[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN AGRICULTURAL COMPANY AND OTHERS . . . . . } PLAINTIFFS;

AND

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } DEFENDANTS.

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SYDNEY, *Aug.* 26, 27, 28, 29; *Sept.* 5.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial Conciliation and Arbitration—Agreement between organization of employés and employer — Agreement intended to have operation in an impossible event—Agreement not to resort to Commonwealth Court of Conciliation and Arbitration—Validity—Public policy—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 24, *Part VI.*

Practice — High Court — Overruling prior decision — Prior decision manifestly wrong.

Held, by the whole Court, that an agreement between an organization of employés and an employer, made at a time when there is an industrial dispute extending beyond the limits of one State to which they are parties, and which is intended by both of them to be operative only as an industrial agreement within Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 or as an agreement certified and filed under sec. 24 of that Act, is not operative at all if it is not such an industrial agreement or is incapable of being certified and filed under sec. 24, and therefore that the High Court will not interfere by injunction to restrain the organization from including the employer in proceedings in the Commonwealth Court of Conciliation and Arbitration in respect of that dispute.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ., that an agreement purporting to prevent the parties to it or either of them from instituting proceedings in the Commonwealth Court of Conciliation and Arbitration is contrary to public policy, and therefore void.

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By *Higgins* J.—The agreement was meant to operate under Part VI. of the Act, and could not; and being impossible of performance it could not be enforced.

By *Isaacs* and *Higgins* JJ.—The High Court is not bound by its own prior decisions, and if in the Court's opinion a prior decision is manifestly wrong it is the duty of the Court to overrule that decision.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Barton* A.C.J. and *Powers* J. dissenting), that *J. C. Williamson Ltd.* v. *Musicians' Union of Australia*, 15 C.L.R., 636, was wrongly decided and must be overruled.

MOTION for injunction.

An action was brought by the Australian Agricultural Co. and a number of individuals and other companies against the Federated Engine-Drivers and Firemen's Association of Australasia, and by the writ the plaintiffs claimed an injunction restraining the defendants from proceeding against the plaintiffs with a certain plaint in the Commonwealth Court of Conciliation and Arbitration, filed by the defendants against the plaintiffs and others, in violation of the terms of certain agreements between the plaintiffs and the defendants dated 13th November 1910 and 3rd, 5th and 18th May 1911.

The agreement between the Australian Agricultural Co. and the defendants, which was similar to the other agreements, contained the following material provisions :—

" This industrial agreement made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904 this fifth day of May 1911 between the Australian Agricultural Company (hereinafter described as the employer) of the one part and the Federated Engine-Drivers and Firemen's Association of Australasia an organization of employés registered pursuant to the provisions of the said Act (hereinafter described as the said organization) of the other part Whereby it is agreed that the rates of pay and terms and conditions of employment of such of the members of the said organization of the classes of labour hereinafter mentioned as are now or may hereafter be during the continuance of this agreement in the employment of the said employer at the said collieries and works shall be as follows :—"

(Then were set out the rates of pay and certain terms and conditions of employment).

"10. The said organization shall not nor shall any of its members make any further request or demand or raise any dispute in relation to industrial matters to upon or with the employer within the State of New South Wales of the Commonwealth of Australia during the currency of this agreement and shall consent to the employer being exempted from all or any award or awards and from the operation of any board that may be at present or during the currency of this agreement made or constituted in the State of New South Wales or in the Commonwealth of Australia to deal with any industrial matter or matters or any matters or any matter or thing mentioned or referred to in this agreement.

"14. Should any dispute arise under this agreement it shall be referred to a Conciliation Board consisting of two representatives appointed by the said organization and two representatives appointed by the Hunter River District Colliery Proprietors' Defence Association. The decision of the majority of the said representatives shall be binding and if a majority of the said representatives do not agree or if the said organization or the said Association refuses or neglects to appoint a representative or representatives such disputes may be referred to" the Deputy Industrial Registrar in charge of the District Registry at Sydney, "whose decision shall be final.

"15. This agreement is executed in pursuance of an agreement made between the said organization of the one part and the said Hunter River District Colliery Proprietors' Defence Association of the other part.

"16. This agreement shall be filed in the office of the Industrial Registrar appointed under the *Commonwealth Conciliation and Arbitration Act* 1904 and shall come into operation on the twelfth day of May 1911 and shall continue in force for a term of three years from the date of making thereof."

The plaintiffs now moved for an interlocutory injunction in the terms set out in the writ.

Campbell K.C. (with him *Starke*), for the plaintiffs. Although the agreement was not effective under sec. 24 of the *Commonwealth Conciliation and Arbitration Act* and may not be capable of being an industrial agreement within Part VI. of that Act, it is a valid

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"10. The said organization shall not nor shall any of its members make any further request or demand or raise any dispute in relation to industrial matters to upon or with the employer within the State of New South Wales of the Commonwealth of Australia during the currency of this agreement and shall consent to the employer being

P. 262, l. 7, for "*Held*, by" read "*Per*".

matter or matters or any matters or any matter or thing mentioned or referred to in this agreement.

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agreement at common law, and under the decision in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1) it put an end to the dispute, so that the dispute was effectively settled before the Arbitration Court had cognizance of it. The agreement disposes of all the elements of the dispute which was then pending, and its terms show plainly that the intention of the parties was that the dispute should cease. That is apart altogether from the question whether there is an express or implied covenant not to take proceedings in the Commonwealth Court of Conciliation and Arbitration. The whole of the terms of the contract must be looked at: *Rigby* v. *Great Western Railway Co.* (2); and they are inconsistent with a continuance of such proceedings. The right to an injunction in this case is not touched by the judgment of *Isaacs* J. in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1); that learned Judge was there dealing with an agreement made before a dispute came into existence, and what he said has no relation to a case where it is alleged that a dispute has been put an end to by an agreement. If the substance of the agreement would be violated by allowing the proceedings in the Arbitration Court to continue, an injunction should go: *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (3); *Kerr on Injunctions*, 4th ed., p. 394; *Doherty* v. *Allman* (4). The right to an injunction does not depend upon whether the Court as to which it is sought is competent to do justice between the parties: *In re Connolly Bros. Ltd.*; *Wood* v. *Connolly Bros. Ltd.* (5). The mere fact that the parties were mistaken in thinking that the agreement was an industrial agreement under the Act and could be dealt with under sec. 24, does not affect its validity as a matter of law.

Ferguson (*Arthur* with him), for the defendants. Assuming the agreement to be good in other respects, in so far as it contains a negative covenant not to proceed in the Commonwealth Arbitration Court it is invalid. This Court cannot bar the way to the Commonwealth Arbitration Court by injunction. The decision to the

(1) 15 C.L.R., 636.
(2) 14 M. & W., 811, at p. 815.
(3) L.R. 16 Eq., 433.
(4) 3 App. Cas., 709, at p. 720.
(5) (1911) 1 Ch., 731, at p. 746.

contrary in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1) should be re-considered. See also *Scott* v. *Avery* (2). Assuming that it is held that there is neither an express nor an implied negative covenant, an injunction should not go, because the Arbitration Court has complete jurisdiction to deal with the agreement and the conduct of the defendants as an answer to the plaint. The agreement as a whole is unenforceable because it was made subject to a condition that it should be filed and should operate as an award under sec. 24, or at least that it should be registered and should operate as an industrial agreement under Part VI. of the Act, and those conditions could not be fulfilled. If both parties to an agreement are under an essential error as to the effect of the agreement, there is no contract: *Stewart* v. *Kennedy* [*No.* 2] (3). The agreement was made under a mutual mistake of the parties that they were making an agreement under the Act which was enforceable under that Act, and it was therefore void: *Kerr on Fraud and Mistake*, 4th ed., pp. 467, 472; *Daniell* v. *Sinclair* (4); *Halsbury's Laws of England*, vol. XXI., p. 34.

[HIGGINS J. referred to *Powell* v. *Smith* (5).]

The organization could have no capacity under the Act to enter into the common law contract, for it is an entity called into existence for a specific purpose, and cannot do anything except under the Act: *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (6).

[RICH J. referred to *Baroness Wenlock* v. *River Dee Co.* (7).]

There was in fact no authority under the rules of the organization in the persons who purported to sign the agreement on behalf of the organization. See rule 12. The agreement did not cover the whole area of the dispute. An injunction should not be granted even if a valid agreement covering the whole of the dispute were made in May 1911, because the defendants are entitled as of right, irrespective of the agreement, to prove in the Arbitration Court the existence of a dispute after that date and before 24th November 1911 which had not been determined by the President. The

(1) 15 C.L.R., 636.
(2) 5 H.L.C., 811.
(3) 15 App. Cas., 108.
(4) 6 App. Cas., 181.
(5) L.R. 14 Eq., 85.
(6) 6 C.L.R., 309, at p. 334.
(7) 36 Ch. D., 674, at p. 685 (*n*).

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agreement is void because it was impossible of performance at the time it was made: *Leake on Contracts*, 6th ed., pp. 494, 495; *Earl of Darnley* v. *London, Chatham and Dover Railway* (1). If the express covenant is bad or does not touch these proceedings, there is no implied covenant arising out of the agreement.

Campbell K.C., in reply. A mutual mistake as to the effect or operation of an agreement is not sufficient to invalidate the agreement unless the mistake goes to the root of the agreement: *Stewart* v. *Kennedy* [*No.* 1] (2). Here the mistake does not go to the root of the agreement. The agreement in its terms is the agreement which the parties intended to make. They arrived at a settlement of all the matters in dispute, and there is nothing to suggest that any matter was left out of consideration. The onus is upon the defendants to show that the agreement would not have been entered into unless the statutory sanctions attached to it, and they have not discharged that onus. [He also referred to *Kennedy* v. *Panama &c. Mail Co.* (3).]

[ISAACS J. referred to *Cooper* v. *Phibbs* (4).]

The making of a common law agreement for the settlement of an industrial dispute to which an organization is a party is not outside the scope of the organization's functions so as to make the agreement a nullity. An organization has ample power to do that which is reasonably necessary to carry out the functions with which it is entrusted. If there is a binding contract not to take proceedings in the Commonwealth Court of Conciliation and Arbitration this Court should grant an injunction: *Sneddon* v. *Kyle* (5).

Cur. adv. vult.

The following judgments were read:—

Sept. 5.

BARTON A.C.J. In this case a number of the respondents to the arbitration proceedings out of which the special case, just dealt with, arose (*Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* [*No.* 3] (6))

(1) L.R. 2 H.L., 43.
(2) 15 App. Cas., 75, at p. 92.
(3) L.R. 2 Q.B., 580, at p. 587.
(4) L.R. 2 H.L., 149.
(5) 2 S.R. (N.S.W.) (Eq.), 112.
(6) 16 C.L.R., 715.

are the plaintiffs, and the organization which is the claimant in the arbitration is the defendant. The plaintiffs may be classed as the northern and southern collieries of New South Wales, though there are other collieries, both northern and southern, which are not parties to this action. The writ claims an injunction restraining the defendant organization from proceeding against the plaintiffs with the plaint No. 6 of 1910 in the Commonwealth Court of Conciliation and Arbitration, filed by the defendant organization against the plaintiffs, in violation of the terms of the agreements between the several plaintiffs and the defendants dated 13th December 1910, 3rd, 5th and 18th May 1911, respectively. The plaint is that which was in question in the special case just dealt with, and the agreements are those which were relied upon in that case so far as the present plaintiffs are concerned. The motion before us was for an injunction until after the trial of the action. The terms of the agreements, their intention as gathered therefrom, and the circumstances surrounding their execution have been very fully discussed. The main incidents in the dispute in the course of which the agreements were made have been described in my judgment in the special case. During certain arbitration proceedings under a plaint which has turned out to have been a nullity during the time of the execution of the agreements, negotiations took place between several of the plaintiffs and the defendants for the settlement of the proceedings which were then supposed by both parties to be effective, and the agreements in question were framed in pursuance of prior agreements between the organization and the associated proprietors of the northern and southern collieries respectively. Those agreements are not before us, but it is apparent to me from the terms of the consequent agreements and from the conduct of the parties in the arbitration proceedings, that they confused an industrial agreement with an agreement under sec. 24. They seem to have thought that the agreements as framed would operate as industrial agreements, and would, if filed, as they were filed, in the office of the Industrial Registrar, operate under sec. 24 also. It is probable that both sides had it as their object and intention to obtain from those agreements every security and advantage that the Arbitration Act could afford. The agreements, as was decided

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to-day on the special case, fail to be industrial agreements within Part VI., and they fail to be agreements under sec. 24. Consequently, they are without the sanctions and attributes which they would have possessed had they conformed to the terms of the Statute. The parties supposed that a valid industrial agreement executed during arbitration proceedings would operate under sec. 24 as well, but the dominant intention was that these should be effective industrial agreements within Part VI. of the Act. It is now contended that if not good as industrial agreements, and in my opinion they are not good as such, they were intended to operate at common law failing a valid operation under Part VI.; but the plaintiffs base their claim for an injunction mainly upon that supposedly valid operation, and they have only relied on the effect of them (if any) at common law as a possible alternative, though very naturally they were more insistent on that aspect of the matter as the failure to comply with Part VI. became more apparent. There are many other questions in the case, but I cannot avoid the conclusion that the substance of the matter lies in this question:—Do these documents represent actually and fully the intended agreements between the parties? It appears to me clear that they do not. The parties were aiming at the production of an instrument which would have certain statutory effects and give them certain statutory remedies in case of breach, and they looked no further than that.

They have failed to compose an agreement with these attributes. I think the circumstances shown in evidence negative the idea that they ever in their minds assented to and executed these particular agreements for the sake of or in contemplation of any effectiveness they might possibly possess at common law. They had no thought of common law obligations. They were thinking only how they might secure the statutory advantages and remedies. My belief is founded a good deal upon the evidence read to us concerning the proceedings in the Arbitration Court both before and after the passage of the amending Act. I believe upon all the facts that if they had been told that the form adopted would not secure these results they would not have entered into these agreements at all, or into any that would not secure what they wanted. Both sides

would have spurned the offer of an agreement destitute of any sanction for its due observance except the shadowy security of an action for nominal damages in case of breach. They believed that this was an industrial agreement effective to put an end to the industrial litigation which they supposed to be then validly proceeding. It was in that view, and at the same time to secure reciprocal remedies equal in practical efficacy to those conferred by an award, remedies which would be secured by the industrial agreement which they mistakenly proclaimed that they had made, that they executed these documents.

If the document merely lacked some provision intended by the parties, there could now be no rectification. The parties cannot be placed in the position they would have occupied if the mistake had not taken place, and the agreement in such a case would not, I think, be enforced by injunction. However that may be, it is clear that enforcement of a document the legal effect of which is far short of conforming to the manifested intention in the minds of both parties, would never be granted by the injunction of this Court. I speak in the sense that in my view the evidence is that this paper is not their agreement, and I do not see how the position which existed between them in May 1911 can now be re-constructed. See *Halsbury's Laws of England*, vol. XXI., pars. 21 to 24. Having arrived at this opinion upon the whole evidence and in view of circumstances such as were not before the Court when it pronounced upon the effect of the agreement in the case of *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1), I do not suggest or think that the decision in that case is in any way impugned by the conclusion at which I arrive upon the material presented in this case. Further, the question of negative covenant, so much discussed at the bar, does not arise where the conclusion of the Court is that the document put before it does not represent the assenting minds of the parties. There is no covenant. The defendant can truly say "*Non haec in foedera veni.*" It is enough to say that in such a case the Court will not grant an injunction.

I am therefore of opinion that the motion must be dismissed, with costs.

(1) 15 C.L.R., 636.

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ISAACS J. The plaintiffs seek an injunction to restrain the defendants from proceeding further with their plaint in the Commonwealth Court of Conciliation and Arbitration, on the ground that by reason of the agreements referred to in the writ of summons the defendants have disentitled themselves to proceed.

The plaintiffs' contention is put in two ways. First, it is said that the agreements were made during the pendency of the arbitration proceedings, therefore the dispute in controversy was terminated, which not only ended the President's jurisdiction, but inherently amounted to an abandonment of all claims in respect of it. Next, it is said that in some of the agreements there is an express negative covenant, whereby the defendants stipulated they would not raise a new dispute, and would consent to exempt the plaintiffs from all State or Commonwealth determinations or awards during the currency of the agreement; and in the other agreements, it is urged the same covenant should be implied.

As to the alleged implied covenant, the settled rule is that the Court cannot imply it, unless "the Court is necessarily driven to the conclusion that it must be implied." See the authorities collected in my judgment in *Nelson* v. *Walker* (1).

In this case I need not say more than that such necessity does not exist; because the implied covenant could not carry the plaintiffs' case further than the express covenants, and if they cannot sustain their contention with regard to the agreements containing the express covenants, they could not profit by the suggested implication.

Now, there are two positions in law which I take to be now firmly established. One is that the right to an injunction such as is claimed —supposing all special objections absent—depends on the conduct of the defendant towards the plaintiff in respect of the litigation the subject of the injunction. The conduct may consist of contractual relations, or it may consist of other conduct making it inequitable to proceed. This is clearly fixed by *In re Connolly Brothers Ltd.*; *Wood* v. *Connolly Brothers Ltd.* (2). Again, supposing a valid contract containing a negative contract with no supervening recognized defence, the plaintiffs' right to insist on it leaves

(1) 10 C.L.R., 560, at p. 586. (2) (1911) 1 Ch., 731.

no discretion to the Court: *Doherty* v. *Allman* (1) and *McEacharn* v. *Colton* (2). But that always supposes a present right as between the parties to stay the proceedings complained of. And I am not prepared to assent to the argument that an injunction against a party who initiates a proceeding in another Court will lie on the ground that the facts show that that other Court has no jurisdiction. The case of *London and Blackwall Railway Co.* v. *Cross* (3) looks the other way. It is not necessary to determine it finally here, but I could not accede to the contention without further persuasion.

If, however, the defendants did for valuable consideration deliberately put an end to the old dispute, it might well be said to be inequitable and oppressive to proceed with the old proceeding. That aspect and the question of the negative covenant may, for the purposes of this case, be considered together.

We have already decided in the special case just determined, that these agreements have no validity as industrial agreements under the Act. Mr. *Campbell*, however, urged with great earnestness and force that it is not inconsistent with failure in statutory vigour, that a bargain should have a binding common law effect.

As an abstract proposition, that cannot be denied, but it depends entirely on the intention of the parties. So one necessary question comes to be this, and, as the plaintiffs are resting upon it to support their injunction, they have the onus of establishing it: Does it appear, actually or probably that the parties intended their agreement to operate as a common law agreement? If not, then not even in an interlocutory application (*Preston* v. *Luck* (4)) should the injunction be granted.

The intention of the parties to a written contract must be ascertained according to legal rules.

For the purposes of this case it will be sufficient to refer to three authorities. In *Smith* v. *Cooke* (5) Lord *Halsbury* L.C. said:—"One must take the language of the instrument itself in its ordinary and natural meaning, and having endeavoured so far as one can to construe it in that ordinary and natural meaning it does not matter

(1) 3 App. Cas., 709, at pp. 719, 720.
(2) (1902) A.C., 104, at p. 107.
(3) 31 Ch. D., 354.
(4) 27 Ch. D., 497, at p. 506.
(5) (1891) A.C., 297, at pp. 298, 299.

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that it appears not to carry out the view that one would in the first instance have imagined the parties intended it to carry out." And further on :—" I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument." Those observations, which only declare emphatically what is undoubtedly the law, leave it clear that for the alleged intention as to its operation we cannot depart from the language of the instrument itself.

But in *Inglis* v. *Buttery* (1) Lord *Blackburn* says :—" Quite consistently with that, I think you may while taking the words of the agreement, look at the ' surrounding circumstances,' as Lord *Ormidale* expresses it, and see what was the intention. You do not get at the intention as a fact, as Sir *James Wigram* in his *Treatise on Extrinsic Evidence* calls it, but you see what is the intention expressed in the words, used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate."

In *Van Diemen's Land Co.* v. *Table Cape Marine Board* (2) Lord *Halsbury* L.C., for the Privy Council, said :—" The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it."

Now, when we read the agreement here by the light of the surrounding circumstances, it is impossible to discover any intention to treat it as a statutory agreement and, failing that, as a common law agreement. The dominant feature of the agreement in this respect are the introductory words, because by them the instrument itself expressly states its own nature, and impresses upon itself a character that is wholly opposed to such an intention as is suggested.

The opening words are : " This industrial agreement made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904 " between the parties mentioned, and referring to the defendants as " an organization of employés registered pursuant to the provisions

(1) 3 App. Cas., 552, at p. 577. (2) (1906) A.C., 92, at p. 98.

of the said Act." Clause 16 also tends to confirm the view derived from the introductory words, but as that and every other clause must be read by the light of the initial declaration, which covers and governs them all, I regard this clause as confirmatory only. My main reliance is on the declaration of contractual character at the threshold, so to speak, of the document.

Now, it is absolutely impossible that this instrument could operate simultaneously as a statutory and as a common law agreement.

Apart from other possible differences, these exist. As a common law agreement no sanction for breach exists except an action for damages by or against the organization; as a statutory agreement sec. 78 provides for penalties; as a common law agreement its duration is three years exactly from its date; as a statutory agreement it does not necessarily terminate then but continues by virtue of sec. 81 until a month after written notice to determine it. As a common law agreement it may be rescinded or varied by a common law agreement, or superseded by an award; as a statutory agreement it can only be rescinded or varied by another industrial agreement; so that two contradictory agreements—the new common law agreement and the old industrial agreement might—on the plaintiffs' contention co-exist.

I say nothing as to the legality with reference to New South Wales law of such a contract as a common law agreement so far as it purports to exclude the defendants from recourse to the industrial authorities of that State.

But, apart from such a consideration, it is in my opinion clear that neither from the internal contents of the document itself, read by the aid of the surrounding circumstances, nor from all the extraneous facts adverted to in argument, can it be taken that the parties or either of them intended the agreement to be other than one resting solely on the *Commonwealth Conciliation and Arbitration Act.* Whether it was designed to rest on sec. 24 or Part VI. is immaterial for the present case. Admittedly, sec. 24 has not been complied with, and, as we have held that Part VI. is not applicable, it follows that the plaintiffs' point as to the agreement being a common law contract fails.

I have said nothing on the subject of mistake because there was no

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mistake on either side. If we could read the document as amounting to a common law agreement, alternatively with having its intended statutory force, the question of mistake would arise.

As that is impossible, the rights of the parties depend upon an agreement the construction or effect of which is not attributable to mistake, but is contested merely on ordinary principles of interpretation.

Those considerations form of themselves one sufficient reason to dispose of the case, and in ordinary circumstances I should not proceed to consider the other branch which was fully argued. That branch is : Assuming the document was intended to operate, and in all other respects did operate as a valid common law agreement, will an injunction lie to enforce the stipulation not to resort to the Commonwealth tribunal of arbitration to settle any dispute that might arise.

But the circumstances that in my opinion call for its consideration are very special and urgent. There are, as is known, a great number of agreements of somewhat similar character in existence; and doubtless they differ in some respects; thousands of people are immediately concerned with them, both employers and employés; and a large proportion of the population of the Commonwealth are more or less directly interested in the orderly progress of the industries they affect. To determine the first branch, and leave the matter there without expressing any views as to the second, by which the correctness of the decision in the *Musicians' Case* (1) is deliberately challenged, would lead to a false impression that we affirm the accuracy of that case, which in its essential facts cannot be distinguished from the present case ; to say that we leave it in doubt for future decision would only disturb the minds of those immediately concerned without affording any guidance, and would be certain to cause further litigation and expense ; and so having regard to the whole situation, I conclude our plain duty is to decide the second branch also. The matter should at once be freed from all possible doubt.

As to the propriety of reconsidering our prior decisions at all, the question has been recently argued most exhaustively in a case

(1) 15 C.L.R., 636.

now pending, and we are in a position to express our views upon it. It is, I apprehend, beyond question our duty to accept any rule laid down by the Privy Council on the subject of general judicial conduct. In some cases that body governs us, and in all others it affords an appropriate model for our guidance.

Now, the Privy Council has never countenanced the doctrine that its own decisions are not reviewable. It has never accepted the theory of the House of Lords as to the immutability of decisions of that tribunal, a theory which rests on a very special ground—namely, that House of Lords decisions are in the nature of acts of legislation. See *per* Lord *Campbell* in *Bright* v. *Hutton* (1) and in *Beamish* v. *Beamish* (2); *per* Lord *Halsbury* L.C. in *London Street Tramways Co.* v. *London County Council* (3), and *per* Sir *Frederick Pollock* in the *Law Quarterly Review* for 1898, vol. XIV., p. 331.

But *cessante ratione cessat lex*, and as no such constitutional theory applies to the Privy Council that body has never followed the consequential doctrine. In *Read* v. *Bishop of Lincoln* (4), after full consideration of the subject, Lord *Halsbury* L.C., as to previous decisions of the Judicial Committee, laid down for himself, Lord *Hobhouse*, Lord *Esher*, Lord *Herschell*, Lord *Hannen*, Lord *Shand* and Sir *Richard Couch*, the rule to be followed in these terms:—"Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law."

There we have laid down for us, by the tribunal by which we are in most respects controlled, that it is the primary duty of even that august tribunal, to consider for itself at the instance of every suitor before it, what is the law by which he is bound. A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law; and if the reasons given appear when examined to be unsound, then, say the Judicial Committee, they are bound "to give effect to their own view of the law"; other-

(1) 3 H.L.C., 341, at pp. 391, 392.
(2) 9 H.L.C., 274, at p. 339.
(3) (1898) A.C., 375, at p. 381.
(4) (1892) A.C., 644, at p. 655.

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wise Judges arrogate to themselves the position of legislators. The Privy Council has in fact reconsidered its own decisions on various subjects for various reasons, and has overruled them.

Thus in *Kielley* v. *Carson* (1) an exceptionally strong Committee overruled a previous case on Parliamentary powers, and it is worthy of note that on this occasion it included Lord *Campbell*, to whom more than to any other Judge may be attributed the now settled doctrine of the House of Lords.

In *Cushing* v. *Dupuy* (2) the Privy Council reviewed its prior decision as to the prerogative of the Crown to admit appeals. Their Lordships said of the earlier decision (3) :—" This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it."

Nothing could be more decisive that the general rule quoted from *Read* v. *Bishop of Lincoln* (4); and further, nothing could more strongly emphasize the fact that the doctrine of the House of Lords is anomalous and rests upon its anomalous position in the constitutional and juristic history of England, than the circumstance that it was the same learned Judge, Lord *Halsbury*, who delivered the widely differing pronouncements in the House of Lords and the Privy Council respectively.

As late as 1907 Sir *Frederick Pollock*, in a note to *Bright* v. *Hutton* (5), observes in contradistinction to the House of Lords, that " the Judicial Committee does not hold itself bound to follow its own previous rulings, neither do American Courts of last resort." And I may add, that neither of those illustrious tribunals, fortified as they both are by long experience, the latter possessing a record of a century and a quarter of stress and strain, in which it has earned, as Lord *Herschell* testified in *Mills* v. *Armstrong*; *The* " *Bernina* " (6), a " high character for learning and ability," trembles at the spectre of instability. That is a danger which the good sense of those tribunals, and every other, always where necessary sufficiently guards against.

Unless, therefore, this Court is to be regarded as possessing a

(1) 4 Moo. P.C.C., 63.
(2) 5 App. Cas., 409.
(3) 5 App. Cas., 409, at p. 417.
(4) (1892) A.C., 644.
(5) 88 R.R., 126, at p. 127.
(6) 13 App. Cas., 1, at p. 10.

nearer approach to infallibility than the Privy Council—and I am unable to press such a claim—no reason presents itself to my mind for refusing to follow the guidance of that august tribunal whose determinations are final in a higher and more decisive sense than any we are empowered to give.

The rule of the English Court of Appeal is practically the same as that of the Privy Council: *The "Vera Cruz"* [*No.* 2] (1) and *Kelly & Co.* v. *Kellond* (2); *Mills* v. *Jennings* (3); so with the English Divisional Court: *Kruse* v. *Johnson* (4). The Lord Chancellors of England adopted the same practice. See *per Jessel* M.R. in *Henty* v. *Wrey* (5). As to co-ordinate Courts, see *per Brett* M.R. in *Kelly & Co.* v. *Kellond* (6), and *per Pollock* C.B. in *Taylor* v. *Burgess* (7). The Supreme Court of Canada adopted a like rule in *Desormeaux* v. *Ste. Thérèse* (8), where it reversed, in a Court of six Judges, its prior decision on the question of its jurisdiction in appeals from Quebec on matters of prohibition given twelve years before by a bench of five Judges, only one of whom was party to the later decision.

In Australia the Supreme Courts of New South Wales and Victoria, at all events, have maintained their authority to overrule prior decisions of their own.

As to American Courts reference has already been made to a statement by Sir *Frederick Pollock*.

This is confirmed in a note in *Cooley's Constitutional Limitations*, at pp. 86, 87, containing a passage from the case of *Pratt* v. *Brown* (9), to which attention was drawn, during the argument in the prohibition case now pending, by my brother *Rich*. That passage embodies what appears to me to be sound sense, and to accord generally with what has fallen from the English bench with reference to questions of ordinary law. See also *Vail* v. *Arizona* (10).

But in addition to that, Sir *Frederick Pollock*, in the *Law Quarterly Review* for 1898, vol. XIV., p. 331, already cited, further says:—"The Supreme Court of the United States, as is well known, does not hold

(1) 9 P.D., 96, at p. 98.
(2) 20 Q.B.D., 569, at p. 572.
(3) 13 Ch. D., 639, at pp. 648, 649.
(4) (1898) 2 Q.B., 91.
(5) 21 Ch. D., 332, at p. 346.
(6) 20 Q.B.D., 569.
(7) 5 H. & N., 1, at p. 5.
(8) (1910) 43 Can. S.C.R., 82.
(9) 3 Wis., 603, at p. 609.
(10) 207 U.S., 201.

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itself bound by its own decisions. Ample reasons for this practice —reasons to which we have no analogy in England—may be found in the high constitutional functions of that Court." And see an illuminative passage in *Willoughby on the Constitution*, vol. I., pp. 51, 52, which brings the review of the question down to 1910, and from that passage I am impelled to quote a few lines having special reference to constitutional questions :—" In *Washington University* v. *Rouse* (1) Justice *Miller* said : 'With as full respect for the authority of former decisions as belongs, from teaching and habit, to Judges trained in the common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a Court.' There are indeed good reasons why the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to other laws." The learned author then proceeds to state reasons which need not be here quoted at length.

In *Pollock* v. *Farmers' Loan and Trust Co.* (2) *Fuller* C.J. says :— " Manifestly, as this Court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

The oath of a Justice of this Court is " to do right to all manner of people *according to law*." Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.

Whatever else may be said with respect to the reconsideration of former decisions—and it is unnecessary here to consider the principles upon which the Court should act in particular cases—so much at least emerges as is undoubtedly beyond challenge, that where a former decision is clearly wrong, and there are no circumstances

(1) 8 Wall., 439.

(2) 157 U.S., 429, at p. 576.

countervailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed.

In my opinion, where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of this Court to declare the law truly. Lord *Herschell*, one of England's greatest jurists, held that view most unmistakably: *Airey* v. *Bower* (1). Speaking of the *Wills Act*, a decision which might have been acted on extensively in disposing of property, the learned Lord said:—"Of course if it were clear that the construction put by the Courts upon the sections was wrong, it would be our duty, disregarding the result, to express a contrary opinion."

Such is my personal opinion, founded upon that and similar passages in other judgments of high authority, though it is not strictly necessary in this case to go further than to say that the decision in the path of the defendants' argument is, in my opinion, clearly erroneous, and that no circumstances exist which could raise an obstacle of expediency in the way of correcting it.

In the *Musicians' Case* (2) it was held that a clear agreement of the nature indicated, not otherwise impeachable, could and ought to be enforced by injunction.

In my opinion, that question ought to be determined one way or the other on a very broad ground. The Constitution, perceiving the immense importance of preserving peaceful and continuous conditions of industry in the Commonwealth, expressly introduced by sec. 51 (xxxv.) a power in Parliament to provide for the prevention and settlement of inter-State industrial disputes by conciliation and arbitration. By covering sec. V. whatever law Parliament should make on that subject is to bind all the Courts and Judges on this continent. Parliament has made such a law of which the keynote is to carry out the principle of the Constitution, and has provided the designated and appropriate tribunal, and the defendants here desire to approach it with an alleged cause for intervention.

It is obvious that if the principle of both Constitution and Act be as stated, and as explained at greater length in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill*

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(1) 12 App. Cas., 263, at p. 269. (2) 15 C.L.R., 636.

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Proprietary Co. (1), it cannot be within the power of one of the parties to destroy the rights of the general community by a bargain with the other party to suppress the tribunal, should the occasion for its interposition arise.

No contract that purports to do that either directly as in the present instance, or indirectly by interposing any term in the nature of a condition precedent, or in any other way, can bar the entrance to the arbitration tribunal, commissioned by the highest authority to maintain the industrial peace of Australia.

I have in the *Musicians' Case* (2), in greater detail and with somewhat analogous instances, stated that the stipulation here relied on by the plaintiffs is contrary to public policy. And as the public policy of industrial peace is inscribed in the Constitution itself and effectuated by Act of Parliament, the views I took there, resting as they do on the high ground of principle just stated, should in my opinion be adhered to.

On both branches therefore, each being an equal and sufficient judicial ground of this judgment, the plaintiffs must fail.

HIGGINS J. The motion in this case is made by some only of the respondents to a plaint in the Court of Conciliation, by those who are proprietors of northern collieries and of southern collieries in New South Wales; and they join with them some proprietors who are not respondents at all.

An injunction is sought restraining an organization of employés from proceeding against the plaintiffs with the plaint, in violation, as alleged, of the terms of separate agreements made with the separate proprietors. No objection has been taken to the unwarrantable joinder of plaintiffs and of causes of action in one writ. The several agreements are not even in the same terms; there has been no order for consolidation; and if we now deal with some twenty-one actions in one proceeding, the case must not be regarded as a precedent. I propose to consider first the effect of the agreement made with the Australian Agricultural Co. as, if the plaintiffs cannot succeed on that agreement, they cannot succeed at all. No other agreement presents a stronger case for the plaintiffs.

(1) 12 C.L.R., 398, at p. 446. (2) 15 C.L.R., 636.

Mr. *Campbell* relies for his equity on a negative covenant of the organization, express or implied, not to proceed with any plaint. He admits that he cannot ask for an injunction on the ground that there is no dispute with the plaintiffs. The agreements have yet to be considered in the Court of Conciliation, with all their circumstances, before the President can be satisfied that the plaintiffs respectively are parties to the dispute referred to in the plaint. The position taken is that the plaintiffs are, by virtue of the agreement, entitled to be no further troubled by any plaint, dispute or no dispute; and Mr. *Campbell* relies on the recent case of *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1). I confess that I should have thought the proper course, as a matter not of jurisdiction, but of discretion and of practice, would be to refuse an injunction until the Court of Conciliation is found to ignore any rights of the plaintiffs under the agreements. That Court has full power to relieve the plaintiffs of further attendance at the arbitration proceedings; it has power even to dismiss the matter or to refrain from further hearing it if it appear that further proceedings are not necessary or desirable in the public interest (sec. 38 (*h*)). But I propose to deal with the points of substance argued before the Court.

In the first place, it is now settled, by the decision of this Court on the case stated under sec. 31, that this is not an industrial agreement under Part VI. of the Act. But Mr. *Campbell* urges that it is nevertheless binding on the union as an ordinary contract at common law. The seal is the seal of the organization; unless the organization can make such an agreement, the agreement is void—has not been made. The organization is a statutory corporation, created for limited statutory purposes; and the power to make the agreement must be affirmatively shown. It can make an agreement for land for its purposes under sec. 58; it can make an agreement for settlement of a dispute of which the Court has cognizance under sec. 24; and it can make an agreement providing for some other method of conciliation and arbitration, under Part VI. Its powers would seem to be limited by sec. 51 (xxxv.) of the Constitution to agreements which are strictly relating to or incidental to the processes of "conciliation and arbitration." But even if,

(1) 15 C.L.R., 636.

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under Schedule B to the Act, the organization may take to itself further powers as to agreements (for, according to Schedule B, "the rules . . . may also provide for any other matter not contrary to law"), yet it has not taken any such further powers. Rule 12 relates merely to the mode of execution of documents—such documents as the organization may lawfully execute. It may be expedient that the organization should have such powers; but the limitations of sec. 51 (xxxv.) of the Constitution must always be remembered. Indeed, in the *Jumbunna case* (1), the learned Chief Justice said as to sec. 58:—"Remembering that the functions and powers of every corporation are limited, I think that these words" ("for the purposes of this Act") "may be read as meaning only that corporations so constituted shall have the powers and functions conferred by the Act."

I am not at present by any means satisfied that any agreement not under the Act can bind the organization—or its future members—as an ordinary agreement for wages and other conditions.

Then it is urged for the organization that the agreement, if made at all, was made subject to a condition, either that it should be certified and filed under sec. 24, and operate as an award, or that it should be an industrial agreement under Part VI. There is no doubt that it was meant to be an industrial agreement under Part VI.; whether both parties intended also to have it certified under sec. 24 is doubtful; and I shall assume, in favour of the plaintiffs, that it was meant merely to come under Part VI. It is headed in the form prescribed in Part VI.: "This industrial agreement made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904 this fifth day of May 1911 between the Australian Agricultural Company . . . of the one part and the Federated Engine-Drivers and Firemen's Association of Australasia an organization . . . registered pursuant to the provisions of the said Act . . . of the other part." It contains an agreement as to the minimum rates of wages for several classes of workers; for hours and other conditions; for aged and infirm workers. It suspends the sliding scale of wages theretofore in practice. It provides for a conciliation board for disputes arising under the agreement; and the Deputy

(1) 6 C.L.R., 309, at p. 336.

Registrar is to decide the dispute if the board be evenly divided. The assistance of the Deputy Registrar is agreed to, for a final decision, in four different contingencies under the agreement. Then (clause 16): "This agreement shall be filed in the office of the Industrial Registrar appointed under the *Commonwealth Conciliation and Arbitration Act* 1904 and shall come into operation on the twelfth day of May 1911 and shall continue in force for a term of three years from the date of making thereof." The meaning clearly is that the agreement shall operate as an industrial agreement under Part VI., with all the incidents of such an industrial agreement. That is to say, the intention was to bind all who are members of the organization at any time during the three years' term (sec. 77); it was to be enforceable by penalty (sec. 78); enforceable as under awards of the Court; it could not be rescinded or varied by any agreement except another industrial agreement (sec. 79); in a certain event it was meant to be varied by the Court (sec. 80); and, after the term, it was to continue in force until one month's notice from one party to the other (sec. 81). Now, none of these results follow if the agreement is to be treated as operating outside Part VI. If it is to be so treated, the only remedy for a breach of the contract by the employer is an action for damages at the suit of the organization; and the organization could not show that it had sustained damages. There is no penalty payable should an employé be paid less than his minimum rate, &c. This position is not what the parties bargaining agreed to. It is said for the organization that the contract was made subject to a condition implied, and that the condition has not been fulfilled. To my mind, this is not an adequate view. To my mind, the agreement, on its face, was one impossible of performance from the first, and, as such, void. It never could be filed (legally), it never could be operative, under Part VI. The matter is novel; but in principle I do not see how it is to be distinguished from the cases of *Harvy* v. *Gibbons* (1); *Duvergier* v. *Fellows* (2); *Faulkner* v. *Lowe* (3); *Bank of Hindustan* v. *Alison* (4). An analogous position may arise under the Torrens

(1) 2 Levinz, 161.
(2) 5 Bing., 248; 10 B. & C., 826; 1 Cl. & F., 39.
(3) 2 Ex., 595.
(4) L.R. 6 C.P., 222.

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Acts, which limit the documents that may be registered. Suppose two neighbours, A and B, agree that A may take trees from B's land in consideration of B being allowed to use part of A's land for a playground for 50 years—the agreement to be registered under the Act: can it be contended that when the Registrar refuses to register such an agreement, and when B finds that he cannot pass his right to his transferrees, as both he and A intended, he is still to submit to the cutting of his trees?

To treat the union, or to treat the employer as bound by the other terms of the agreement, when these terms, as to Part VI. so vital and so radical, were not and could not be enforced in law, would be to fix a party to an agreement which he had not made. The appropriate answer is *Non haec in foedera veni.* The cause of the agreement for the impossible is mutual mistake—a mistake in law; what we find is an agreement for the impossible, and if it is not binding as a whole, it is not binding at all.

The enforcement of the contract by injunction is, in substance, another mode of enforcing specific performance (*Barret* v. *Blagrave* (1); *Leake on Contracts*, 1117); and—with rare exceptions, in such cases as *Lumley* v. *Wagner* (2)—the Court will not enforce performance of a part unless it can enforce performance of the whole (*Clarke* v. *Price* (3); *Ellis* v. *Colman* (4); *Merchants' Trading Co.* v. *Banner* (5)). In short, the Court will not enforce a contract unless the parties can be "put in the condition for which they stipulated" (*In re Mercantile and Exchange Bank*; *Ex parte London Bank of Scotland* (6)). In the present case—to paraphrase the expressions used by *Turner* L.J. in *Broughton* v. *Hutt* (7)—the organization never intended to be bound unless it got an agreement under Part VI., and the employer never intended either party to be bound unless it got such an agreement.

The next point urged by Mr. *Ferguson* is, that even if the agreement were in other respects enforceable as an ordinary agreement at common law, the negative covenant, which Mr. *Campbell* asserts—express or implied—is void as being against public policy. I shall

(1) 5 Ves., 555.
(2) 1 D.M. & G., 604.
(3) 2 Wils. C.C., 157.
(4) 25 Beav., 662.
(5) L.R. 12 Eq., 18.
(6) L.R. 12 Eq., 268, at p. 276.
(7) 3 DeG. & J., 501, at p. 505.

here say that I have much doubt whether clause 10 of the agreement contains a negative covenant so sweeping as Mr. *Campbell* contends. The first part of the clause deals with *future* demands; the second part of the clause provides that the organization "shall *consent to the employer* being exempted from all or any award or awards," with some ill-conceived phrases following. But again I assume, in favour of the plaintiffs, that their construction of the clause is right. Now, it must be taken, according to the decision of the majority of the High Court, that the plaint did not come into existence until the 24th November 1911; and therefore the agreement (5th May 1911) is to be treated as made before plaint, but after demand and dispute. The question is: Is an agreement not to proceed for conciliation and arbitration in the Court of Conciliation and Arbitration valid? For this question it must be assumed that the dispute —the dispute referred to in the plaint—existed, and has not been terminated. There is no reference to that dispute in the agreement; and the question whether that dispute still existed as between the employés and the Australian Agricultural Co. at the time of the plaint remains to be considered by the Court of Conciliation. If the dispute exists in fact, is an agreement between the organization and an employer that no plaint shall be pressed, that no award shall be made, valid and enforceable against the organization, assuming that such an agreement is within the competency of the organization? In my opinion, such an agreement is in direct contravention of the Act. If there is an actual dispute subsisting, whether the dispute ought to exist or not, it is provided that the Court "shall" have cognizance of it, for purposes of prevention and settlement, in any one of the four cases mentioned in sec. 19. Then the Court "shall . . . hear inquire into and investigate" the dispute, "shall" try to reconcile the parties (sec. 23); and, if it cannot procure an agreement under sec. 24, the Court "shall" by an award determine the dispute.

Suppose an extreme case—suppose a dispute involving a widespread strike, stopping the wheels of the industry, inflicting huge losses on the employers, the employés and the public, even causing riots; suppose that the Registrar, under sec. 19 (*a*), certify (without plaint) that the dispute is "proper to be dealt with by" the Court

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"in the public interest": is it to be said that the organization must under its agreement oppose the settlement of the dispute, and even ask the Court to except this employer from any arbitration? If the Court were established for the benefit of the employers and employés only, there would be much more reason for saying that they must be bound by their agreement (*cf. Simpson* v. *Lord Howden* (1)). But the Court is established for the benefit of the public, as industrial disturbances injure the public as well as the parties directly concerned. No agreement between private persons (I am still assuming that the dispute is not settled) can prevent the operations of the Court with a view to the "peace order and good government of Australia." Private agreements cannot be allowed to stand in the way of the Act; the Act involves, in essence, an interference, in the interest of the public, with private agreements (*cf.* sec. 40, *inter alia*). The Court deals with industrial actualities, with actual disputes, however the disputes have arisen, and whether in breach of an agreement or not. As President of the Court, I have always insisted on the principle that agreements should be upheld—"a bargain's a bargain"; but I recognize that in view of some proffered immediate advantage employés are generally willing to sign almost any agreement. If the employers can stop the Court's operations by agreements for three years, they can stop the operations for thirty, for one hundred years; and the insertion of a clause in such agreements will often paralyze the Court in its endeavours for peace. If such clauses can successfully be enforced, private persons can bar the exercise of a public function. I do not like to put my view merely on the principle recognized in *Scott* v. *Avery* (2)—that upon the general policy of the law "parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals." That principle is analogous; but the position here is much stronger. The position is that a tribunal, of a novel and exceptional character, has been created by the Federal Parliament under an Imperial Act, for the purpose of settling industrial disputes, and as a substitute for the baneful remedy of "strike"; and any agreement between A and B which

(1) 10 A. & E., 793; 9 Cl. & F., 61. (2) 5 H.L.C., 811, at p. 847.

has the effect of depriving, not only A and B, but the public, of the benefit of this tribunal, is distinctly against the policy, and even against the express provisions, of the law. It was held, in *Coppock* v. *Bower* (1), that an agreement to pay money in consideration of the payee abandoning a petition against the return of a member of Parliament, a petition based on alleged bribery, was void, because the proceedings on the petition were for the benefit of the public. It was held, in *Nerot* v. *Wallace* (2), that an agreement to pay certain moneys to assignees in bankruptcy, in consideration of their forbearing to proceed with an examination of the bankrupt before the Commissioners, was void as contrary to the policy of the bankruptcy laws ; for, as was pointed out by *Grose* J., not only the creditors, but the public, had a right to know the circumstances. There is no distinction in principle.

On both these grounds, therefore—the ground that the agreement of the character intended is impossible of performance, and the ground that it is void as against the policy of the Act—I hold that if we are free to act on our view of the law the motion for injunction should fail.

But in deciding the case we are brought face to face with the recent decision in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (3). That was a decision on a special case in which the question of the invalidity of the agreement on the ground of public policy was not directly raised. The first question turned on the retrospective effect of sec. 4 of the amending Act of 23rd November 1911 ; the second question raised a question as to the *jurisdiction* of the High Court to enforce by injunction an agreement not to make any further request or demand during the agreement. The two learned Judges who gave the majority judgment (two to one) did not, in their judgments, discuss the point of public policy at all ; and I see that the union had not the advantage of being represented by counsel. The precise agreement alleged in this case—an agreement not to proceed in the Court of Conciliation in respect of demands already made—was not before the High Court in the *Musicians' Case*. But the decision of the majority in that case clearly involves the position that an injunction will lie in the High Court to enforce

(1) 4 M. & W., 361. (2) 3 T.R., 17. (3) 15 C.L.R., 636.

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an agreement—a common law agreement—so as to prevent recourse to the Court of Conciliation. In my opinion, that position is wrong; and I concur with my brother *Isaacs* in his view that we are not only entitled, but are in duty bound, to overrule that case.

I must add that, even if there were no other ground for refusing the injunction, I should refuse to make it perpetual (at all events) until the other respondents to the plaint—or at all events, the other coal-owners—are made parties to the action, and given an opportunity to express their views. No doubt, the right to the injunction must ultimately depend on the agreements to which the other respondents are not parties; but the coal-owners who are in competition with these coal-owners are interested in having these owners bound by the same conditions as themselves; and they should have a chance of being heard. A claimant may not oppose the motion—may even be in collusion with the plaintiffs, in order to impose the conditions sought on the others only. All that I say is that these other coal-owners should be enabled to urge any relevant argument; and any unnecessary appearance could be punished by costs. These other coal-owners may have agreements also.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this case the Court is asked to restrain the defendants from proceeding against the plaintiffs with the plaint No. 6 of 1910 in the Court of Conciliation and Arbitration, on the ground that to so proceed would be in violation of the terms of certain agreements. The case is put in two ways. It is first said that the agreements in question in fact settled the dispute existing between the parties, and that consequently the Court of Conciliation and Arbitration has no longer any jurisdiction to proceed in the matter. In the next place, it is said that the agreements contain either express or implied undertakings by the defendants not to proceed with that or any other plaint during a specified time. The plaintiffs have not satisfied us on either of these points. Whether we look at the surrounding circumstances or confine ourselves to the agreements, we are driven to the conclusion that the parties intended that their dispute should be settled only on the condition

that the agreements or memoranda of them were filed so that they might have operation under the *Commonwealth Conciliation and Arbitration Act*, and that unless they had such operation they should have no operation at all. It is now clear that they could have no operation under the Act, and accordingly there is no ground for restraining the defendants from proceeding with their plaint. The opinion which we have just expressed is, we understand, practically identical with that of the four other members of the Court sitting in the present case, and in our view it is not consistent with the judgment of the majority of the Court in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1). That case was decided by the Chief Justice and *Barton* J., forming the majority of the Court, *Isaacs* J. dissenting. The Chief Justice was strongly disposed to think that the agreement, which for present purposes may be regarded as practically identical in form, and in the circumstances under which it was made, with the agreements now sued on, was an industrial agreement within the meaning of the *Commonwealth Conciliation and Arbitration Act*. We have just decided in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* [*No.* 3] (2), that that view cannot be maintained. Both Justices were of opinion that the agreement, if not an industrial agreement within the Act, was binding at common law and, subject to certain grounds for invalidating it set out in the pleadings —which if established would have invalidated any agreement—was enforceable against the defendants; on that ground they decided that an injunction could go. If that agreement was enforceable these agreements are enforceable, and if an injunction could have gone in that case there is no reason why an injunction should not go in this. It is true that the view which now commends itself to all members of the Court was not considered in that case, and for that reason it is said that our decision in this case should not be regarded as overruling *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1). It is equally true that in the judgments of the Chief Justice and *Barton* J. there is no reference to the question of public policy which induced *Isaacs* J. to come to the conclusion that no injunction could be granted; they express no opinion on a matter

(1) 15 C.L.R., 636. (2) 16 C.L.R., 715.

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which to him seemed all important, though, as they did not adopt and act on his view, it may perhaps be assumed that it did not commend itself to their minds. In these circumstances is it desirable to leave that case without further comment, if we think that the view expressed by *Isaacs* J. is correct? In our opinion, to do so would be to encourage confusion and error in the minds of persons interested in Australian industries, and to invite costly and unnecessary litigation. We think that the agreements, so far as they purport to preclude the defendants from having recourse to the Court of Conciliation and Arbitration, are attempts to oust the jurisdiction of the Court, and are void as against public policy. We adopt the reasons stated by *Isaacs* J. in his dissenting judgment in *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1).

POWERS J. This is a motion for an order that the defendants and their agents and servants, &c., should be restrained, and that an injunction should be granted restraining them, from proceeding, until after the trial of the action against the plaintiffs, on the plaint No. 6 of 1910 in the Commonwealth Court of Conciliation and Arbitration, filed against the plaintiffs in violation of the terms of certain agreements between the plaintiffs and defendants. The circumstances under which the application for the injunction was made have been fully set out in the judgments already delivered. The question we are asked to decide in this case is whether the agreements in question entitle the plaintiffs to an injunction to prevent the defendants from proceeding further with the plaint.

It was contended for the plaintiffs: (1) that the agreements were industrial agreements under Part VI. of the *Commonwealth Conciliation and Arbitration Act* (secs. 73-81); or (2) that they were agreements that could be registered under section 24 of the Act; or (3) that the agreements were binding as common law agreements apart from the question whether they could, or could not, be made effective under the *Commonwealth Conciliation and Arbitration Act.*

It has been decided by this Court in the case between the same parties, submitted by the learned President of the Court, that the agreements were not industrial agreements within the meaning of

(1) 15 C.L.R., 636.

the words "industrial agreement" under Part VI. of the Act. I agree with the judgments already delivered so far as they decide that the agreements in question were only entered into on the joint understanding of both parties that they were statutory "industrial agreements" under Part VI. of the Act; and that they did not fully express the true will of the parties as common law agreements. I agree with what my brother *Higgins* has said in his judgment on this point. I understand him to hold that there is no doubt that the intention of all parties was to enter into an agreement enforceable by penalty, and, generally, subject to the provisions of Part VI. (secs. 73-81) of the Act.

If the agreement is treated as outside the Act, it is an entirely different agreement; the only remedy for a breach of the contract would be by an action for damages. That is not what the parties agreed to. That was not the arrangement under which the organization agreed to settle the dispute. It is not possible to perform the agreement made, as it has been held not to be an agreement within Part VI. of the Act, and, if enforceable, it can only be enforced as an entirely different agreement, namely, as a common law agreement. Such an agreement was not entered into by the parties. The parties cannot be compelled to carry out an agreement they did not make. Specific performance of the agreement really entered into cannot be enforced, and Courts will not enforce performance of part, if the whole cannot be enforced. Further, this Court has already held, in the case stated by the learned President, that it is his duty notwithstanding the production of the agreements to proceed on the plaint, and to investigate the facts, nature, and circumstances of the said agreement. I therefore concur in the view that the agreements in question do not, for the reasons I have given, entitle the plaintiffs to the injunction asked for. The motion for the order and injunction asked for should be dismissed.

Some of my learned brethren have dealt with other questions, which I do not think it necessary to decide in this case, and I, therefore, do not propose to deal with them until it is necessary to do so. I understood my brother *Isaacs*, however, to say that it was the duty of this Court to reverse the decision in

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the *Musicians' Case* (1) for the reasons he gave in his judgment. Some of my learned brethren have also dealt with that case. I think it only right to say I have not considered that case in arriving at my decision, because I do not think the point on which this Court was unanimous was raised in that case. My brother *Barton* says it was not, and could not be, raised on the facts in that case. In any case we were not pressed strongly by counsel to review the decision of the Court in the *Musicians' Case* (1), nor was there any argument in this case as to the judicial policy to be considered by the Court before reversing one of its previous decisions. On the contrary, I understood counsel for the defendants during his argument to say (and my notes bear that out) that he did contend: (1) that it was not necessary to review the decision in the *Musicians' Case* (1); (2) that the decision in that case was not an authority against the contentions he submitted to the Court. He did say that if the Court decided against him on the points submitted, he would ask the Court to review the decision in the *Musicians' Case* (1). The Court has not decided against him. The question has not been considered by me—first, because it has yet to be decided in the action pending, after hearing argument by the parties; secondly, because it was not necessary to do so; and, thirdly, because the Court was not constituted as a Full Court to consider the review of any prior decision.

I add, with some diffidence as a very junior member of the Court, and without consulting any member of the Court, that I am at all times prepared to consider the review of any decision of this Court, by a Full Bench called to consider that question, and to reverse any decision if it is shown to be clearly wrong, subject to the well known considerations to be applied to the particular case in question at the time, according to the well known judicial policy of British, Australian and American Courts, and I think of all Courts of appeal in English-speaking communities.

I decline even to consider a question of reversing a decision of this Court casually, or even seriously, raised by counsel, not clearly urgent, and not raised before as full a bench as is available. If we do not show some respect to our own Court's decisions, no counsel will

(1) 15 C.L.R., 636.

feel safe in advising the public, and it will create uncertainty and confusion. If it was necessary to decide in this case whether the decision in the *Musicians' Case* (1) should be reversed, I would under the circumstances mentioned follow the rule laid down by my brother *Isaacs* in this Court on more than one occasion (the latest, I think, on the 18th March this year), and by the Judges of the Courts of appeal in England, Australia and America in every case—namely, to follow the decisions given in their respective Courts until they are reviewed and reversed by as full a bench as is available, called for the purpose of considering the decision. In *Allen Taylor's Case* (2) *Isaacs* J. said:—"*Whybrow's Case* (3) decided that the power of this Court to interpose by writ of prohibition where a Commonwealth Court is proceeding without jurisdiction is given direct by the Constitution as original jurisdiction of the High Court, and there being no authority to Parliament to annul that authority, any attempt to do so necessarily fails. By that decision this Court, unless constituted as a Full Bench, is bound, and so this case must be determined accordingly." That is a well recognized principle in all Courts of appeal. For that reason I do not see my way to consider, at present, whether common law agreements to settle disputes are against public policy, or any other question decided by the majority of the Court in that case; or to consider any other question that it is not necessary to decide to enable the Conciliation Court to continue its proceedings. The Conciliation Court can proceed with its work by a decision on the one point we all agree upon, without disturbing any previous decision of this Court. Urgent public need for the reversal of the decision was mentioned. I do not remember hearing of it during the argument. The Conciliation Court is doing a great work, and doing it well, and it is invaluable in cases where people cannot, or will not, settle disputes; but if disputes can be avoided or settled without reference to the Court at all, it must, I think, be a public benefit instead of a danger.

Motion dismissed with costs.

(1) 15 C.L.R., 636.

(2) 15 C.L.R., 586, at p. 606.

(3) 11 C.L.R., 1.