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agreements in question: the policy pursued is in no way foreshadowed or contemplated in either agreement, nor was it the necessary outcome of either agreement. It must not, however, be supposed that their Lordships view with approval everything which was done in pursuance of this policy.

In their Lordships' opinion the decision appealed against was right, first, because so far as the Crown relied upon sec. 4 (1) (*a*) and sec. 7 of the Act, there was no evidence (at any rate no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and secondly, because so far as the Crown relied on sec. 10 there was no evidence (at any rate no sufficient evidence) of injury to the public.

Cons *David Jones Finance & Investments v Comr of Taxation* (1991) 28 FCR 484

Foll *Waterside Workers Fed v Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

Their Lordships desire, in conclusion, to acknowledge the assistance which they have received from counsel on both sides in a case of much difficulty and complexity.

Appl *Northern Territory of Australia v Lane* (1995) 39 ALD 527

Foll *Northern Territory of Australia v Lane* (1995) 59 FCR 332

Appl *Northern Territory of Australia v Lane (Native Title Registrar)* (1995) 138 ALR 544

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE PRESIDENT THEREOF AND THE AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION.

EX PARTE THE BRISBANE TRAMWAYS COMPANY LIMITED.

EX PARTE THE MUNICIPAL TRAMWAYS TRUST, ADELAIDE.

[No. 1].

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MELBOURNE, *March* 4, 5, 6, 9, 10, 11, 24.

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

Jurisdiction of High Court—Prohibition—Original or appellate jurisdiction—"Officer of Commonwealth"—Judicial officer—President of Commonwealth Court of Conciliation and Arbitration—Binding effect of prior decisions of High Court—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 71, 73, 75 (v.)—*Commonwealth Conciliation and Arbitration Act* 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 31.

Jurisdiction to issue prohibition to a tribunal acting without or in excess of its jurisdiction is in its nature original and not appellate.

The term "officer of the Commonwealth" in sec. 75 (v.) of the Constitution includes judicial officers of the Commonwealth properly so called, and therefore includes the President of the Commonwealth Court of Conciliation and Arbitration.

Held, therefore, that original jurisdiction has been conferred by sec. 75 (v.) of the Constitution upon the High Court to issue prohibition to the President of the Commonwealth Court of Conciliation and Arbitration, and that sec. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, so far as it purports to take away from the High Court the power to issue prohibition in respect of an award or order of the Commonwealth Court of Conciliation and Arbitration, is invalid.

R. v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.*, 11 C.L.R., 1, upon that point affirmed.

The High Court is not bound by its previous decisions, but will only review a previous decision when that decision is manifestly wrong.

ORDERS *nisi* for prohibition.

An order *nisi* was obtained by the Brisbane Tramways Co. Ltd. calling upon the Commonwealth Court of Conciliation and Arbitration and the President thereof and the Australian Tramway Employees Association to show cause why a writ of prohibition should not issue directed to such Court and the President thereof and such Association to prohibit such Court from further proceeding against the Brisbane Tramways Co. Ltd. upon a certain award made by the President.

An order *nisi* was also obtained by the Municipal Tramways Trust, Adelaide, calling upon the President of the Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees Association to show cause why a writ of prohibition should not issue directed to the President of such Court to prohibit such Court from further proceeding against the Municipal Tramways Trust upon the same award made by the President.

On the return of the orders *nisi* they were heard together, and a preliminary objection was taken by counsel for the Australian Tramway Employees Association that the High Court had no

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jurisdiction to issue prohibition to the Commonwealth Court of Conciliation and Arbitration. This report deals only with that objection.

The nature of the arguments sufficiently appears in the judgments hereunder.

Mitchell K.C. and *Feez* K.C. (with them *Henchman*), for the Brisbane Tramways Co. Ltd.

O'Halloran and *Angas Parsons*, for the Municipal Tramways Trust, Adelaide.

Arthur, for the Australian Tramway Employees Association.

Starke (with him *Schutt*), for the Commonwealth intervening.

During the argument reference was made to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (2); *Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia* (3); *Halsbury's Laws of England*, vol. IX., pp. 14, 59; vol. X., pp. 141, 151, 176; *Marbury* v. *Madison* (4); *Ex parte Gordon* (5); *Ex parte Warmouth* (6); *Ah Yick* v. *Lehmert* (7); *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (8); *Federated Amalgamated Railway &c. Association* v. *New South Wales Railway &c. Association* (9); *Moses* v. *Parker*; *Ex parte Parker* (10); *Canadian Pacific Railway Co.* v. *Toronto Corporation and Grand Trunk Railway of Canada* (11); *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.* (12); *Baxter* v. *New South Wales Clickers' Association* (13); *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (14); *R.* v. *Commissioners for Special*

(1) 11 C.L.R., 1.
(2) 15 C.L.R., 586, at p. 605.
(3) 17 C.L.R., 261.
(4) 1 Cranch, 137.
(5) 1 Black, 503, at p. 504.
(6) 17 Wall., 64.
(7) 2 C.L.R., 593.
(8) 6 C.L.R., 309, at p. 323.
(9) 4 C.L.R., 488, at p. 493.
(10) (1896) A.C., 245.
(11) (1911) A.C., 461.
(12) (1913) A.C., 781.
(13) 10 C.L.R., 114, at pp. 129, 145.
(14) 15 C.L.R., 576.

Purposes of the Income Tax (1); *Macleod* v. *Attorney-General for New South Wales* (2); *Colonial Bank of Australasia* v. *Willan* (3); *Colonial Sugar Refining Co.* v. *Irving* (4); *In re Grosvenor and West-end Railway Terminus Hotel Co. Ltd.* (5); *Ex parte Simon* (6); *Ex parte Death* (7); *Chabot* v. *Morpeth* (8); *Smith* v. *Whitney* (9); *Starin* v. *New York* (10); *Miller* v. *Haweis* (11); *Church* v. *Inclosure Commissioners* (12); *South Eastern Railway Co.* v. *Railway Commissioners* (13); *In re Local Government Board*; *Ex parte Kingstown Commissioners* (14); *Mackonochie* v. *Lord Penzance* (15); *Sweetland* v. *Turkish Cigarette Co.* (16); *Wilcox* v. *Donohoe* (17); *Federated Engine-Drivers and Firemen's Association* v. *Broken Hill Proprietary Co. Ltd.* [*No.* 2] (18); *Blood* v. *Bates* (19); *Spackman* v. *Plumstead District Board of Works* (20); *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (21); *R.* (*Wexford County Council*) v. *Local Government Board* (22); *In re Sanborn* (23); *Inter-State Commerce Commission* v. *Brimson* (24); *Texas and Pacific Railway Co.* v. *Inter-State Commerce Commission* (25); *Manning* v. *Farquharson* (26); *Payne* v. *Hogg* (27); *Blackball Miners* v. *Judge of Arbitration Court* (28); *R.* v. *Hunt* (29); *Ex parte Oklahoma* (30); *Ex parte Oklahoma* [*No.* 2] (31); *Curlewis and Edwards on Prohibition*, pp. 3-5, 26, 600; *Chitty's Forms*, 13th ed., pp. 794-6; *Short and Mellor's Crown Practice*, 2nd ed., p. 252; *Encyclopædia of the Laws of England*, vol. x., p. 491.

Cur. adv. vult.

The following judgments were read:—

March 24.

GRIFFITH C.J. In this case the Court is asked to overrule the

(1) 21 Q.B.D., 313.
(2) (1891) A.C., 455.
(3) L.R. 5 P.C., 417, at p. 440.
(4) (1905) A.C., 369.
(5) 76 L.T., 337.
(6) 4 T.L.R., 754.
(7) 18 Q.B., 647.
(8) 15 Q.B., 446.
(9) 116 U.S., 167.
(10) 115 U.S., 248.
(11) 5 C.L.R., 89.
(12) 11 C.B.N.S., 664.
(13) 6 Q.B.D., 586, at p. 590.
(14) 18 L.R. Ir., 509, at p. 514.
(15) 6 App. Cas., 424, at p. 443.
(16) 47 W.R., 511.
(17) 3 C.L.R., 83, at p. 88.
(18) 16 C.L.R., 245.
(19) 31 Vermont, 147, at p. 150.
(20) 10 App. Cas., 229.
(21) 5 C.L.R., 33, at pp. 40, 52.
(22) (1902) 2 I.R., 349, at p. 373.
(23) 148 U.S., 222.
(24) 154 U.S., 447, at p. 485.
(25) 162 U.S., 197.
(26) 30 L.J.Q.B., 22, at p. 24.
(27) (1900) 2 Q.B., 43.
(28) 10 N Z. Gaz. L.R., 633.
(29) 6 El. & Bl., 408.
(30) 220 U.S., 191.
(31) 220 U.S., 210.

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decision in *Whybrow's Case* (1), in which it was held by majority that the High Court has jurisdiction under sec. 75 (v.) of the Constitution to grant prohibition to the President of the Commonwealth Court of Conciliation and Arbitration if he assumes to exercise powers which it is not within the competency of the Commonwealth Parliament to confer. The High Court then consisted of five Justices, one of whom, being a party to the proceedings, could not sit as a Judge in his own cause. The Bench was constituted of the other four Justices, of whom three, namely, my brother *Barton*, my late lamented brother *O'Connor* and myself, concurred in the decision I have stated. My brother *Isaacs* dissented from this opinion, holding that prohibition appertains not to original but to appellate jurisdiction, from which Parliament has power under sec. 73 to except any Court that it may create.

The Court was a Full Bench, that is to say, it was constituted of all the Justices who could take part in the decision. We are asked, in the first place, to say that a decision of the High Court, even if pronounced by a Full Bench, ought not to be regarded as a binding authority by a Full Bench in a later case in which the Bench is differently constituted. There are now seven Justices.

In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow ; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were *res integra*. Otherwise there would be grave danger of a want of continuity in the interpretation of the law.

In the present case we are all agreed that the decision in *Whybrow's Case* (1) is to be treated as open to review, and I proceed to deal with the matter on that footing.

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

The Commonwealth Arbitration Court, as I will call it, is a creature of Parliament under the powers conferred in pl. xxxv. of sec. 51 of the Constitution, by which the Parliament is authorized to make laws with regard to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. We start with the governing principle that the powers of the Parliament are limited by the Constitution, and that any act done under the asserted authority of a Commonwealth law may be impeached in appropriate proceedings on the ground that it was done in excess of the authority conferred by the Constitution. Parliament cannot take away this right by any form of words or any device.

In the case provided for by sec. 51 (xxxv.) there are three limits: The subject matter of the legislation must be (1) a dispute, (2) an industrial dispute, (3) an industrial dispute extending beyond the limits of any one State. If it does not fall within these limits the Parliament has no authority, and it is a mere truism to say that Parliament cannot confer on a Court of its creation authority to deal with matters not within its own power.

Sec. 73 of the Constitution provides that the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of, amongst others, any federal Court. The kind of appeal intended is shown by the enumeration of subject matter.

By the *Commonwealth Conciliation and Arbitration Act* 1904 it was provided (sec. 31) that no award of the Court should be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatever. The section stood thus when *Whybrow's Case* (1) was decided in 1910. In 1911 Parliament inserted the words "or be subject to prohibition or mandamus" after "called in question." It is objected that the power to grant prohibition has now been taken away. The answer to that question depends upon the authority by which it was conferred.

The first point made in support of the objection is based

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

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upon the view expressed by my brother *Isaacs* in *Whybrow's Case* (1), namely, that prohibition is an exercise of appellate jurisdiction (in support of which a passage, or rather a footnote, in vol. IX. of *Halsbury's Laws of England*, p. 59, was cited), and that it has therefore been taken away by excepting it from the appellate jurisdiction of the High Court.

In my opinion the jurisdiction of the superior Courts in England to grant the common law writ of prohibition was original and not appellate jurisdiction. An examination of "the origin and reason of the writ" as well as "the history of the procedures by which it has at different times been enforced," to use the words of *Brett* J. in *Worthington* v. *Jeffries* (2), seems to put this beyond controversy. As was pointed out by *Willes* J. in his great opinion in *Mayor &c. of London* v. *Cox* (3):—"All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative, and the unauthorized proceeding against the individual, 'prohibitions by law are to be granted, at any time, to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary.'" The last sentence is from *Articuli Cleri*, 2 Inst., 602.

In *Worthington* v. *Jeffries* (4) *Brett* J. proceeded to say:—"These authorities show that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all."

We all know that the Court of King's Bench was never a Court of appeal from the Ecclesiastical Courts, to which in ancient times prohibitions were most commonly directed, or, indeed, from any other inferior Court to which the writ lay. It might be

(1) 11 C.L.R., 1, at p. 48.
(2) L.R. 10 C.P., 379, at p. 381.
(3) L.R. 2 H.L., 239, at p. 254.
(4) L.R. 10 C.P., 379, at p. 382.

granted at the suit of the King or of a stranger. The Judge who usurped jurisdiction was a party to the proceedings. The writ might be applied for before judgment in the original cause as soon as the defect in jurisdiction became apparent. Finally, the prohibiting Court had no concern with the merits of the case itself.

In all these particulars prohibition differs from appeal. The powers of an appellate Court are exercised in the original cause, and between the same parties, and the Court is required to examine the merits and correct any error in the decision. Moreover, it is a well known rule that appeal is the creation of Statute. I find it impossible, therefore, to suppose that the framers of the Constitution or the Parliament of the United Kingdom, who must have been familiar with these matters, intended by the use of the word "exceptions" in sec. 73 to include a power to take away prohibition for want of jurisdiction.

As against this view reliance was placed on a passage in the judgment of *Marshall* C.J. in *Marbury* v. *Madison* (1) dealing with the writ of mandamus. That very learned Judge held that the jurisdiction to issue such a writ except as incidental to the decision of a case in which the Supreme Court had appellate jurisdiction would be an exercise of original jurisdiction, and that as no such jurisdiction was conferred by the Constitution on the Supreme Court the writ could not issue. The passage does not help the respondents. The passage in *Halsbury's Laws of England* already referred to is a mere enumeration of the business assigned to the King's Bench Division, which happens to be placed in a footnote to a section of the work dealing with appellate jurisdiction. It is, of course, true that a Court of appeal of general jurisdiction may reverse a judgment of an inferior Court brought before it for review on any ground showing that it was wrong, and that want of jurisdiction would be such a ground. I pointed this out in the case of *Ah Yick* v. *Lehmert* (2). It was also lately pointed out by the Lord Chancellor in *National Telephone Co. Ltd.* v. *Postmaster General* (3). But it would not, I think, occur to the mind of any English lawyer to suggest that because an appeal

(1) 1 Cranch, 137.
(2) 2 C.L.R., 593, at p. 601.
(3) (1913) A.C., 546, at p. 549.

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lies in certain cases from County Courts to the King's Bench Division the jurisdiction to grant prohibition to a Judge of a County Court for want or excess of jurisdiction is an exercise of the appellate power, or that if the appeal were taken away the power to grant prohibition would go with it.

In my judgment, therefore, this objection fails.

The next point made was that if the granting of prohibition appertains to original and not appellate jurisdiction it has not been conferred by the Constitution or otherwise. This is a valid objection if it can be sustained in fact. Sec. 75 (v.) confers upon the High Court original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. It is urged that the word "officer" does not include judicial officers properly so called, but only officers who, although not judicial, exercise judicial functions. But when we consider that "prohibition" is not only a term well known to English law, but the term specially used to designate the appropriate remedy for restraining inferior Courts or tribunals which usurp jurisdiction, and that the writ does not lie in any other case, the natural meaning seems to be that the prohibition meant by the section is that remedy. It cannot be maintained that a Judge of an inferior federal Court is not an officer of the Commonwealth within the meaning of this Chapter of the Constitution, in which by sec. 72 it is expressly enacted that his salary shall not be diminished during his continuance in office. I cannot find any ground for limiting the meaning of the word to non-judicial officers exercising judicial functions.

Another interesting point was raised on the construction of this provision. The power conferred by sec. 51 (xxxv.) of the Constitution is to make laws with respect to arbitration. The authority to arbitrate might be conferred upon an individual arbitrator, or board of arbitrators, or a Court; but in either case the functions would be arbitral, and in so far as an award was made in the exercise of arbitral functions it would not, even without sec. 31 of the Arbitration Act, be appealable under sec. 73. See *National Telephone Company's Case* (1). The test whether an appeal would lie in such a case would, as pointed out

(1) (1913) A.C., 546.

by Lord *Moulton* (1), be whether the tribunal in giving the decision in question was exercising arbitral powers or acting as a Court. It is true that the Arbitration Act calls the Arbitration Court a "Court" and a "Court of Record," but the nomenclature does not alter the nature of the functions. In the discharge of his arbitral functions the President is not bound by the rules of evidence, but may inform his mind in any manner he thinks fit. A Court of appeal would have no means of reviewing a decision so arrived at (*Moses* v *Parker* (2)). I am strongly disposed to think that the so-called Court of Arbitration when performing its arbitral functions is not acting as a Court properly so called. But the President is undoubtedly, in any view of the case, an officer of the Commonwealth, so that, *quâcumque viâ*, the case is within sec. 75 (v.). The jurisdiction conferred by that section cannot, of course, be taken away by the Commonwealth Parliament. I should add that I do not think that sec. 71 can be relied upon as of itself conferring jurisdiction.

For these reasons I think that the preliminary objection should be overruled. It is, therefore, not necessary to deal with the arguments based upon sec. 76 (1) of the Constitution, and secs. 30, 31, and 33 of the *Judiciary Act*, or to consider the extent to which those sections would be qualified by the amendment of sec. 31 of the *Commonwealth Conciliation and Arbitration Act*, if valid.

BARTON J. The above-named applicants severally obtained orders *nisi* to prohibit the President of the Commonwealth Court of Conciliation and Arbitration from proceeding in an arbitration in which the Australian Tramway Employees Association were the claimants. The applicants were two of the parties making answer to the plaint. Included in the grounds of the orders *nisi* were the following:—That there was no dispute; that there was no industrial dispute; and that there was no industrial dispute extending beyond the limits of any one State. See Constitution, sec. 51 (xxxv.).

Upon the return of the orders *nisi*, counsel for the claimant Association, which is a respondent here, took the preliminary

(1) (1913) A.C., 546, at p. 559. (2) (1896) A.C., 245.

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objection that this Court has no power to prohibit the Court of Conciliation and Arbitration or its President. The principal grounds of the objection are: (1) that prohibition is a part of the appellate jurisdiction granted to this Court by the Constitution, and that Parliament, by sec. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, has exercised the power given in sec. 73 of the Constitution to make statutory exceptions to the appellate jurisdiction; (2) that if prohibition is not within sec. 73 it has never existed as a power of this Court, which is a creature of Statute, namely, of the Constitution, which has not given the Court such a power in any other provision.

It may be mentioned at the outset that the second ground includes the contention that the President of the Arbitration Court is not "an officer of the Commonwealth" within the meaning of sec. 75 (v.) of the Constitution.

The grant in sec. 73 confers on this Court "jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences" of, *inter alia*, any other federal Court, or Court exercising federal jurisdiction. According to the objectors, the Court of Arbitration is a federal Court.

The first question to which I shall address myself is whether a proceeding in prohibition is an appeal from a judgment, decree, order or sentence of an inferior Court. The question is not whether at some times and under some circumstances a question of jurisdiction may be determined during the hearing of an appeal, but whether a proceeding in prohibition is an appeal within the terms of this section of the Constitution. That a question of jurisdiction may sometimes be determined in the course of an appeal goes without saying; but that is very poor ground for an argument that a proceeding in prohibition is an appeal, and still worse ground for the contention that it is an appeal from a judgment, or a decree, or an order, or a sentence. It is elementary knowledge that the writ will issue upon the moment that jurisdiction to hear a case is shown to have been wrongly assumed, whether that is shown before or after an adjudication. A stranger to the case in the inferior Court can

scarcely make himself an appellant from a proceeding in that Court, and yet prohibition will in a proper case be granted by the superior Court at the instance of a stranger. On the other hand, appeal does not lie until the inferior Court has given some formal decision capable of being recorded in the proceedings. The Court which issues prohibition is not necessarily a Court with power to entertain an appeal from the Court prohibited, or with power to pronounce on the merits of the case or to vary or set aside the judgment. A judgment on appeal is a judgment in the original suit; a judgment in prohibition is given in an entirely new proceeding. Most of these distinctions were drawn by Mr. *O'Halloran* in his argument for one of the applicants.

That the appeals to which sec. 73 relates are appeals in the true sense is confirmed by the manner in which the word "appeal" is used in the second sub-section of sec. 73, in the proviso to that section, and in its final paragraph, and by the use of the word wherever it occurs in sec. 74.

It seems tolerably clear, then, that whatever sec. 31 (1) of the Arbitration Act may effect by way of exception from sec. 73, it cannot reasonably be contended that its provision as to prohibition is a legislative exception to that section, inasmuch as prohibition has nothing to do with the section, but is an exercise of original jurisdiction by means of a writ issuing from the superior Court.

The first ground of objection is therefore untenable.

The judicial power of the Commonwealth, so far as it is attributable to a federal Supreme Court, is vested in the High Court. It would seem grotesque that such a tribunal should be destitute of the power to restrain the wrongful assumption of jurisdiction by officers having or usurping the authority of Courts inferior to itself. And if such a power is not given to the High Court, it is not given to any authority. True, the Imperial Parliament, the whole Australian people, and the States may alike have withheld that power, though it seems impossible to suggest a reason for its being withheld, when one considers that without it the grossest usurpations of judicial authority might proceed unchecked, and that violations of the Constitution might become a common occurrence. True, also, there are means by which the victims of such proceedings may resist the enforcement

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of void adjudications; and they may bring actions for things done under them. But one does not readily attribute to the framers of the Constitution an intention to leave the subject without redress, or even protection, until he is in danger of ruin; nor an entire neglect to deal with the matter. It is natural therefore to expect that the Constitution would make provision for the intervention of the supreme tribunal of the Commonwealth, to keep judicial and quasi-judicial officers within bounds. The applicants argue that such a power is a necessary implication from the whole scheme and structure of the Judicature chapter. But they also claim that the power has been expressly granted in the fifth sub-section of sec. 75, and there at the least I think they are right. They also contend that if that sub-section does not apply, then where the erroneous assumption of authority is in respect of a matter arising under the Constitution or involving its interpretation, sec. 76 (1) and the provisions of the *Judiciary Act* enable them to come to this Court for the appropriate process. In the view which I take of the case it is not necessary to pronounce upon this argument.

Sec. 75 gives the High Court original jurisdiction "in all matters . . . (v.) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." It is of course clear that if the President of the Arbitration Court engaged in the hearing of an alleged "inter-State" dispute, is an officer of the Commonwealth within the meaning of this provision, the objection fails.

The argument for the objectors as to this provision is that the President is a judicial officer, and that sub-sec. (v.) includes in the term used only officers assuming to act judicially, but without judicial authority. I confess myself at a loss to find a reason for this distinction, which, as I cannot help thinking, is merely speculative.

No doubt the term is used, elsewhere in the Constitution, to indicate executive officers, as in secs. 64 and 67, or departmental officers, as in secs. 51 (xxxix.) and 85. But in those cases the sense in which the term is used has been limited by the context. There is no such limitation in sec. 75 (v.). Indeed, the context gives the term a very extensive meaning. In *Whybrow's Case*

(1) the learned Chief Justice of this Court gave strong reasons for the conclusion that " when the Constitution speaks of a prohibition against an officer of the Commonwealth it means an officer whose functions are judicial or quasi-judicial," and added that even if the meaning of the words of sec. 75 were ambiguous, the necessity of such a controlling power existing somewhere was so apparent that he thought the ambiguity should be resolved in favour of the power. After agreeing with the reasons of his Honor I went on to say (2):—" The terms of the 75th section of the Constitution, sub-sec. (v.), seem to afford a good reason why the phrase 'an officer of the Commonwealth' should have been used to include judicial and quasi-judicial as well as other officers. That reason is that the sub-section covers cases of mandamus and injunction as well as prohibition. As both these writs will lie in cases of officers who are not exercising judicial functions at all, while prohibition is applicable only to persons who do exercise them, the draftsman has apparently sought and found a phrase which would extend to every class of officer to whom any one of the three writs might properly be directed. We were not furnished with any reason why this phrase should not include the class of persons to whom a writ of prohibition is ordinarily directed, and there is no restrictive context." In the very full argument of the present objection any such reason was similarly lacking, and I adhere to the opinion which I then expressed. My late brother *O'Connor* gave cogent reasons for coming to the same conclusions as the learned Chief Justice and myself. I will only add that I cannot find anything in the third chapter of the Constitution which suggests that the writ of prohibition of which the section speaks is a remedy differing either in its nature or its object from that which by ancient usage and authority has been applied in England to keep the proceedings of inferior tribunals, whether strictly Courts or not, within the bounds of the jurisdiction assigned them by law.

I refrain from discussing the question whether the tribunal which the legislature has entitled the Court of Arbitration is acting as a Court, or merely as an arbitral tribunal, when engaged in the hearing of industrial disputes. My views as to

(1) 11 C.L.R., 1, at p. 22. (2) 11 C.L.R., 1, at p. 33.

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secs. 73 and 75 of the Constitution are so definite that I do not feel called upon to give a decisive opinion on this question. As the Chief Justice has pointed out, the President is in either view an officer of the Commonwealth and within sec. 75 (v.). Of course, if an application for a prohibition is an appeal, there are strong grounds for thinking that sec. 31 of the Arbitration Act takes away the jurisdiction of this Court under sec. 73. But if the President is within sec. 75 (v.) the amendment of 1911 is clearly ineffective so far as it purports to affect the power expressed by the Constitution in that section. Whether the amendment has any other effect consistently with the Constitution is a question not involved at present.

As I am clearly of opinion that the Constitution in sec. 75 (v.) gives the familiar remedy of prohibition as a matter of jurisdiction, I do not think it necessary to notice the argument that sec. 31 of the Arbitration Act deals only with the form of the process, and merely forbids the use of the writ known as prohibition in restraint of the Arbitration Court, leaving it open to this Court to correct erroneous assumptions of jurisdiction by the use of process other than prohibition. If this Court is given both the jurisdiction and the writ, as I am clear that it is, then sec. 31 of the Arbitration Act can by no means impede the issue of the writ.

As the case of *Ah Yick* v. *Lehmert* (1) was discussed in the course of the argument, and the several judgments of the members of the Court were dissected, I think it as well to say a few words as to the part I took in that decision. While I agreed that the case might be regarded as one for the exercise of appellate rather than of original jurisdiction under its circumstances, I expressly guarded myself against saying that it was not a case in which a mandamus could issue from this Court in its original jurisdiction. I thought that, having regard to the provisions of the *Judiciary Act*, especially sec. 39, the Chairman of General Sessions, although a Judge of an inferior Court of the State, could *pro hac vice* be regarded in respect of his federal jurisdiction as an officer of the Commonwealth within the meaning of sec. 75 (v.) of the Constitution. Whether the case could

(1) 2 C.L.R., 593.

rightly be regarded as an appeal within sec. 73 of the Constitution, or not, I think it probable that mandamus lay to the Chairman as the Judge of a Court invested with federal jurisdiction. What is more to the present purpose, however, is that my words are open to the construction that I considered sec. 75 (v.) to be of a narrower scope than is attributed to it by the views which I am expressing to-day. I am not sure that I intended so to narrow its construction, but if that is a fair deduction from the words, I think that was wrong, and that the larger view I expressed in *Whybrow's Case* (1) is the right one.

In conclusion, I would say that I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decision. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. That the prior decision was that of little more than half their number might be urged with greater fairness, but it cannot be urged against *Whybrow's Case* (2), which was decided by the whole Court then in existence save the Justice who as President of the Arbitration Court was a party respondent to the order *nisi*. But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest. It is not *Ah Yick* v. *Lehmert* (3) which can relevantly be challenged by the present objection, for that was a case in which the dicta as to mandamus were only indirectly connected with the present question as to prohibition, and if a mandamus were an appeal within sec. 73 it would not follow that prohibition was also an appeal. But the allowance of the present objection would clearly be an overruling of our decision of a similar point in *Whybrow's Case* (2), and although at the time of its decision the amendment of 1911 in sec. 31 of the *Judiciary Act* had not been made, still if the decision is clearly wrong the present objection prevails, while if the decision is right Mr. *Arthur's* objection falls to the

(1) 11 C.L.R., 1, at p. 33. (2) 11 C.L.R., 1.
(3) 2 C.L.R., 593.

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ground; and I think it is quite right. Of course, I speak of *Whybrow's Case* (1) as typical of other occasions on which a similar point has been raised without success.

For the above reasons I am of opinion that the objection must be overruled.

ISAACS J. In one of the Tramway cases (2), heard since the passing of sec. 14 of Act No. 6 of 1911, the preliminary point was taken that the effect of that enactment was to deprive this Court of jurisdiction to issue a writ of prohibition to the Court of Conciliation and Arbitration. I agreed in overruling the objection, feeling bound, as the Court was then constituted, by the decision in *Whybrow's Case* (1). My reasons are stated in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (3).

In the present case, the accuracy of *Whybrow's Case* (1) is contested before the Court, sitting as a Full Bench, and that has now to be considered. I have on a former occasion indicated what appears to be the duty of this Court to correct an erroneous interpretation of the fundamental law. The grounds of my opinion, based on the highest authority for us, need not be here repeated. I will only add that the opposite view would make us guardians, not of the Constitution, but of existing decisions, right or wrong. If applied in the present case, it would be fatal to the applicants.

It is necessary to define the exact point arising for our decision. The application is to prohibit the Arbitration Court, as I term it for brevity, from enforcing an award already made and completed; that is to say, it is not an application to prevent the President from proceeding to make an award.

The difference is precisely as if in ordinary State jurisdiction a private arbitrator made an award between parties, and it were then filed as a rule of Court, or an action were brought upon it in the Supreme Court.

The fact that the arbitrator happens to be personally identical with the individual who presides in the Court is irrelevant. The

(1) 11 C.L.R., 1.
(2) See 15 C.L.R., at p. 606.
(3) 15 C.L.R., 586, at pp. 605-607.

tribunals are distinct; and the question is whether "a Court" can be prohibited under sec. 75 (v.) of the Constitution. The well known rule that a judgment given without jurisdiction can be prohibited so long as anything remains to be done under it, does not touch this point. The legislature has assumed to create a Court of Record for all purposes, preliminary and consequent, as well as for the actual settlement of the dispute. And no doubt the nature of the function of the arbitrator in actually determining the dispute is quasi-judicial, in the sense indicated by Lord *Selborne* in *Spackman* v. *Plumstead Board of Works* (1). That would be sufficient according to the established authorities to attract prohibition in a proper case. See, for instance, *Church* v. *Inclosure Commissioners* (2); *R.* v. *Local Government Board* (3); *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.* (4); *In re Local Government Board*; *Ex parte Kingstown Commissioners* (5); *Partridge* v. *General Council of Medical Education* (6); *R.* v. *Clerkenwell General Commissioners of Taxes* (7). But in the sense that constitutes a judicial tribunal a Court of justice, one of the kind of Courts in which the Constitution vests the judicial power, the arbitrator is not a "Court," and in my view—reasons for which appear in the *Sawmillers' Case* (8) and in the *Boot Employees' Case* (9)—the legislature cannot convert him into a "Court" within the meaning of the Judicature provisions of the Constitution. So much of the Arbitration Act as assumes to do so may, in my opinion, be simply disregarded. The President has all necessary powers, and the mere fact that he is called a Court does not affect his powers.

But in respect of the enforcement of an award, the position is entirely different. The award, when made, creates and settles rights, and those rights may be judicially enforced in the manner prescribed by the legislature, by any recognized Court, and in my opinion by no other, because such enforcement, including interpretation, is properly within the judicial power. In this domain the Court is well constituted, and none the less by reason of the

(1) 10 App. Cas., 229, at p. 240.
(2) 11 C.B.N.S., 664.
(3) 10 Q.B.D., 309, at p. 321.
(4) 17 Ch. D., 493.
(5) 18 L.R. Ir., 509, at p. 514.
(6) 25 Q.B.D., 90, at p. 96.
(7) (1901) 2 K.B., 879.
(8) 8 C.L.R., 465, at pp. 522 *et seqq.*
(9) 10 C.L.R., 266, at pp. 316 *et seqq.*

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wide provisions of sec. 25 of the Act. That section should be read as a procedure section, and it does not except "rules of law," as was the case in *Moses* v. *Parker* (1), a circumstance that seems to me to have been the real point of the judgment of the Privy Council. And see *Canadian Pacific Railway* v. *Toronto Corporation* (2). The legislature, so far from contemplating the Court being free from any rules of law, clearly intends that the rights of the parties shall be fixed by the award, and that those rights are to be enforced by the methods prescribed: See, for instance, secs. 32 and 48.

The tribunal which in this case is sought to be prohibited is therefore a Court in the strict sense; and the question is, does prohibition ever lie to it, even when it is proceeding to exceed its jurisdiction. I would here introduce a word of caution to avoid future misapprehension. This is not a question whether, whatever be the law as to the nature of an industrial dispute, or the validity of the enactment of preference, that Court has or has not jurisdiction to entertain an application to enforce an award *de facto* made by the arbitrator, or to decide the validity of any award in whole or in part. That may yet have to be determined. It is simply a question whether, assuming the Court itself to be proceeding without or in excess of jurisdiction, it may be prohibited.

As to that, I expressed the opinion in *Whybrow's Case* (3) that prohibition is part of the appellate power. If it be, then, as I said in that case, it is inconceivable that the Constitution would expressly permit this or any other proceeding to be excepted from the appellate jurisdiction of this Court, and yet confer the same thing irrevocably as original jurisdiction, and that, too, not by the name of a Court but of an officer. My opinion there expressed, as to prohibition being a part of the appellate power, was fortified by references I there made. In America a long and unbroken line of decisions gives further support to that view. The term appellate jurisdiction has there received a very broad signification—as in *Marbury* v. *Madison* (4); *Virginia* v. *Rives* (5).

(1) (1896) A.C., 245.
(2) (1911) A.C., 461.
(3) 11 C.L.R., 1, at pp. 47, 48.
(4) 1 Cranch, 137, at p. 175.
(5) 100 U.S., 313.

Prohibition has often been there granted, *United States* v. *Hoffman* (1) being one instance; and as late as 1911 this was done in *Ex parte Oklahoma* (2). It is to be observed that the jurisdiction of the Supreme Court of the United States to issue a writ of mandamus is not exercised as in England by the King's Bench as having a general supervisory power over inferior Courts, but simply under the appellate power, regulated by Congressional legislation (*Kendall* v. *United States* (3)). This is important when we come to consider sec. 71 of our Constitution. The question, however, for us is whether these extraordinary writs are within our own appellate jurisdiction. The opinion I formed and expressed in *Whybrow's Case* (4) was an independent opinion based upon general considerations. But the principle that those writs are part of the appellate jurisdiction here was expressly maintained in two cases in this Court, namely, *Ah Yick* v. *Lehmert* (5) and *Wilcox* v. *Donohue* (6). I only refer to those cases as weighty confirmation of the view I took in *Whybrow's Case* (4).

In *Ah Yick's Case* (5) Judge *Johnston* sitting in General Sessions refused to enter an appeal from a Police Magistrate on the ground that he had no federal jurisdiction. A mandamus was applied for and granted to hear and determine, and as an appeal. The learned Chief Justice said (7) the motion was " in reality an invocation of the appellate jurisdiction of this Court. The granting of writs of mandamus, prohibition, and *habeas corpus* at common law may be regarded as in one sense an exercise of original jurisdiction, and in another as the exercise of appellate jurisdiction. When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, or it may consist in an assertion by that Court of a jurisdiction which it does not possess, or it may consist in a refusal of that Court to exercise a jurisdiction which it possesses.

(1) 4 Wall., 158.
(2) 220 U.S., 191.
(3) 12 Peters, 524, at p. 621.
(4) 11 C.L.R., 1.
(5) 2 C.L.R., 593.
(6) 3 C.L.R., 83.
(7) 2 C.L.R., 593, at p. 601.

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In all these cases the Court of Appeal can exercise its appellate jurisdiction in order to set the error right." There the bare assertion of jurisdiction not possessed, or the bare refusal of jurisdiction in fact possessed, was regarded as a decision—that is, as coming within the terms "judgment, decree, order, or sentence." That is further emphasized on p. 602. My brother *Barton* said (1):—"His Honor the Chief Justice has said that this is a case of the exercise of appellate rather than of original jurisdiction," and his Honor agreed with the learned Chief Justice, and then went on to refer to sec. 75 (v.) in terms that have been thought of comfort to both sides in this case.

Wilcox v. *Donohue* (2) was a case where *Pring* J. discharged a rule *nisi* for statutory prohibition, declining to consider the matter, on the ground that he had no jurisdiction. This Court entertained an appeal from *Pring* J. The learned Chief Justice said (3):—"The Judge having refused to entertain the appeal, the appellant is entitled to some redress." Discharging a matter for want of jurisdiction is only striking it off the list of Court business. Special leave was granted to appeal, under sec. 35 of the *Judiciary Act*, sub-sec. 1 (*b*), which refers to a "judgment," and the refusal to entertain the case was therefore regarded as a judgment.

Those cases may or may not be supportable under sec. 75 (v.) on the ground that the Judges there were "officers of the Commonwealth." That question is not before us, and has never been decided. Before it comes to be decided, I should wish to hear argument, possibly including that on the part of some State concerned, as to whether State Judges, including the Chief Justices and Judges of the Supreme Courts, are really in law "officers of the Commonwealth" without any consent on their part, or any selection, appointment or power of removal by the Executive Government of the Commonwealth.

The authority, however, of a decided case consists in the principle upon which it is decided (*In re Hallett* (4)), and if the principles upon which the two cases referred to were rested, and with which I fully agreed in *Whybrow's Case* (5), be sound—or

(1) 2 C.L.R., 593, at p. 608.
(2) 3 C.L.R., 83.
(3) 3 C.L.R., 83, at p. 87.
(4) 13 Ch. D., 696, at p. 712.
(5) 11 C.L.R., 1.

if this Court were to hold to the view that a decision once given must stand—then it seems to me impossible to repel the preliminary objection now raised. I cannot conceive of the same proceeding in the same matter being at one and the same moment both appellate and original jurisdiction. Confusion must not exist between an " original writ " and " original jurisdiction." A writ of error was an original writ, but of appellate jurisdiction.

The first great question, then, to my mind, is whether the earlier view is right. If I think not, it is my duty to interpret the Constitution as I believe it to be.

Since the argument was closed, I have carefully examined the question anew, and apart from the authorities cited, and I have been irresistibly led to the conclusion that mandamus for refusal to entertain a matter within jurisdiction, and prohibition against entertaining a matter without or in excess of jurisdiction, do not fall within the appellate jurisdiction of this Court.

The American decisions must be taken to be right on the United States Constitution ; and even under the English system of law there is a sense in which prohibition and mandamus can be termed appellate. But upon the true construction of our federal Constitution, I am clearly of opinion that the appellate jurisdiction there contained is narrower. The reasons which have led me to this conclusion I shall state.

In the first place, this Court is not a common law Court, but a statutory Court. To the Constitution and the laws made under the Constitution it owes its existence and all its powers ; and whatever jurisdiction is not found there expressly, or by necessary implication, does not exist. The Constitution does not in general terms, as in the case of the State Constitutions with reference to Supreme Courts, endow the High Court at a stroke with all the powers of the Court of King's Bench. Sec. 71 has been referred to as having that effect. But that is not so. Sec. 71 confers no jurisdiction whatever. It merely declares the separation of judicial authority from all other, and prescribes that it shall be exercised by judicial tribunals and not otherwise, and indicates the tribunals. But the section does not prescribe the limits of the judicial power, or confer jurisdiction upon any Court. That is left for the succeeding sections.

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The contention that complete jurisdiction is granted by sec. 71 would make the following sections largely superfluous, and to a great extent inconsistent. Sec. 78 assumes that there are to be limits of the judicial power to an extent yet unexpressed.

If analogy and persuasive precedent be needed as to this point, reference may be made to the words of *Marshall* C.J. in *Marbury* v. *Madison* (1) and in *Durousseau* v. *United States* (2).

Sec. 73 confers the appellate jurisdiction, which is given "with such exceptions and subject to such regulations as the Parliament prescribes."

As to this qualification an argument was raised which merits a moment's attention, as it ought not to be left in doubt: it was, that Parliament cannot bodily except from the jurisdiction given the whole class of some proceeding, but can merely, in some way undefined by the argument, provide a check or restriction upon the appeal. I wholly dissent from that.

"Exception" means what it says. "An exception," says Lord *Watson* in *Cooper* v. *Stuart* (3), "is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant." See also *per Buckley* J. in *Savill Bros. Ltd.* v. *Bethell* (4). Here the grant of power to the Court is made by the Imperial Parliament general in the first instance, leaving it to the Commonwealth Parliament to make what "exceptions" from the grant it thinks necessary or desirable. "Regulation" is the other word, and emphasizes the force of "exceptions."

The phrase comes from the American Constitution, and reference may usefully be made to such cases as *Durousseau* v. *United States* (2); *Ex parte McCardle* (5); and *Murdock* v. *Memphis* (6).

The next phrase in sec. 73 is "to hear and determine appeals from all judgments, decrees, orders, and sentences." The words "appellate jurisdiction" do not occur; but the word "appeal" or "appeals" is used.

The ordinary meaning of "appeal" is confined to cases where,

(1) 1 Cranch, 137, at pp. 174, 175.
(2) 6 Cranch, 307, at pp. 313, 314.
(3) 14 App. Cas., 286, at p. 289.
(4) (1902) 2 Ch., 532.
(5) 7 Wall., 506, at pp. 513, 514.
(6) 20 Wall., 590, at p. 620.

on the substantive matter in litigation, the Court appealed to may make its own order, the order which the primary Court should have made. See *per* Lord *Cairns* in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.* (1). And so I interpreted it as contained in the Arbitration Act (*Whybrow's Case* (2)). Is it used in a larger sense in the Constitution?

The word in the singular or the plural form occurs no fewer than six times in sec. 73, and three times in sec. 74. Its use is such as to indicate that it means the same thing in relation to the High Court as it does with reference to the Privy Council, and that circumstance has to me been the finally determining factor in arriving at its signification. It naturally leads to the inquiry what is the meaning of an appeal to the Privy Council. In the first place the phrase "judgment, decree, order and sentence" is taken from the Privy Council Acts and Orders relating to appeals.

And I have searched for instances in which the Judicial Committee had dealt one way or the other with the question of an application to it for a writ of mandamus or prohibition, to a colonial Court. I have not seen any as to prohibition, but very recently have found three upon the question of mandamus. The first is *In re Muir* (3) in February 1840. The Court of Common Pleas of Tobago wrongly refused to enter up judgment after verdict for plaintiff. Application for a mandamus was made to the Privy Council. *Parke* B. (for himself, Lord *Brougham*, *Bosanquet* J. and Dr. *Lushington*) held that though it was the opinion of the Judicial Committee that it was the bounden duty of the colonial Court to give judgment for the plaintiff their Lordships held there was no precedent for issuing, and no power in them, sitting as a Court of Error, to issue a mandamus to the Court below.

In the following June there came before the Judicial Committee the case of *In re Manning* (4). The same members sat, except that *Erskine* J. replaced *Parke* B. There the Court of Common Pleas of Antigua refused—apparently wrongly—to order a judgment to be entered up for the plaintiff. From

(1) 4 App. Cas., 30, at pp. 39, 40.
(2) 11 C.L.R., 1, at p. 47.
(3) 3 Moo. P.C.C., 150.
(4) 3 Moo. P.C.C., 154.

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this a writ of error was taken to the Court of Error in the Island. That Court refused to proceed, deciding that it was not properly constituted. An application was made to the Privy Council for leave to appeal from both Courts. As to the lower Court the application failed, because at that time no writ of error lay direct from that Court to the Privy Council. If it had lain, the Judicial Committee said that the refusal to enter up judgment might have been considered an informal mode of giving a judgment, similar to one in arrest of judgment, and that the parties go without day, and in that case it might have been reversed by the Judicial Committee, and such judgment given as the Court ought to have given. That would have been a real appeal, because the judgment, however informal, would have been on the substantial question in controversy. And as to the Court of Error, it was said by *Bosanquet* J. (1) that Court had "done nothing, and the question now is, whether a writ of error will lie from that judgment in which they have done nothing, in which they have pronounced nothing, that can be appealed from. In that respect it appears to us, therefore, that the application would be in the nature of a mandamus, calling upon them to proceed and to give judgment, for which we find no precedent." *Muir's Case* was referred to and followed. Their Lordships observed (2):—"As far as regards an appeal to Her Majesty in Council, these parties are without remedy, which is a very great evil." A suggestion was thrown out to make representations to the proper quarter, if the Judges still refused to do what they ought to do, and so the Judicial Committee left it as a legal wrong without a legal remedy. *Manning's Case* (3) was itself followed in *In re Whitfield* (4) in 1845, and therefore since the Act 7 & 8 Vict. c. 69 (1844) enabling the Privy Council to entertain appeals from Courts that are not Courts of Error, but making no alteration as to mandamus.

There is a converse case which shows where an appeal does lie, and so shows the distinction and completes the matter. In *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (5), decided

(1) 3 Moo. P.C.C., 154, at p. 164.
(2) 3 Moo. P.C.C., 154, at p. 165.
(3) 3 Moo. P.C.C., 154.
(4) 5 Moo. P.C.C., 157, at p. 160.
(5) L.R. 10 Ind. App., 4.

in 1884, an Indian Judge entertained but refused an application for execution of a Privy Council decree, basing his refusal on his view of the law applicable to the case. An "appeal" by Statute lay to the Full Court from "judgments." The Full Court, the Chief Justice dissenting, thought the refusal was not a "judgment" largely on the ground that the primary Judge had no jurisdiction to inquire as to a right to execution, and had therefore usurped jurisdiction. The Privy Council, however, treated the refusal as a judgment, he having made an order, and the Judicial Committee said that he was within his jurisdiction but that usurpation of jurisdiction, if it had occurred, would have been a valid ground of appeal.

These cases acting upon the words of the Constitution leave no doubt in my mind that "appeal" is the ordinary appeal as defined by Lord *Cairns*. This sets free one great difficulty, and to my mind the greatest difficulty, in extending the meaning of 75 (v.) to Judges of Courts, though I am not unmindful of possible future discussion, as to how far it may narrow the jurisdiction of this Court in directions hitherto unsuspected.

I come now to sec. 75 (v.) itself. The crucial words for this purpose are "officer of the Commonwealth." No one could of course deny that a Judge holds an office, and when directly appointed by the Commonwealth, and accepting his office and salary from and removable by the Commonwealth, he is an officer of the Commonwealth. The remaining difficulty arises from the fact of the very same expression existing in sec. 51 (xxxix.) of the Constitution, where it is apparently used, in respect of a power existing in a person himself, by virtue of the individual office he holds under the Commonwealth.

I cannot say I am entirely clear of doubt as to this. The authorities so constantly in definition both of mandamus and prohibition refer to "Courts" that the omission of the word is striking. And no doubt, as I have already observed, there would be considerable scope for the operation of the sub-section even if Courts were excluded. The whole section is one pointed to jurisdiction over litigants, and in a substantial sense a Court is not a litigant. Still the considerations which fall on the side of

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inclusion are on the whole more powerful than those to the contrary.

The corresponding American clause contains no reference to prohibition, and this materially weakens the force of that precedent. A judge is not only an "officer" but he is in strictness sometimes so referred to. The *Statute of Westminister the First*, as *Willes* J. observes in *Mayor &c. of London* v. *Cox* (1), enacts a remedy against "great men and their bailiffs and others (the King's officers only excepted, unto whom especial authority is given)," acting unlawfully. The "King's officers," says *Willes* J. (citing 2 Inst., 230) (2), "mean the King's justices in his general Courts of justice." The Courts are the King's Courts, that is, the places where the Sovereign theoretically dispenses justice, and the Judges are officers for the purpose.

The theory of prohibition is that the person or persons to whom the writ is directed are attempting to exercise judicial authority in the name of the King but without the royal permission, and are alleged, as *Willes* J. phrases it in *Cox's Case* (2), to "resort to force unwarranted by law."

Forms of the writ are given in the work of *Glanvill*, the Chief Justice of Henry II., at pp. 56, 57 and 97. In the first two forms the King commands the sheriff to "prohibit N., that he hold not in his Court the plea which is between M. and R." The third has reference to the Ecclesiastical Court, and there the King commands the sheriff to "prohibit such Judges lest they hold plea in the Court" &c.

Modern practice preserves the substance (see *Chitty's Forms* and *Short and Mellor on the Practice of the Crown Office*). *Willes* J. in *Cox's Case* (3) treats the Judge as the Court for the purpose, and says:—"The application may be made either against the party or the Judge to be prohibited, or both," and a few lines afterwards uses the term "the Court" as meaning the same thing.

Consequently, once it is settled that the appellate power granted to the Court does not itself contain the right to prohibit inferior tribunals, there is no inherent difficulty in applying sec. 75 (v.)

(1) L.R. 2 H.L., 239, at p. 254. (2) L.R. 2 H.L., 239, at p. 255.
(3) L.R. 2 H.L., 239, at p. 280.

to the judicial officers of Courts. It is not improper, where a statutory provision is fairly open to two constructions, to apply the test of consequences. If there were no power of mandamus or prohibition to federal Courts, either under the appellate or the original jurisdiction, justice in those Courts might easily be brought to a standstill or delayed, and a legal wrong would easily exist without a legal remedy as in *Manning's Case* (1) already cited.

On the whole, therefore, I am of opinion that, notwithstanding sec. 31 of the *Commonwealth Conciliation and Arbitration Act*, it is within the competence of this Court under sec. 75 (v.) of the Constitution to grant prohibition to the Arbitration Court in a case where that Court is proceeding to act without jurisdiction.

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

GAVAN DUFFY J. In *Whybrow's Case* (2) this Court decided that after an order and award had been made prohibition would lie from this Court to the Court of Conciliation and Arbitration restraining it from further proceeding thereon. The Court consisted of four Judges, and three of them were of opinion that prohibition would lie because the provisions of sec. 75 (v.) of the Constitution authorizing prohibition to an officer of the Commonwealth enabled prohibition to go to a federal Court. It appears to have been assumed, following a previous decision in *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (3), that the Court of Conciliation and Arbitration was a federal Court within the meaning of sec. 73 of the Constitution, but this case was much questioned in argument before us, and it was urged that the President was an officer of the Commonwealth within the meaning of sec. 75 (v.) not because it was—but because it was not—such a Court. It is enough to say that in our opinion the Court of Conciliation and Arbitration is such a Court for the purpose of exercising those functions the exercise of which is sought to be restrained in the present case, even though it may not be a Court for the purpose of making an award or of performing other functions entrusted to it by the

(1) 3 Moo. P.C.C., 154.
(2) 11 C.L.R., 1.
(3) 6 C.L.R., 309.

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Commonwealth Parliament, a matter about which we express no opinion. If that be so, there remains the question whether the Court in *Whybrow's Case* (1) was right in holding that the provisions of sec. 75 (v.) of the Constitution enable prohibition to issue to federal Courts.

The ultimate argument is put thus: The gift of judicial power in our Constitution is moulded on that in the Constitution of the United States, and any controlling or disciplinary power sought to be exercised by this Court over any other federal Court must be found in the appellate power contained in sec. 73 of the Constitution which can be withdrawn, and in this case has been withdrawn, by the Commonwealth Parliament. The provisions of sec. 75 (v.) are not intended to confer any original disciplinary power over such Courts, but are intended merely to remedy a specific defect in the American Constitution disclosed by the case of *Marbury* v. *Madison* (2), which shows that there is no jurisdiction in the Supreme Court of the United States to issue mandamus or prohibition to non-judicial officers of the Government. The words used "officer of the Commonwealth" appropriately express such an intention, but must be strained in order to make them apply to federal Courts. Finally, the collocation of the words "mandamus" and "injunction" with the word "prohibition" in the sub-section shows that it deals with individuals not Courts.

To this it is answered that *Marbury* v. *Madison* (2) and subsequent cases disclose a more serious defect in the Constitution, for they show that though the Supreme Court of the United States may issue process in the nature of mandamus and prohibition to inferior Courts as ancillary to its appellate jurisdiction, it cannot issue such writs either to Courts or to individuals as an exercise of original jurisdiction, and is powerless to check unlawful assumptions of jurisdiction unless where recourse can be had to it by way of appeal. Our Constitution, in sec. 75 (v.), confers the power wanting in the Constitution of the United States and gives original jurisdiction to this Court to control not only non-judicial officers but federal Courts exceeding their jurisdiction, whether appeal lies for them or not. The words "officer of the Commonwealth" used in it, naturally and properly

(1) 11 C.L.R., 1. (2) 1 Cranch, 137.

include both judicial and non-judicial officers, and so apply to federal Courts, for it is to the Judge presiding in a Court that the writ of prohibition is directed, and the writ of prohibition itself for all practical purposes is not applicable to any Commonwealth officer other than a judicial officer.

It is further said that if this reading of sec. 75 (v.) be not adopted the Commonwealth Parliament by taking away the right of appeal under sec. 73 will be at liberty to create tribunals which shall be competent to finally interpret the Constitution and define its limitations, a function which the Constitution clearly intended to entrust to this Court.

If this matter were *res integra* we should be disposed to adopt the argument first stated, but in the circumstances we are not disposed to overrule *Whybrow's Case* (1). We think that the words used in sec. 75 (v.) can be reasonably read as applying to judicial officers and so to Courts. If the law is clear either way, it is as a general rule our duty to expound it in that way even if in doing so we decline to follow a prior decision of this Court, but we should not interfere with settled law for light cause. We think we should be wrongly using our undoubted power if we set aside a considered decision of this Court unless we were convinced that it was wrong. We are not convinced that the decision in *Whybrow's Case* (1) is wrong, and for that reason we think it must stand.

The Commonwealth Parliament cannot take away a right granted by the Constitution. The preliminary objection must therefore fail.

POWERS J. The preliminary objection was taken by Mr. *Arthur* on behalf of the claimant Association that prohibition does not lie to the Commonwealth Court of Conciliation and Arbitration on the following grounds:—(1) This Court has no original corrective jurisdiction over inferior tribunals or federal Courts; (2) the only original jurisdiction, so far as prohibition is concerned, conferred on the High Court by the Constitution, is the original jurisdiction conferred by sec. 75 (v.), and that subsection only refers to "officers of the Commonwealth," not to

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

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judicial officers acting or assuming to act as a federal Court; (3) the President of the Commonwealth Court of Conciliation and Arbitration is not "an officer of the Commonwealth" within the meaning of sec. 75 (v.) of the Constitution; (4) (*a*) prohibition is a part of the appellate jurisdiction of the High Court, and the appellate jurisdiction of the High Court is defined by sec. 73 of the Constitution, and is subject to "such exceptions and subject to such regulations as the Parliament" of the Commonwealth "prescribes"; (*b*) although prohibition could have been granted by the High Court in the exercise of its appellate power before the *Commonwealth Conciliation and Arbitration Act* of 1904 was passed, the power of the High Court to prevent the Commonwealth Court of Conciliation and Arbitration by prohibition from proceeding in a matter in which it exceeds its jurisdiction has been excepted and taken away by sec. 31 of the *Commonwealth Conciliation and Arbitration Acts* of 1904-1911.

Sec. 31 referred to, as amended in 1911, enacts that "(1) No award or order of the Court shall be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition or mandamus, in any other Court on any account whatever."

Prior to the decision of this Court in *Whybrow's Case* (1) sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 (referred to later on as the Arbitration Act) did not contain the words "or be subject to prohibition or mandamus."

In *Whybrow's Case* (1) above referred to, Mr. *Arthur* on 20th June 1910 took the same preliminary objection as he has taken in this case, and on the same grounds (2). The matter was fully argued by counsel for the parties and by counsel for the States of New South Wales and Victoria respectively (as interveners). The Court delivered a considered judgment on 10th July following. The majority of the Court, the learned Chief Justice, my brother *Barton*, and the late Mr. Justice *O'Connor*, held that the High Court in its original jurisdiction, under sec. 75 (v.) of the Constitution, had power to grant prohibition to the President of the Commonwealth Court of Conciliation and Arbitration (referred to later on as the Arbitration Court) if he assumes powers which it is not within the competency of the Common-

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

(2) 11 C.L.R., 1, at p. 6.

wealth Parliament to confer on the Arbitration Court. The Court unanimously held, but on different grounds, that sec. 31 as it then stood did not take away the power of the High Court to control the President of the Arbitration Court by means of a writ of prohibition where there was a want or excess of jurisdiction.

There has not been any alteration in the Constitution since that decision was given. The *Judiciary Act*, by which original jurisdiction in matters referred to in sec. 76 of the Constitution was conferred on the High Court, has not been amended in any way that could possibly affect this question; but sec. 31 of the Arbitration Act has since been amended in the way referred to.

Mr. *Arthur*, during the argument in the present case, in referring to *Whybrow's Case* (1), admitted that if the decision of the majority of this Court in that case was not clearly wrong, the preliminary objection must fail, notwithstanding the amendment of sec. 31 since the date of that judgment, because the Commonwealth Parliament could not take away jurisdiction directly conferred on the High Court by the Constitution as original jurisdiction.

The questions for this Court to consider therefore are :—Does prohibition lie to the Arbitration Court from this Court (1) under the original jurisdiction conferred on this Court by the Constitution under sec. 75 (v.), or (2) under the original jurisdiction conferred by the Commonwealth Parliament on the High Court by the *Judiciary Act* 1903 (secs. 30 to 38 inclusive) under the powers contained in sec. 76 of the Constitution, notwithstanding sec. 31 of the Arbitration Act, or (3) under the appellate jurisdiction conferred on the High Court by the Constitution under sec. 73, notwithstanding sec. 31 of the Arbitration Act ?

As to question 1.—I hold that prohibition does lie to the President of the Arbitration Court under the original jurisdiction conferred on this Court by the Constitution in sec. 75 (v.).

I agree with the reasons given by the majority of this Court in *Whybrow's Case* (1) (including those in the judgment of the late Mr. Justice *O'Connor*). I have had the privilege of reading the judgments just delivered by the learned Chief Justice and

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

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my brother *Barton* on this question, and I agree with the reasons given by them in the judgments just delivered for holding that prohibition does lie to the President.

Great stress was laid on the use of the words "officer of the Commonwealth" in another part of the Constitution, sec. 51 (xxxix.), where the words clearly do not apply to the federal judiciary. In my opinion in sec. 51 (xxxix.) the words apply only to officers of the Commonwealth as officers of a department of the public service. In sec. 75 (v.), however, the same words used in connection with "prohibition" must necessarily refer to officers of the Commonwealth holding judicial or quasi-judicial offices.

As to questions 2 and 3.—As this Court is unanimous on the answer to the first question, I agree that it is not necessary to answer question 2 or 3. The power directly conferred on the High Court by the Court *as original jurisdiction* cannot be taken away by the Commonwealth Parliament.

It is also unnecessary now to consider whether certiorari could be granted to bring up the award to be quashed.

Referring to the remarks of all my colleagues about reversing judgments of this Court, I hold the opinions I expressed last year in Sydney. In September last in the case of *Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia* (1) in delivering my judgment I said:—"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"—except the House of Lords. "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 deci-

(1) 17 C.L.R., 261, at p. 292.

sions, no counsel will feel safe in advising the public, and it will create uncertainty and confusion."

It is in that light I regard the decision in *Whybrow's Case* (1). The decision in that case stands as the decision of this Court, followed on two occasions since the amendment of sec. 31—namely, in the *Tramways Case* (2) and in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (3). Under those circumstances I think it would have to be shown that the decision was clearly wrong, and, as it has been followed by this Court in other cases, that it would be in the interests of the public to reverse it.

As to *Ah Yick's Case* (4), that judgment was delivered by two Justices of the Court only. In *Whybrow's Case* (1) the Court consisted of all the Justices of this Court who could sit on the application. The case was very fully argued. Both parties and the two States of Victoria and New South Wales were represented by counsel. The judgments were considered judgments delivered more than two weeks after the preliminary objection was taken.

Even if there is any inconsistency in the reasons given in the two judgments, under the circumstances I have no hesitation in following the later judgment.

For the reasons given, I agree that the preliminary objection fails.

Objection overruled.

Solicitors, for the Brisbane Tramways Co. Ltd., *Blake & Riggall* for *Thynne & Macartney*, Brisbane.

Solicitor, for the Municipal Tramways Trust, Adelaide, *T. S. O'Halloran.*

Solicitors, for the Australian Tramway Employees Association, *Brennan & Rundle.*

Solicitor, for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) 11 C.L.R., 1.
(2) See 15 C.L.R., at p. 606.
(3) 15 C.L.R., 586.
(4) 2 C.L.R., 593.