industrial tribunal from the control of the superior Courts, and they were added, it must be remembered, after the judgments of this Court in *Clancy's Case* (2) had interpreted sec. 32 of the earlier Act as not depriving the superior Courts of their right of review in cases where the industrial tribunal had exceeded its jurisdiction. Under these circumstances sec. 52 of the Act of 1908 cannot, it seems to me, be interpreted as if the additional words meant nothing. Some effect must be

(1) L.R. 20 Eq., 1, at p. 6.

(2) 1 C.L.R., 181.

given to them, and it must, I think, be taken that at the very least the legislature intended the decisions of the Industrial Court to be more independent of supervision by the superior Courts than those of the tribunal constituted by the earlier Act had been. The difficulty is to determine whether the words by which that larger measure of independence has been conferred are to be interpreted as freeing the Industrial Court absolutely from control or supervision by the superior Courts, or as freeing it from such control and supervision conditionally only, that is to say, for so long only as it keeps within certain limits of jurisdiction. The broad features of the *Industrial Disputes Act* 1908 stand out very clearly. Its subject matter is the relations of employer and employé in industrial matters. For the purposes of adjusting those relations Industrial Boards are constituted and invested with extensive powers. Over them is the Industrial Court having large appellate and some important original jurisdiction. The Statute as a whole must be taken to impose a definite limit on the powers of Boards and Court. Their jurisdiction cannot from its nature and origin extend beyond the subject matter of the enactment which has created them. In that way, therefore, the outside boundary of the jurisdiction is upon the face of the Act fixed with sufficient certainty. But that does not by any means solve the difficulty. The question has still to be decided whether the Court can without question by any other tribunal determine finally that a matter submitted for decision does or does not involve an issue outside the subject matter of the enactment. In this connection it will be useful to contrast the constitution and status of the present Industrial Court with that of the Industrial Arbitration Court created by the earlier Act. The new tribunal consists of a Judge of the Supreme Court or of the District Court instead of a Board of three of whom two were laymen. It is a Court of appeal from the Boards, and is expressly empowered to determine questions of jurisdiction. Its constitution and powers indicate that the legislature intended to clothe it with important duties in respect to keeping the operations of the Boards within the ambit of its provisions. Apart from sec. 52 the Industrial Court would stand in the same position as any other Court of limited powers. Its jurisdiction is founded upon and can be

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exercised solely with respect to a certain subject matter. The existence or non-existence of that subject matter is in every case a jurisdictional fact which it must determine. Can it give itself jurisdiction in a case where in reality subject matter does not exist by deciding that it does exist? That was the exact point decided in *Clancy's Case* (1). The Industrial Arbitration Court had exercised its powers in respect of circumstances in which the relations of employer and employé did not in fact exist. This Court held that the industrial tribunal could not give itself jurisdiction by wrongly deciding that jurisdictional fact. But we had there to deal with sec. 32 of the earlier Act, very different in its language, as I have pointed out, from sec. 52 of the present Act. To what extent has the new provision enlarged the Industrial Court's uncontrolled power to determine the fact upon which the exercise of its jurisdiction must be founded? To put upon the words of the section their widest possible meaning would be in effect to allow the Court to determine its own jurisdiction; it would be to treat it as a Court of unlimited powers which could without possibility of question embrace within its jurisdiction matters altogether outside the scope of the Act. On the other hand to adopt the narrow construction, which would deprive the tribunal of the protection of the section merely because it acted contrary to law on a question of jurisdiction, would be to ignore the differences in constitution and functions between the tribunal established by the old Act and that established by the new, and to give no effect to the words which the legislature has added to sec. 32 with the obvious intention of making the new Court a more independent tribunal than its predecessor. In my opinion effect can best be given to the intention of the legislature by a reading which avoids both these extremes, and which construes sec. 52 as freeing the Industrial Court from the control or supervision of the superior Court in all cases where the proceedings of that Court show on the face of them that they have relation to the subject matter over which the Statute has given it jurisdiction. Looking, therefore, at the object and scope of the Act, at the emphatic language of sec. 52, and at its legislative history, I think it must be taken that the legislature intended to confer jurisdic-

(1) 1 C.L.R., 181.

tion upon the Industrial Court to determine finally and without possibility of review by any other tribunal every question, whether of law or of fact, necessary for its decision, so long as its proceedings show on the face of them that the subject matter of adjudication had to do with the relation of employer and employé in industrial matters within the meaning of the Act. In any case, therefore, in which it appears on the face of the proceedings that that was the subject matter involved, the decision of the Industrial Court with reference to that subject matter, whether right or wrong, in fact or in law, cannot be called in question by a superior Court. It would follow that, if sec. 52 of the new Act could be applied to the proceedings in the present case, the appellant's application to the Supreme Court was rightly rejected. The jurisdiction of the Industrial Court was apparent on the face of the proceedings. The relation of employer and employé existed in fact between the appellant and his apprentice. The award and the Common Rule obviously dealt with industrial matters within the meaning of the Act. The interpretation of the award, of the Common Rule, of the indentures of apprenticeship, of the *Apprentices Act*, and the determination of the extent to which, if at all, existing rights under that Act were affected by the *Industrial Act* 1901 all relate to the subject matter over which the Court had jurisdiction. In accordance, therefore, with the interpretation which I have placed on sec. 52, the erroneous determination of the Industrial Court in respect of any or all of these matters could not be questioned in any other tribunal. If, therefore, the proceedings against the appellant had been instituted for the first time in the Industrial Court, the Supreme Court would have been right in holding that the decision of the Arbitration Court must be taken to be final and conclusive whatever may have been their opinion as to the appellant's grounds of objection. But the proceedings were not instituted for the first time in the new Court, but in the old Industrial Arbitration Court under the old Act, and effect must be given to the provisions of sec. 8 of the new Act. In the view which I take of that section, the appellant's common law right of invoking the aid of the Superior Court is cut down, not by sec. 52 of the new Act, but by sec. 32 of the old Act. It is by virtue

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of sec. 8 that proceedings initiated in the old tribunal are continued and carried on to completion in the new. Existing rights of litigants are however preserved by the following words: "For the purpose of carrying out the above provisions, the enactments of the first mentioned Act shall continue in force, and shall, *mutatis mutandis*, apply to the hearing and determination of any such matter by the Industrial Court, and to the enforcement of any order or determination of such Court." That provision is obviously intended to keep on foot the rights of the parties as they existed at the time when the proceedings were initiated before the old tribunal. The *Colonial Sugar Refining Co. v. Irving* (1) is a clear authority that the taking away of the right of appeal would be an interference with an existing right and not merely an alteration of procedure. That principle must apply equally to the right of recourse to a superior Court for the purpose of keeping a tribunal of limited powers within its jurisdiction. The language of sec. 8 is wide enough in my opinion to include that right, but even if the words used were ambiguous, it would be contrary to the well recognized principles of statutory construction to interpret them as depriving a litigant of rights which would have been his if the litigation had continued in the old Court. In my opinion sec. 8 of the new Act must be read as keeping in force sec. 32 of the old Act for the purposes of litigation initiated in the old and continued in the new Court. The only restriction therefore which has been placed on the appellant's common law right of seeking the aid of a superior Court to keep a Court of limited jurisdiction within its powers is that which is embodied in that section. That being so, the law as laid down in *Clancy's Case* (2) must prevail, and if the Industrial Court has applied the award to a state of facts outside its jurisdiction the appellant was entitled to a prohibition at the hands of the Supreme Court. The rights of the parties to the appeal must therefore depend upon whether the Industrial Court, in adjudging the appellant guilty of a punishable breach of the Common Rule, under the circumstances of this case exceeded its jurisdiction. The Common Rule can have no greater force than the original award, and the

(1) (1905) A.C., 369.

(2) 1 C.L.R., 181.

Industrial Court has no power to so interpret the latter as to make its provisions applicable to circumstances which the Industrial Arbitration Court would not have had jurisdiction to deal with. The award fixes certain rates for apprentices generally. The Industrial Court has held that those rates are binding on the appellant, notwithstanding that they are at variance with the rates fixed by the indentures of apprenticeship. If, as the appellant contends, the Industrial Arbitration Court had no power to impose on master or apprentice obligations inconsistent with those embodied in the indenture, the Industrial Court had, it is clear, no jurisdiction to adjudge the appellant guilty. In determining what was the power of the Industrial Arbitration Court in this respect it will be necessary to consider first the nature and extent of the jurisdiction of that Court to deal with the relations of employer and employé in all industrial matters, and then the terms of the particular indenture of apprenticeship now under consideration. The object of apprenticeship is to secure to the apprentice proper instruction in a trade, and the indenture aims at creating the relation of employer and employé between master and apprentice on such terms and conditions as will best attain that object. The adding of parent or guardian as a party is to secure effective attainment of that object; the agreement is in its essence merely between employer and employé. The *Industrial Arbitration Act* 1901 empowers the Court created under its provisions to determine disputes between employers and unions of employés with reference to industrial matters. The master is none the less an employer and and the apprentice is none the less an employé because the relation is created by an indenture of apprenticeship; and I see no reason to doubt that the words of the Statute taken in their ordinary meaning are large enough to include the relation of employer and employé when so created. Indeed it would be difficult to conceive of an industrial dispute in the skilled trades which would not necessitate for its effective settlement some dealing with apprentices, whether by way of readjusting the relations between employer and apprentice or by way of regulating the proportion of apprentices to journeymen in a particular business and the class of work on which apprentices are to be employed. The

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effective attainment of the objects of the Act would seem therefore *primâ facie* to necessitate the interpretation of its language according to the ordinary meaning of the words used, that is, including the relations of employer and employé where the terms of employment are contained in indentures of apprenticeship. That being so, it seems to me immaterial whether the indenture was entered into before or after the initiation of the dispute settled by the award. Since the judgment of this Court in the *Federated Saw Mills Case* (1) it can I think hardly be questioned that the Industrial Arbitration Court could in its award impose conditions on employers and employés inconsistent with contracts of employment subsisting between them at the time when the dispute arose. On that question I have expressed my opinion in that case as follows (2):—"Industrial Arbitration may involve the abrogation of the existing contractual rights of either of the parties where the abrogation is necessary for the effective settlement of the industrial dispute. That proposition was questioned in the course of the argument. But it is to my mind one of the fundamental conditions on which the jurisdiction of Industrial Courts is exercised." In the case of contracts of employment between master and adult workmen such an interpretation of the Act must necessarily be adopted if the remedial powers of the Court are to be effectually exercised. For the same reason the Court must be taken to have the same power where it becomes necessary in the settlement of a dispute to make an award inconsistent with an indenture of apprenticeship which was in existence before the dispute arose. But against the interpretation which I have indicated, and which would appear to follow naturally from the application of the plain words of the Act to its subject matter, reasons have been urged for construing its general expressions with a restricted meaning so as to exclude from its operation the relation of employer and employé when it is constituted by indenture of apprenticeship. The argument is put in this way—The indenture no doubt creates the relation of employer and employé, but it does much more. It confers on the infant employé the status of apprentice with the rights and obligations which the law attaches thereto. It is a provision for enabling

(1) 8 C.L.R., 465.

(2) 8 C.L.R., 465, at p. 510.

him to learn a trade and thus gradually relieve his parent or guardian from the obligation of maintaining him. The terms of the indenture concern therefore not only the master and the apprentice, but also the parent or guardian, whose interest in the faithful observance of the covenants is substantial and not merely formal. Upon that state of things the argument is founded that the legislature could not have intended, by general words in an Act concerning disputes in industrial matters between employers and employés generally, to empower the Industrial Arbitration Court to disregard or infringe the rights of parent or guardian under the indenture and to render of no effect the system established by Statute for the instruction of apprentices. There are under the law of New South Wales two classes of apprenticeship the distinction between which it is important to bear in mind in dealing with the appellant's contention,—apprenticeships under the *Apprentices Act* 1901 and apprenticeships not under the Act. The Act constitutes a system of apprenticeship under which provision is made for teaching trades to poor children whose care and maintenance the State has in various ways taken upon itself; under which, also, the relations of master and apprentice generally are dealt with and summary remedies are created for the adjustment of their differences. Indentures coming within the Act confer statutory rights on all the parties to them, not on the master and apprentice only. The securing to the parties the exercise of those rights is part of a system instituted by the State for ensuring efficient instruction in skilled trades to its young people, and for making that instruction one of the means by which the poor and destitute children, whose care the State has taken upon itself, are trained to be good citizens. No doubt Parliament could, if it thought fit, confer on the Industrial Arbitration Court power to disregard that system and the conditions of indentures entered into in accordance therewith, and to treat the duties and obligations thereby undertaken by the parties as of no moment whenever the Court deemed such a course expedient for the settlement of an industrial dispute. I am disposed to think, if it were necessary in this case to decide the matter, that there are very strong reasons for doubting whether the legislature intended by the

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general words of such an Act as the *Industrial Arbitration Act* to empower a Court created for the settlement of industrial disputes to practically abolish the statutory system of apprenticeship and the rights created under it, and to hand over to the Industrial Arbitration Court the control in the last resort of the relation of master and apprentice in all industrial matters. But in the view that I take of the disposal of this appeal it becomes unnecessary to determine that question.

As to the other class of apprenticeships, those not within the Act, it will be observed that the *Apprentices Act* does not embrace the whole law relating to apprenticeship in New South Wales. It however repeals, expressly and impliedly, all other Statutes on the subject, the repeal including, in my opinion, the early English Apprentice Acts in force here by virtue of 9 Geo. IV. c. 83. It therefore stands as the only Statute relating to the general law of apprenticeship in force in New South Wales. An indenture not within it cannot have the advantage of its provisions, though the operation of the indenture as between the parties is unaffected, and it is a good indenture of apprenticeship at common law. But its provisions are enforceable only in the ordinary Courts. The right of having disputes between master and apprentice settled by summary procedure before Justices conferred on parties to an indenture within the *Apprentices Act* does not extend to indentures not within the Act. Such being the position of apprenticeships constituted by indentures not within the *Apprentices Act*, there seems to be no reason why the language of the *Industrial Arbitration Act*, which is wide enough to include the relation of employer and employé created by such agreements, should not apply to them. The control by the Industrial Arbitration Court of the relation of master and apprentice cannot in such cases be open to the objection that it involves the infringement of statutory rights conferred in the public interest and the setting aside of the statutory system of apprenticeship. On the grounds, therefore, which I have already fully stated in considering the *primâ facie* meaning of the general words of the *Industrial Arbitration Act*, I am of opinion that that enactment must be construed as empowering the Industrial Arbitration Court to deal with the conditions under which

apprentices are employed in any industry within the meaning of the Act in all cases where the employment is by virtue of an indenture not under the *Apprentices Act*, and that in all such cases an award could have been made by that Court inconsistent with the conditions of the indenture. If the indenture were on its face outside the *Apprentices Act*, the jurisdiction of the Arbitration Court to make the award and to enforce it would be, I think, beyond serious question. But that is not the position. The indenture purports to be under the Act, and is in fact in accordance with its requirements except that it contains in addition to the scheduled covenants and stipulations the two provisions which were the subject of so much discussion on the re-argument of this appeal.

One question of far-reaching importance at once arises altogether apart from the form or contents of the indenture. Had the extinct Industrial Arbitration Court jurisdiction to regulate conditions of employment in respect of all apprentices, whether indentured in accordance with the *Apprentices Act* or not? If it had no jurisdiction in respect of apprenticeships within the Act, was the indenture under consideration in this case an indenture within the Act and so not subject to an award of that Court, or did the indenture by reason of the added provisions differ so substantially from that embodied in the Schedule as to be taken outside the Act? Subsidiary questions of almost equal importance arise incidentally. As the indenture purports to be made under the Act, could the objection that it was not in accordance therewith be raised except on the apprentice electing to treat it as outside the Act, or was it within the power of the Arbitration Court, the question being one of jurisdiction, to raise and determine that issue for itself irrespective of the election or intention of either party to the indenture? Now what is the nature of the litigation in which the Court is called upon to determine these important and difficult questions of law? The order now under consideration is the result of proceedings initiated in the old Court and continued in the new under sec. 8 of the present *Industrial Arbitration Act*. It is by reason of its initiation in the old Court, as I have pointed out in the early part of this judgment, open to review by the Supreme Court and this Court in respect of every error of law on

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which it has founded jurisdiction. But the orders of the new Court in which all future proceedings for compelling observance of the awards of the old Court must be taken are, as I have pointed out, protected from question or inquiry at the hands of a superior Court so long as the proceedings on the face of them relate to disputes in industrial matters. As far as I am able to judge it is difficult to understand how, in the face of sec. 52, any of the questions of jurisdiction arising on the facts of this case could be raised by way of prohibition or otherwise in respect of such orders. The one sufficient answer to all of them would be that the whole subject matter with which the Court was dealing was on the face of the proceedings within the jurisdiction of the Industrial Court. It would appear, therefore, highly improbable that any of the important questions of jurisdiction which we are called upon to decide between the parties in this case can ever be raised again in any effective way. Under these circumstances I agree with my learned brothers who have preceded me that we should follow the course taken by this Court in *Hannah* v. *Dalgarno* (1) that, having regard to the exceptional way in which the questions of law have arisen in this case, the interests of justice will be best served by not allowing special leave, thereby leaving undisturbed the order of the Industrial Court. For these reasons I agree that the special leave to appeal, granted *ex parte* on the appellant's motion, should be rescinded.

ISAACS J. The conclusion arrived at to rescind the leave to appeal, with which I quite agree, eliminates from consideration several aspects to which it otherwise would have been necessary to advert.

There still, in view of all the circumstances, remain some very important questions to which it is proper I should address myself.

The first is whether a decision of the Industrial Court is in any case open to prohibition. Sec. 52 says "the validity of any decision shall not be challenged by prohibition or otherwise."

Now I must say I have found it extremely difficult to perceive the possibility of any reasonable doubt in the face of those words. They are clear, distinct and unmistakeable.

(1) 1 C.L.R., 1, at p. 12.

A considerable amount of ingenuity was expended in endeavouring to introduce ambiguity into this simple phrase, but I could see nothing substantial in the argument. However, it is my duty to point out the untenable nature of the contention by reference to legal principles, prior decisions, and legislative action.

The first word of importance in the phrase is "validity."

Now, "validity" is a well known technical expression, and is equivalent to legality or not being *ultra vires*. If without jurisdiction, a decision is certainly invalid. As to the word "validity" used with regard to jurisdiction, see for instance *Bacon's Abridgment*, "Certiorari"; *Hedley* v. *Bates* (1); *Colonial Bank of Australasia* v. *Willan* (2). The expression has been so well defined by Federal Circuit Judge *Emmons* in *Sharpleigh* v. *Surdam* (3) that I quote his words: "Validity has a well understood technical, as well as popular acceptation, and must receive such meaning in the Courts if its use in the Statute does not suggest a different one. In the general nomenclature of the law, no word is so frequently used to signify legal sufficiency in contradistinction to mere regularity as this one. We say a deed is regular but invalid for want of power in the attorney or officer. When a lawyer says he concedes the regularity of a sale, but objects to its validity, it is known the conditions are questioned upon which the power to make it depended. Elementary books, in treating of question of both business and official agencies, employ it as a compendious word, as also including every incident of complete legality. Regularity, on the other hand, never does so. An official sale, an order, judgment or decree may be regular. The whole practice in reference to its entry may be correct, but still invalid for reasons going behind the regularity of its forms. But, when we say a judgment, decree, or sale is valid, it fully excludes the idea that it is void for any reason."

In *DeTreville* v. *Smalls*, *Strong* J. (4) says of a sale:—"It may be regular in form and in the mode of its conduct, but it cannot be valid, unless authorized by law." That is the sense in which, for instance, *Lord Chelmsford* used the word "valid" in *Ashbury*

(1) 13 Ch. D., 498, at p. 503.
(2) L.R. 5 P.C., 417, at p. 443.
(3) 1 Flippin, 472, at p. 487.
(4) 98 U.S., 517, at p. 522.

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Railway Carriage and Iron Co. v. *Riche* (1); and so by *Lord Hatherley*, at p. 688, and *Lord O'Hagan* (validly), at p. 691; and so in *Learoyd* v. *Bracken* (2) by *Lord Esher* M.R.

Therefore, there can be no doubt that when the legislature forbade impugning the "validity of any decision"—"decision" being the next word to receive attention—they meant to prohibit the challenge of its legality, and so decision there meant decision in fact. So "award" in sec. 30 must mean award in fact. This is indisputable from the words both of sec. 30 and sec. 38 (3). Similarly in sec. 47, which includes for this purpose secs. 43 and 44. It is to be observed that the Parliament of New South Wales, in the heading of Part 5 of the *Justices Act* No. 27 of 1902, has used the word "decisions" in the same way, as meaning decisions in fact, because statutory prohibition is one of the methods of "appeal," and see sec. 115 (ii). Then we come to the word "prohibition."

It was argued by Mr. *Wise* that "prohibition" should be confined to statutory prohibition, or prohibition for the non-observance of natural justice. Notwithstanding there is nothing in the language of sec. 52 to justify this contention, he argued that section 45 applied the provisions of the *Justices Act* to the proceedings before the Industrial Court, and as they include statutory prohibition, sec. 52 would be satisfied by that. But to this, besides the inherent breadth of expression in sec. 52, there are several objections. First, statutory prohibition, as already pointed out, is declared to be one form of statutory appeal, and the words "appealed against" in sec. 52 would in themselves be sufficient to embrace all forms of appeal, and therefore would include statutory prohibition. Next, we observe that sec. 49 gives certain powers of recovering penalties in Petty Sessions. Sec. 50 excludes all "proceedings in the nature of an appeal," which as applied to magistrates would most certainly include statutory prohibition, and also excludes "prohibition" which must be common law prohibition. And if the word "prohibition" means common law prohibition in sec. 50, it must have the same signification in sec. 52.

If the argument limiting the word "prohibition" to statutory

(1) L.R. 7 H.L., 653, at p. 679.

(2) (1894) 1 Q.B., 114, at p. 117.

prohibition fails, then, remembering that prohibition for want of natural justice was a common law proceeding, the conjoint use of the expressions "validity," "decision," "challenged," and "prohibition" irresistibly leads to the conclusion that the jurisdiction of the Supreme Court to prohibit the Industrial Court from enforcing any of its decisions has been taken away.

Prohibition has always been used to restrain proceedings *ultra vires* in whole or in part.

Consequently, from the internal evidence of the Act No. 3 of 1908 I entertain no doubt that common law prohibition is excluded as to the Industrial Court.

The history of the legislation and of the events leading up to it confirms the view derivable from its language.

Under the Act of 1901 prohibition had more than once been granted by the Supreme Court for excess of jurisdiction (*Ex parte Caterers' and Restaurant Keepers' Association* (1) and *Clancy's Case* (2)). In *Clancy's Case* it was expressly stated by *Stephen* A.C.J., at p. 593, and by *Griffith* C.J., at p. 197, and *O'Connor* J., at p. 205, of the respective reports that the reason for prohibition was excess of jurisdiction, in dealing with a matter which the Arbitration Court, when interpreting the Act, erroneously thought it was competent to deal with.

During 1906 applications for prohibition were becoming fairly common. In *Ex parte W. D. & H. O. Wills Limited* (3) a prohibition was granted, the Supreme Court being of opinion, on examining the evidence, that in fact no dispute existed between employers and employés, but only between the union and the employers, and, therefore, no jurisdiction existed to entertain the claim. In the *Sydney Ferries Case* (4), the Court was again called upon to prohibit, but declined, holding on the facts that there was a dispute. In the *Commonwealth Portland Cement Co.'s Case* (5) the Supreme Court, on application for prohibition, granted it *quoad*, that is, as to nine out of twelve classes of work, following *Wills's Case* (3).

In 1907 in the *Haberfield Case* (6) the Supreme Court granted

(1) 3 S.R. (N.S.W.), 19.
(2) 3 S.R. (N.S.W.), 592; 1 C.L.R., 181.
(3) 6 S.R. (N.S.W.), 461.
(4) 6 S.R. (N.S.W.), 639.
(5) 6 S.R. (N.S.W.), 720.
(6) 7 S.R. (N.S.W.), 247.

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prohibition to the Arbitration Court for travelling, as it was held, outside its jurisdiction. That decision was reversed by this Court (1) on the ground that the Arbitration Court had upon the construction of the Act jurisdiction to determine the question in controversy.

It is therefore plain that when in 1908 the Parliament of New South Wales determined to legislate afresh upon the subject of industrial disputes they were well acquainted with the fact that prohibition—the ordinary common law prohibition—had been frequently employed as the instrument for invalidating or attempting to invalidate the decisions of the arbitration tribunal. No instance of statutory prohibition for the purpose had arisen, or could have arisen, for the law did not provide for it in such a case.

In addition to this—though but for the stout argument of Mr. *Wise* it would scarcely seem necessary to advert to it—there is what amounts to a subsequent legislative recognition of the word "prohibition" as the common law writ. Act No. 3 came into force on 1st July 1908. On 10th August the Supreme Court in *Ex parte Newcastle Coal Co.* (2) refused a rule *nisi* for a writ of prohibition, the learned Chief Justice of that Court basing his opinion on two grounds—first, that the proceeding sought to be prohibited was not judicial; and next, that even if it were judicial, no prohibition would lie because of the concluding words of sec. 52. *Sir Frederick Darley* observed: "If that section is within the powers of the legislature to pass, as to which I express no opinion whatever, then no decision upon matters within the purview of the Act can be challenged in this Court on motion for a prohibition." The other two learned Judges offered no opinion as to sec. 52, though *Pring* J. said it was open to argument as to the power of the legislature to pass the latter part of the section. The view of the Chief Justice however was clear as to the meaning of "prohibition." When the case came before this Court (3) leave to appeal was refused, on the ground that the proceeding sought to be restrained was merely a recommendation. But in the course of the argument the learned Chief Justice said: "If a

(1) 5 C.L.R., 33.

(2) 8 S.R. (N.S.W.), 335, at p. 337.

(3) 6 C.L.R., 466, at p. 468.

Board not lawfully appointed attempts to exercise the functions of a Board, you can apply for prohibition or *quo warranto*." This was in effect repeated in the judgment. Upon this the Parliament of New South Wales, in Act No. 24, sec. 4 (*j*), took occasion to add to sec. 24 of No. 3 these words: "The validity of the constitution of a board shall not be challenged by prohibition or otherwise." Those are the identical words which are found in sec. 52. Parliament had already had the interpretation put upon them by the learned Chief Justice of New South Wales, and determined to avoid the possibility indicated by the learned Chief Justice of this Court. In face of this new enactment, the meaning as to which no shadow of doubt exists, it seems to be perfectly impossible to entertain for a moment the contention of the appellant to which I have already adverted. Sec. 52 does in my opinion abolish prohibition in every form.

I should not omit to notice an argument addressed to us that the legislature when prescribing jurisdictional limits cannot have meant nevertheless to allow the Court to wander at large unchecked by the Supreme Court, and so to enlarge its own jurisdiction as it pleased.

That argument does not convince me. The legislature is master of its own creatures. It has erected a Court which it thinks may be well trusted to observe the bounds prescribed; a Court whose decisions are arbitral in nature, or else supervisory or executory of arbitral determination of the Boards, the main decisions under the Act being to create rights and then enforce them, not as is usual with Courts to recognize pre-existing rights and then enforce them. The matters adjudicated upon concern hundreds or even thousands of individuals and affect the course of trade and industry; and it is not to be wondered at that Parliament, choosing between the possibility of a highly trained and specially experienced judicial tribunal accidentally exceeding the exact limits of its powers, and the disastrous confusion which may result from a total overthrow under the strict rules of common law prohibition of industrial arrangements, have preferred the former. It has always power to shorten the authority of the Court or impose a check upon its action.

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And it is not true that the Court may without possibility of control indulge in extravagant commands.

Lord *Lindley* in two passages in the *Free Church Case* (1) answers the objection. He adverts at p. 702 to the distinction between an erroneous decision and "a decision by a body having no jurisdiction over the matter decided"—and in passing I may point to his Lordship's use of the word "decision" in the same sense as in the concluding words of sec. 52. Lord *Lindley* also at p. 695 refers to the condition implied in all instruments creating powers, namely, that the powers shall be used *bonâ fide* for the purposes for which they are conferred. And if the Industrial Court were to sentence an employer or employé to penal servitude, or to eternal deprivation of industrial rights, or to fine him £1000, the order would be so outrageous and unreasonable as to be altogether beyond the pale of the Act, and could not be supported as a *bonâ fide* exercise of judicial power. I make no doubt the Supreme Court would prohibit an act so manifestly lawless from being carried into execution. But the legislature, in reposing its confidence in the Industrial Court, of course leaves out of consideration all such wild and irrational conduct, and so should we.

Mr. *Wise* then urged as a last resource that the doubts suggested by the Supreme Court in the *Newcastle Coal Co. Case* (2) as to the power of Parliament to pass a law excluding prohibition were well founded. He contended that it is repugnant to the Act 9 Geo. 4 c. 83, sec. 3, made permanent by 5 & 6 Vict. c. 76, sec. 53. But the last mentioned section, while making the older provisions permanent, concludes with power to alter the previous Acts—which at once puts an end to the argument.

Mr. *Wise* was not prepared to challenge the validity of sec. 5 of the New South Wales Constitution, No. 32 of 1902, and that section is ample to support the provision under consideration.

So much relates to any case arising entirely under the Act of 1908.

Then comes the question whether sec. 52 applies to a decision given under the authority of sec. 8.

The objection raised to the application of sec. 52 to such a case

(1) (1904) A.C., 515.

(2) 8 S.R. (N.S.W.), 335.

as the present is that it would interfere with existing rights of litigants in a pending application, and that there is neither express language nor necessary implication to justify this. Well, the first thing to ascertain is what the legislature has actually said; for there is no room for any implication or presumption contrary to the actually expressed intention of Parliament. The section enacts in the first place that where on the expiration of the Act of 1901 there is any "matter pending in proceedings before the Court of Arbitration for a penalty for breach of an award or of an industrial agreement," the proceedings may be continued and "such matter shall be heard and determined by the Industrial Court."

Stopping there for a moment, we may observe that so far the legislature has recognized the entire disappearance of the Arbitration Court, and has not left the question of continuance to the operation of sec. 9 of the *Interpretation Act* 1897, whatever effect that section might otherwise have in the absence of any competent Court; but Parliament has taken upon itself to make express affirmative provision for the continuance of the proceedings and the determination of the matter, not by the old Court but by an absolutely new tribunal—the Industrial Court.

Had the section gone no further, the new Court would have had the jurisdiction and the duty of hearing and determining the issue as to the alleged breach, and in case of conviction of awarding the punishment.

Whatever right of appeal or challenge in any form existed with respect to determinations of the Arbitration Court necessarily disappeared with the Court itself, and therefore it is meaningless to say that such a right remains unless taken away by express words or necessary implication. There, with the utmost deference to the contrary opinion, lies the fallacy of the appellant's contention, and no authority that I am aware of exists to support it. It is quite different from the case of the same Court existing, with a variation as to appeals in future cases. Whether a similar right exists with respect to the new Court depends entirely on the nature of that tribunal and any expressed will of the legislature with respect to questioning its decisions. If, for instance, the legislature had simply said that

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pending applications should be heard and determined by the Supreme Court, no right of prohibition would have existed, because by the ordinary operation of the common law no such writ goes to the superior Court. So, too, if the Industrial Court acting under sec. 8 had been declared by the Act to have the powers and jurisdiction of the Supreme Court: see *Skinner* v. *Northallerton County Court Judge* (1). Therefore it is necessary to have regard to the constitution and status of the Industrial Court itself, and find from the words of the legislature when setting up the Court how far its operation is to be controlled by the Supreme Court. If the section had stopped with the direction I last read, that "such matter shall be heard and determined by the Industrial Court," the other parts of the Act would have to be at once examined.

The legislature, however, has not stopped there, and the appellant contends that the succeeding words of the section preserve the right of prohibition. But the reason of the further words is evident. Sec. 7 was a necessary provision in respect of pre-existing awards, orders, and directions of the Court of Arbitration and industrial agreements, and it provides that they "may be *enforced* under the provisions of the Act."

These words draw in the provisions of sec. 43, which substitutes for the sanctions stated in such awards and orders and agreements new and very drastic penalties, including the power of imprisonment for three months without the option of a pecuniary penalty. This would have been so hard on a defendant in a pending litigation that common justice required a special exemption in that case, and so Parliament, after expressly conferring on the Industrial Court jurisdiction to hear and determine a pending proceeding, went on to restrict the powers of the Court as to the order it could make and the method of enforcing such order. It did so in these terms:— "For the purpose of carrying out the above provisions" (that is, for the purpose of the proceedings *down to the hearing and determination by the Industrial Court and not further*), "the enactments of the first mentioned Act" (that is, the provisions of law as enacted by the Act of 1901) "shall continue

(1) (1899) A.C., 439.

in force" (that is, shall still be law), "and shall, *mutatis mutandis*, apply to the *hearing and determination* of any such matter by the Industrial Court, and to the *enforcement* of any order or determination of such Court." Parliament, therefore, has expressly limited the application of the old law to the continued proceedings. It applies old "enactments" in other provisions of the old Act. It does not renew the old Act itself (see *per Ridley* J. in *Wakefield Light Railways Co.* v. *Wakefield Corporation* (1)), but in effect incorporates or adopts those provisions into the new Act as a statement of jurisdictional powers of the Industrial Court, which comes into being, and receives all its authority from the Act of 1908 alone. And it is only such of the former enactments as relate to (*a*) the *hearing and determination* by the Industrial Court and (*b*) the *enforcement* of the order or determination of the *Industrial Court*, that are *pro hac vice* to continue. *Pring* J. very properly said that the right to obtain a writ of prohibition to the Court of Arbitration was not conferred by the *enactments* in the Act of 1901. On the contrary, said the learned Judge, the writ lay in the *absence* of any enactment depriving the litigant of his ordinary common law rights. I quite agree with those observations. They go to the heart of the matter. The adoption of the old provisions was for the special purpose of delimiting *the powers of the Industrial Court itself*, and not for the purpose of affirming or affecting the powers of the *Supreme Court* should the Industrial Court be alleged to have transcended its powers. The enactments as to the hearing, determination and enforcement are all, so to speak, within the walls of the Industrial Court itself, and are not appropriate to indicate the action of any other Court. Whatever order the old Arbitration Court could have made, the Industrial Court was empowered to make; in whatsoever manner that order could be enforced, so the order of the Industrial Court could be enforced. That begins and ends the provision of sec. 8. The orders the old Court, and therefore the new, could make are provided for in sec. 26 of the old Act, and includes sub-sec. (*n*):— "To deal with all offences, and *enforce* all orders under this Act." The powers of enforcement are set out in sec. 37, and include jurisdiction to hear and determine a proceeding for fines and penalties.

(1) (1906) 2 K.B., 143.

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The practical execution of its orders may be regulated by rules of Court (sec. 26, (*c.*) (*v.*)), and is provided for in secs. 39 and 40, which all use the word "enforcement." Of course, restraining execution of an order or quashing it, is the very opposite of "enforcement."

Therefore sec. 8 determines nothing as to whether prohibition applies. An order under sec. 8 is an order of the Industrial Court under the Act of 1908 quite as much as an order of that Court made under other sections, the only difference being in the extent of the powers conferred upon it, and the powers so conferred are powers of the Industrial Court, and are exercised by that Court as its own powers, and not as powers of the defunct tribunal.

We have then to go outside sec. 8 to ascertain whether prohibition lies. What is the nature of the Court, and is it one to which prohibition may legally go? Sec. 13 creates it. It consists of one Judge either of the Supreme Court or a District Court. He acts alone as a decisive tribunal, but may be assisted by assessors. It is, of course, a Court whose proceedings are *primâ facie* examinable for jurisdiction by the Supreme Court, and there is nothing in sec. 13 which militates against it. It has not, for instance, been declared to have the power and jurisdiction of the Supreme Court. Then we have to look at sec. 52, which is framed in the broadest and most comprehensive fashion ever adopted in a privative section. It would be difficult to suggest any wider language. "Any decision" means any decision which is in fact given by the Court under that Act. If under the provisions of sec. 7 it decides as to a breach by A. of an old award, and on the same day under the provisions of sec. 8 it decides as to another breach by A. of the same award, what reason can be advanced for Parliament making one decision beyond challenge and leaving the other open to prohibition, and making contradictory decisions possible in respect of the same award? And in such case which would the Industrial Court be bound to follow in a subsequent case? If the decisions were in respect of an industrial agreement, are all the parties to be bound by it, or free from it? It seems to me that, if the Court newly erected is, on the proper construction of sec. 52, to be considered as implicitly trusted by the legislature not to exceed the larger and more

responsible powers conferred in respect of new business, there is no apparent reason why Parliament should, in the absence of direct language to the contrary, be supposed to refuse its trust with regard to the narrower limits fixed for pending business. The legislature adopted its own method of restriction by limiting the powers of the Court itself. To assume that absolute trust was given in more important circumstances and distrust manifested in less important events, and to do so by mere implication, in the face of the express demarcation indicated in sec. 8, appears to me unreasonable. I therefore arrive at the conclusion that, whatever the effect of sec. 52, it applies to all decisions, in other words, "any decision" means any decision, and not some decisions only.

If sec. 52 does not apply, neither does sec. 54, but it would hardly be contended that the legislature did not intend to make wilful false swearing before the Industrial Court punishable as perjury except where the proceedings were entirely new. There is no adoption in the old Act of 1901, and therefore none in sec. 8 of the Act of 1908, of sub-sec. III. of the *Parliamentary Electorates Act* 1893. See sec. 26 (*m*) of the Act of 1901. Sec. 54 of the new Act provides:—"Whosoever, before a board or the Industrial Court, wilfully makes on oath any false statement knowing the same to be false shall be guilty of perjury." This was apparently considered by Parliament necessary to punish perjury, and witnesses surely had no vested right to swear falsely and escape punishment as perjurers simply because the proceedings were pending on 1st July 1908. And, as on the other hand, if sec. 54 applies, there can be no reason of construction why sec. 52 should not also apply.

I therefore am of the same opinion as the majority of the Supreme Court that prohibition is excluded as much in respect of a decision under sec. 8 as under the other part of the Act.

The next question to be dealt with is how far the Arbitration Court under the Act of 1901 had power to affect the wages of apprentices. The appellant contended that the Act did not include apprentices at all, and if it did, then it did not include apprentices who previously to the award were indentured under the *Apprentices Act* 1901.

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As to whether the *Arbitration Act* extends to apprentices at all, it is to be observed that the Statute is framed in the widest possible terms. It was passed to meet the case of industrial disputes from whatever cause arising, and the public tranquillity and uninterrupted course of industrial operations constituted the aim of Parliament.

"Industrial matters" include by the statutory definition the hours of employment, sex, age, qualification, and status of employés, the employment of children or young persons.

"Employé" means a person employed in an industry.

The Act of 1901, so far as material to this matter, was adopted from the New Zealand Act of 1894, under which, with similar relevant language, as pointed out by Mr. *Beeby*, apprentices were dealt with by the Arbitration Court as included within the statutory provisions. I have found several cases in the New Zealand Reports where this was done. The following cases are instances:—*Auckland Saddlers* (1), in April 1900; *Dunedin Bakers* (2), 28th September 1900; *Otago Millers* (3), 22nd October 1900; *Otago Plasterers* (4), 4th February 1901; *Otago Boilermakers* (5), same date; *Wellington Saddlers* (6), 7th February 1901.

So that in the year 1901 the Parliament of New South Wales, with the Act and its accepted interpretation before it, bodily adopted the same expressions, and this circumstance is not unimportant as assisting to ascertain the intention of the legislature.

But the matter does not rest there.

The New South Wales Court was composed of a Judge and representatives of the employers and employed respectively, and these members unanimously and consistently acted upon the view that the terms used did include apprentices, and that the Act could not reasonably be worked without regulating apprenticeship.

In the *Tailors' Award* 1903 (7) apprentices are provided for; and in *Ex parte Kane* (8) the Court, on the true construction of its award, refused permission to the indentures of an apprentice to

(1) 2 N.Z. Arb. Rep., 3.
(2) 2 N.Z. Arb. Rep., 255.
(3) 2 N.Z. Arb. Rep., 257.
(4) 2 N.Z. Arb. Rep., 265.
(5) 2 N.Z. Arb. Rep., 267.
(6) 2 N.Z. Arb. Rep., 133.
(7) 2 N.S.W. Arb. Rep., 445, at p. 450.
(8) 3 N.S.W. Arb. Rep., 40.

an employé. In the *Saddlers' Award* (1) apprenticeship was regulated; and in *Re Weekes* (2) the Court unanimously held that the *Saddlers' Award* (3) as then framed applied to contracts of apprenticeship existing at the date of the award, and made an order in the particular case against an employer for breach of it; but the Court accepted a specific amendment to operate equitably in the future, so as to save previous indentures. The jurisdiction was thus clearly exercised. In the *Bookbinders' Award* 1905 (4) apprenticeship was regulated, and here the Court, profiting by its experience in the *Saddlers' Case* (3), thought it right to except existing contracts. Consequently, in the absence of any legislative language in the new Act negativing the interpretation which had consistently been placed upon the statutory words, it is I think a proper assumption that that interpretation was accepted as a correct one. Indeed, sec. 27 of the Act of 1908 by sub-sec. (*e*) relating to apprentices and improvers assumes the accuracy of the construction given to the initial definitions. It would in many trades be notoriously an imperfect and often wholly ineffective award that omitted reference to apprentices; and the well known range of disputed matters left Parliament in no ignorance as to the necessity of including this class of employés which are bound by the generic term used. The first objection therefore fails.

The next objection raised is the question whether indentures under the *Apprentices Act* 1901 were outside the purview of the *Arbitration Act* 1901, provided only they were made before the dispute, or possibly the award.

This point, when plainly stated and thoroughly understood, seems to me unique. There is no instance that has been called to my attention of any similar objection ever been taken or given effect to.

It is not a matter of an Act of Parliament operating retrospectively. The passing of the *Arbitration Act* 1901 is the first event in order of time.

That Act became law more than a year before the making of the indenture in question, and the real question is whether it is open to employers to defeat an existing Act by private contract. The

(1) 2 N.S.W. Arb. Rep., 479, at p. 485.
(2) 3 N.S.W. Arb. Rep., 28.
(3) 2 N.S.W. Arb. Rep., 479.
(4) 4 N.S.W. Arb. Rep., 209, at p. 217.

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Act creates an Arbitration Court for the hearing and determination of industrial disputes (sec. 16). "Industrial disputes" meant disputes in relation to industrial matters, &c.; and "industrial matters" included "wages allowances or remuneration of *any persons employed or to be employed* in any industry." It therefore embraced persons already under contract as well as those engaged in the future. The latter would be universally included under all ordinary principles of interpretation.

This Act was passed 10th December 1901, and the appellant, with this legislation on the Statute book, expressly extended even to persons then already "employed," as well as those "to be employed," claims that an agreement entered into by him fourteen months after the Act is assented to, with persons then employed for the first time, can entirely bar its operation. It is to me a startling proposition, and if correct still offers considerable opportunity for enterprise in that direction.

I cannot agree that the Parliament of New South Wales left open to employers so simple an evasion of its own direct and later enactment. All prior legislation must be read subject to later enactments, unless there is some express or necessarily implied declaration to the contrary.

In my opinion whatever contract for employment of a workman or apprentice, after the *Arbitration Act* 1901 was passed, must be taken to have been entered into with a full knowledge of and subject to the power of the Arbitration Court, in case of industrial dispute, to do what the legislature instructed it to do, unfettered by any private action intended or calculated to obstruct its action.

In the absence of express words overriding the unrestricted words of the *Arbitration Act*, what principle can be resorted to for allowing such an evasion? Retrospectivity is out of the question, because, as already pointed out, the *Arbitration Act* is the later Act and the contract was subsequent to that Act. It is said to rest on the implication of preserving rights. Now it is plain to me beyond all question that if the legislature thought it necessary to disregard contracts of service found by its Arbitration Court to be unfair when made by adults who are to a considerable extent in a position to guard their own welfare, it

could never have meant to leave mere children to endure whatever injustice they may be subjected to by others. It was also said that special remedies were enacted both for and against apprentices under the Act. But, again, that legislation had been in force since 1894, found insufficient, as it manifestly was, because it is not a question of remedies under the *Arbitration Act*, but of rights. To give an apprentice a specific method provided of getting a starvation wage of 2s. 6d. a week is no compensation for depriving him of an adequate wage to which he is otherwise admittedly entitled.

It is further true that the legislature has enabled the justices to cancel the contract if they think it unfair. That in any case is not an easy thing to do when one recollects that, even before justices, the contest may be expensive and difficult even when attended with success, and if failure results the apprentice would be in no enviable position.

Because these modifications in the law have been made—plainly for the benefit of infants for whose protection the law is always solicitous—is it to follow that they are to be specially excluded from the beneficial operation of the *Arbitration Act*? Does the mere fact that before a dispute occurs or an award is made a master secures the services of children at a rate which may, upon the determination of the Arbitration Court, prove to be of a grossly inadequate sum, effectually bind these children down for the whole term of the agreement, say several years ahead, to the inadequate wage? Justices may or may not think proper to discharge the apprentice, and unless they do, the wage however inadequate must on that argument prevail. I am unable to feel any doubt whatever that this is not the intention of the New South Wales legislature. They have used language, "persons employed or to be employed," comprehensive enough to cover this case, and to give effect to the objection would, in my opinion, be unjustly attributing a deliberate disregard for the most helpless class of employés in the whole community, children admittedly incapable of judging for themselves, whose wills may have been completely overborne and who have not the means, knowledge, opportunity, or perhaps the courage, to conduct a case

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before justices, with all the intricacies and risks, and inequalities of position which such an undertaking involves.

The appellant says it would interfere with existing rights. What rights? Is it the right to keep the child on starvation wage? There may be a merely nominal wage in the indenture; and the result is the same. Such a right is not worthy of much consideration, and I cannot believe the New South Wales legislature by implication—for their language in its natural signification is opposed to it—ever intended this result. *Fry* L.J. in *De Francesco* v. *Barnum* (1), in declining to apply the doctrine of specific performance to contracts of service, said:—"I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery."

And where the legislature and the tribunal appointed by the legislature finds that anything below a stated sum is inadequate, even under the same conditions as are set out in the indenture, then, to force children to serve at a rate admittedly insufficient and unfair, is, in my opinion, to reduce the contract to one of virtual slavery. I think a Court should strain against it; and unless coerced by the very strongest words should refuse to recognize such an alleged right, or to impute to the legislature the intention to preserve it.

But then it was urged in support of the same contention that the Act creates rights and obligations in respect of third persons which must not be interfered with, and as they would be interfered with if the infant's position were improved, no such improvement is permissible.

It is not the case that the Act creates rights in third persons. Infants in eleemosynary institutions may be bound apprentices by the principal of the institution; children deserted or left without means of support may be bound by two justices. It is I apprehend a hopeless contention that the principal of an orphan asylum or public institution such as a reformatory, or the two justices, has or have personal rights or obligations under the contract. And the Act places the father, mother, guardian, justices and principal in precisely the same position.

Sec. 13 provides that an indenture of apprenticeship which is

(1) 45 Ch. D., 430, at p. 438.

executed by the apprentice of the first part; by the parent, or such person (that is the principal), the guardian, or justices of the second part; and the master of the third part, and which specifies certain matters, and which "shall be in the form or nearly as may be set out in the Second Schedule" shall be as binding on the *master and the apprentice as if the apprentice were of full age.* There are certain limitations on the terms which may be inserted—as by sec. 4 which forbids the binding an apprentice under fourteen or for more than seven years, and by sec. 16, which forbids the binding an apprentice for more than forty-eight hours a week with the exception of specified industries. But there is not a word in the Act about the third party being bound, or about there being any remedy for or against him. His office is merely to consent, and this consent makes up for the infancy of the apprentice; the capacity of the designated person to judge of the infant's welfare is taken as equivalent to that of the latter at full age, and so the contract once entered into in that way is presumed to be for his benefit, and he and the master are bound as if the infant were twenty-one. But that is all. And when the Schedule is looked at, this is plain to demonstration. The apprentice is named as of the first part; the third party is named as of "the second part (as consenting hereto)." The agreements are all expressed as between the apprentice and the master. Each of these agrees to certain things and binds himself to the other "his executors and administrators"; and finally two spaces are left—manifestly for the apprentice and the master—for due observance of these agreements. As some discussion arose as to this last clause, I may usefully point out that there are several reasons why those two spaces cannot include the third party and must refer to the master and apprentice. The third party, as already mentioned, is merely a consenting party; the master and apprentice have already agreed for themselves, their executors and administrators; the third party has not previously agreed to perform any covenant and agreement, and therefore the last clause would be senseless as to him; and, lastly, to bind executors and administrators of the Principal of an orphan asylum, or of two justices, would be even more absurd than binding those officials themselves. This

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view so presented is further strengthened by the Third Schedule relating to assignments which carries out the same idea. But, supposing the third party were properly there, what follows? The contract like every other would be subject to any change in the law, the principle of *Mayor of Berwick* v. *Oswald* (1) and *Baily* v. *De Crespigny* (2) would apply, and the parties' rights would be varied accordingly.

Consequently, as far as the *Arbitration Act* 1901 was concerned, an indenture under the Act should be considered on no higher basis than if it were an ordinary agreement of apprenticeship at common law.

But what is meant by an indenture under the *Apprentices Act*? The construction of the particular deed in this case is not material, and I absolutely say nothing about it. But having directed my observations to the power of the Arbitration Court to deal with apprentices bound under statutory indentures, it is I conceive incumbent on me to explain what I mean by the term. I do not mean every deed that purports to be under the Act. Nor does it answer the description merely because the contract entered into is binding at common law. In my opinion no such contract can be considered as a deed under the Act unless it complies with the statutory provisions, and subjects the infant to no greater disadvantages than the Act imposes on him. The Statute is in derogation of the common law. It binds infants for any number of years up to seven, or until they attain their majority, but only on certain conditions. If those conditions are strictly followed there is the statutory and irrebuttable presumption, so long as the indenture remains uncancelled, that the bargain is for the infant's benefit, and it is binding. But the Act requires that the indenture shall be "in the form, as nearly as may be, set out in the Second Schedule hereto; and every such indenture shall be binding," &c.

When an Act requires an instrument to be "in the form" given, that is mandatory and imperative, and not merely directory (see *Henry* v. *Armitage* (3)). If the master by varying the form varies the rights of his apprentice to the prejudice of the latter

(1) 3 El. & Bl., 653, at p. 678. (2) L.R. 4 Q.B., 180.
(3) 53 L.J.Q.B., 111.

that is not such an indenture as the Act declares binding, and the parties are relegated to their common law position.

If upon the true construction of any indenture, purporting to be in compliance with the Act, an apprentice were to be made subject to penalties or clear disadvantages beyond those provided or permitted by the enactment, that would be such a substantial variation from its conditions as to place the bargain outside the sphere of its operation. As a test, suppose the apprentice were to be prosecuted under the penal provisions of the Act for a breach of such an indenture as I have supposed, could he not set up the objections and lawfully claim that he was not bound by sec. 13? In my opinion there would be no valid answer to such a defence, and such a deed would therefore not answer the description of the term "indenture" under the Act as I have used it.

The question whether this particular indenture, on a proper construction, answered the test, is now unnecessary to be answered as a matter of law of general importance. The legislative change has obliterated the old Arbitration Court, and in future such a question must be determined by the new Industrial Court, and as its decisions are not open to challenge, any decision of this Court, by way of construing the particular deed under which this case arises, would lay down no general rule, and it is not a matter for special leave, which ought, therefore, to be rescinded.

Special leave to appeal rescinded.

Solicitors, for the appellant, *Betts & Son*, Goulburn, by *Pigott & Stinson.*

Solicitors, for the respondents, *G. S. Beeby & Moffatt.*

C. A. W.