ascertain the value, or, if the shipper declines to state the true value, from fixing by the contract a value which both parties under the contract may be taken to agree to accept as the value.

I am of opinion that the liability of the defendants on the facts of this case is limited to £10, and that the judgment of the Court should be reduced from £12 17s. 6d. to £10.

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AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Appeal allowed. Judgment appealed from discharged. Judgment entered for defendants. Appellants to pay costs of appeal.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondent, *Leach & Thomson.*

Dist *Alexander* v *Australian National Airlines Commission* 89 FLR 320

Foll *Nunn* v *Chubb Australia Ltd* [1986] TasR 183

Cons *Alexander* v *Australian National Airlines Comm* [1988] 1 QdR 331

Dist *Alexander* v *Australian National Airlines Commission* 74 ALR 285

Appl *Health Insurance Commission* v *Peverill* (1994) 119 ALR 675

Cons *Gooley* v *Westpac Banking Corporation* (1995) 129 ALR 628

Appl *Construction, Foresty, & Energy Union* v *Gordonstone Coal M'ment* (1997) 149 ALR 296

B. L.

Cons *Makucha* v *Albert Shire Council (No2)* [1995] 1 QdR 518

Foll *Byrne & Frew* v *Australian Airlines Ltd* (1995) 131 ALR 422

Appl *Byrne & Frew* v *Australian Airlines Ltd* (1995) 69 ALJR 797

Appl *Byrne & Frew* v *Australian Airlines Ltd* (1995) 185 CLR 410

Refd to *Kinzett* v *McCourt* (1999) 46 NSWLR 32

Discd *Aust Communications Authority* v *Viper Communications* (2001) 110 FCR 380

Discd *Pangallo* v *Actew Corp* (2002) 168 FLR 245

Appl *Actew Corp* v *Pangallo* (2002) 127 FCR 1

Appl *Construction, Forest, Min & Energy Union* v *Gordonstone Coal M'ment* (1997) 78 FCR 437

[HIGH COURT OF AUSTRALIA.]

JOSEPHSON . . . . . APPELLANT;
DEFENDANT,

AND

WALKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Nov.* 16, 17.

Griffith C.J., Isaacs and Powers JJ.

Industrial Arbitration—Obligation imposed by Statute—Mode of enforcement—Rate of wages fixed by award—Recovery of difference between wages paid and those payable under award—Jurisdiction of Supreme Court—Industrial Arbitration Act 1912 (*N.S.W.*) (*No.* 17 *of* 1912), *secs.* 49, 55, 58.

Sec. 49 of the *Industrial Arbitration Act* 1912 provides that "(1) Where an employer employs any person to do any work for which the price or rate has

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been fixed by an award" (of the Court of Industrial Arbitration) ". . . he shall be liable to pay in full in money to such person and without any deduction the price or rate so fixed. (2) Such person may, within six months after such money has become due, apply in the manner prescribed to the registrar or to an industrial magistrate for an order directing the employer to pay the full amount of any balance due in respect of such price or rate. Such order may be so made notwithstanding any smaller payment or any express or implied agreement to the contrary. The registrar or magistrate may make any order he thinks just, and may award costs to either party, and assess the amount of such costs. (3) Such person may, within the said period of six months, in lieu of applying for an order under the last preceding sub-section, sue for any balance due as aforesaid in any District Court or Court of Petty Sessions: Provided that any person feeling himself aggrieved by a judgment or order of such Court given or made under this sub-section may appeal therefrom to the Court of Industrial Arbitration as prescribed."

By sec. 55 an exclusive appeal from an order of the registrar or of an industrial or other magistrate or justices made under the Act lies to the Court of Industrial Arbitration; and

By sec. 58 the decisions of that Court are made final and subject to no appeal.

Held, that the mode specified in sec. 49 of enforcing the obligation imposed upon an employer by that section is exclusive; and, therefore, that an action by an employee to recover from an employer the difference between the wages actually paid in accordance with their agreement and those payable under an award will not lie in the Supreme Court.

Ex parte Brandt, 12 S.R. (N.S.W.), 105, discussed.

Decision of the Supreme Court of New South Wales: *Walker* v. *Josephson*, 13 S.R. (N.S.W.), 550, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by James Walker against Sydney Arthur Josephson, in which by the declaration it was alleged that the plaintiff sued the defendant "for that the defendant employed the plaintiff to do the work of a journeyman plumber in a certain district and the said employment continued for a long time and thereby a certain rate of wages became due and payable by the defendant to the plaintiff in respect of the said employment by virtue of the Statutes in that behalf made and provided and by virtue of certain awards fixing and determining the said rate of wages due and payable for the said employment duly made under and in accordance

with the said Statutes and duly published yet the defendant in breach of the said Statutes and of the said awards paid the plaintiff a rate of wages lower than that fixed and determined and made payable by the said Statutes and the said awards in respect of the said employment and a certain balance that is to say £118 6s. remains due and payable by the defendant to the plaintiff." The plaintiff claimed £118 6s.

The defendant demurred to the declaration on the ground that the Supreme Court had no jurisdiction to entertain the cause of action sued upon.

The Full Court gave judgment for the plaintiff on the demurrer, holding that they were bound by the decision in *Ex parte Brandt* (1): *Walker* v. *Josephson* (2).

From that decision the defendant now, by special leave, appealed to the High Court.

Brissenden (with him *Sanders*), for the appellant. Where a Statute imposes a new obligation and also specifies a mode of enforcing it, that mode is the only one that can be adopted: *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (3); *Pasmore* v. *Oswaldtwistle Urban Council* (4); *Devonport Corporation* v. *Tozer* (5); *Institute of Patent Agents* v. *Lockwood* (6).

[GRIFFITH C.J. referred to *Barraclough* v. *Brown* (7).]

The money claimed to be due is due, as is alleged by the declaration, under and by virtue of the *Industrial Arbitration Act* 1912 (*Cork and Bandon Railway Co.* v. *Goode* (8)), and the remedy prescribed by that Statute in sec. 49 is exclusive. *Ex parte Brandt* (1), even if rightly decided, is distinguishable, and does not govern this case. That case was decided under sec. 41 of the *Industrial Disputes Act* 1908, under which the only mode prescribed of enforcing the obligation was by proceedings in the Court of Industrial Arbitration, which only sits in Sydney, and the limitation of the time for taking proceedings was three months. Under sec. 49 of the Act of 1912, however, the obligation may be

(1) 12 S.R. (N.S.W.), 105.
(2) 13 S.R. (N.S.W.), 550.
(3) 9 C.L.R., 378.
(4) (1898) A.C., 387.
(5) (1902) 2 Ch., 182.
(6) (1894) A.C., 347.
(7) (1897) A.C., 615.
(8) 22 L.J.C.P., 198.

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enforced by proceedings before the registrar of the Court of Industrial Arbitration, before an industrial magistrate, before a District Court or before a Court of Petty Sessions, and the period of limitation is extended to six months; so that the remedy given by that section is ample. Sec. 49 was passed after the decision in *Ex parte Brandt* (1), and indicates an intention to make the particular mode of enforcing the obligation exclusive if it was not exclusive before. If that procedure is followed an appeal lies only to the Court of Industrial Arbitration, whose decisions are final and not subject to any appeal: See secs. 55, 58. The object of the legislature was that all questions as to the proper rates of wages to be paid to employees under awards should be determined by that Court only.

Perry (with him *Addison*), for the respondent. There is no difference in principle between sec. 41 of the Act of 1908 and sec. 49 of the Act of 1912. Sec. 49 creates no new obligation, but only additional remedies to those existing at common law: *Ex parte Finneran* (2). The obligation to pay wages arises by implication from the request to do particular work and the doing of it. At common law it was for a jury to say what were reasonable wages for that work. Sec. 49 only took away from the jury the right to say what were reasonable wages, but an action still lies in the Supreme Court upon the contract to recover wages at the rate fixed by the section.

Brissenden, in reply.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court overruling a demurrer to a declaration.

The declaration alleges that "the defendant employed the plaintiff to do the work of a journeyman plumber in a certain district and the said employment continued for a long time and thereby a certain rate of wages became due and payable by the defendant to the plaintiff in respect of the said employment by virtue of the Statutes in that behalf made and provided and by virtue of certain awards fixing and determining the said rate of

(1) 12 S.R. (N.S.W.), 105. (2) 14 W.N. (N.S.W.), 104.

wages due and payable for the said employment duly made under and in accordance with the said Statutes and duly published." That is clearly an action upon the Statute, as in the case of *Cork and Bandon Railway Co.* v. *Goode* (1) cited by Dr. *Brissenden*. The Supreme Court held that the declaration was good, considering that they were bound by a previous decision of the Full Court in *Ex parte Brandt* (2). The Statute upon which the declaration is founded is the *Industrial Arbitration Act* 1912, which, by sec. 49, provides that "(1) Where an employer employs any person to do any work for which the price or rate has been fixed by an award, ... he shall be liable to pay in full in money to such person and without any deduction the price or rate so fixed."

The ground of the demurrer is substantially that an action will not lie in the Supreme Court, that the obligation sought to be enforced is an obligation created by Statute, and that the general rule is that where a Statute creates a new obligation and provides a special mode of enforcing it, no other Court has jurisdiction to enforce that obligation. The case generally referred to to establish that rule is *Pasmore* v. *Oswaldtwistle Urban Council* (3). I quote from the speech of the *Earl of Halsbury* L.C.:—"The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord *Tenterden* accurately states that principle in the case of *Doe* v. *Bridges* (4). He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' The words which the learned Judge, Lord *Tenterden*, uses there appear to be strictly applicable to this case. The obligation which is created by this Statute is an obligation which is created by the Statute and by the Statute alone. It is nothing to the purpose to say that there were other Statutes which created

(1) 22 L.J.C.P., 198.
(2) 12 S.R. (N.S.W.), 105.
(3) (1898) A.C., 387, at p. 394.
(4) 1 B. & Ad., 847, at p. 859.

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similar obligations, because all those Statutes are repealed; you must take your stand upon the Statute in question, and the Statute which creates the obligation is the Statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department."

I have already read the first paragraph of sec. 49. If that paragraph stood alone, a new obligation would be created, and if nothing more were said that obligation could be enforced in any Court of competent jurisdiction. Stopping there, and before reading the rest of sec. 49, I will point out the nature of the obligation which is imposed. It is an obligation which does not depend upon the agreement of the parties at all. In the ordinary case of an award by arbitrators appointed by the parties the obligation created is one arising out of contract. It is founded upon the submission, by which the parties agree to be bound by the decision of the arbitrators. But in this case that which is called an award is of an entirely different character. The obligation created by it does not depend upon any agreement of the parties express or implied, and may arise without their knowledge. If by the award it is determined that journeymen plumbers shall receive not less than a certain rate of wages, each journeyman plumber is entitled to those wages, and, although the employer and the employee have gone on for a long time the one paying and the other receiving what each honestly believes to be the proper rate of wages, nevertheless if it is afterwards found that the wages paid are less than those fixed by the award, the right of the employee to receive the wages so fixed has accrued.

I will now read pars. 2 and 3 of sec. 49:—"(2) Such person may, within six months after such money has become due, apply in the manner prescribed to the registrar or to an industrial magistrate for an order directing the employer to pay the full amount of any balance due in respect of such price or rate. Such order may be so made notwithstanding any smaller payment or any express or implied agreement to the contrary. The registrar or magistrate may make any order he thinks just, and may award costs to either party, and assess the amount of such costs. (3) Such person may, within the said period of six

months, in lieu of applying for an order under the last preceding subsection, sue for any balance due as aforesaid in any District Court or Court of Petty Sessions: Provided that any person feeling himself aggrieved by a judgment or order of such Court given or made under this sub-section may appeal therefrom to the Court of Industrial Arbitration as prescribed." By sec. 55 an appeal is given from an order of the registrar or any industrial or other magistrate or justices under the Act to the Court of Industrial Arbitration, and proceedings by way of appeal from justices are to be taken in the same way as appeals from justices to the Supreme Court. That section also provides that "no other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed." The effect of these provisions is that every case may come in one way or another before the Court of Industrial Arbitration, which is a Court from which no appeal lies, and which cannot be controlled by any other Court. Under those circumstances I think that the general rule applies. A new obligation is created and a special mode of enforcing it is given. That mode, according to the general rule, is exclusive of any other mode of enforcing it. That is sufficient to dispose of this case.

It may be that the rule is not one of universal application, but only amounts to a very strong presumption which may be rebutted if there are sufficient grounds for thinking that the language of the Act itself shows that the legislature intended that the mode of enforcing the obligation should not be the only mode, but that the party should also be entitled to have recourse to any ordinary means of enforcing it under the general law. In this case, however, having regard to the peculiar nature of the obligation there seem to be very special reasons, not only for appointing a special tribunal, but also for limiting the time within which the obligation may be enforced. Very difficult questions often arise as to what is the proper rate of wages of a particular workman. He may think that he is receiving the proper rate and the employer may think that he is paying it. But some other person may interfere and prosecute the employer for not paying the proper rate, and the employer, notwithstanding that he thinks he has been paying the proper rate,

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may be fined and ordered to pay the difference between the wages paid and those payable under the award. That is a very serious obligation to be hung over a man, and if it were to hang over him for six years, or possibly, as Dr. *Brissenden* has pointed out, for twenty years, no employer would know where he was. He might estimate his profits from year to year on the basis of the wages he had been paying, and then at the end of a period of years discover that the wages he had been paying were less than those fixed by the award and that those profits had disappeared. There is therefore ample reason for imposing a limitation upon the time within which the remedy may be enforced, apart from the difficulty of knowing what exactly is the work of, for instance, a journeyman plumber and that of a solderer. Moreover, the whole scheme of the Act seems to be to leave the determination of these questions in the hands of the special tribunal, the Court of Industrial Arbitration. So far from there being reasons for not restricting the mode of enforcing the obligation, there are very strong reasons for saying positively that it was intended by the legislature that the mode of enforcing it stated in sec. 49 should be exclusive.

Ex parte Brandt (1) was decided under sec. 41 of the *Industrial Disputes Act* 1908. The first paragraph of that section corresponds with the first paragraph of sec. 49 of the Act of 1912, but the provisions made by sec. 41 for enforcing the obligation were of a very different character. The time limited for taking proceedings was three months instead of six months, and the only tribunal to which jurisdiction was given was the Court of Industrial Arbitration. That Court only sits in Sydney, and as the awards apply to the whole State, the mode of enforcing the obligation might be said to be almost illusory if it was limited to that Court. It would practically deprive employees in the country of any remedy. In addition to the impossibility or great difficulty of getting to the Court within the time limited, there was the difficulty of bringing a claim before one single Court in which the claims might be numbered by thousands and whose business was said to be very congested. The learned Judges in *Ex parte Brandt* (1) appear to have

(1) 12 S.R. (N.S.W.), 105.

thought that the remedy given by sec. 41 was so illusory as to justify them in saying that it was not intended to be exclusive. I express no opinion as to whether that argument is sound, but it is one that any Court would be anxious to support. That decision, however, has no application to the present case, which must be decided upon the existing Statute and not upon that which was repealed. All the arguments founded upon sec. 41 of the repealed Act have been removed by sec. 49 of the present Act. The remedy is now ample and complete, and there is no reason why the general rule should not apply.

For these reasons I think that the Supreme Court has no jurisdiction to entertain the claim made by the declaration, and that the demurrer should have been allowed, and the appeal should succeed.

ISAACS J. read the following judgment:—I am of the same opinion.

The Supreme Court started with the decision in *Ex parte Brandt* (1), and held that the present case was governed by that decision. The appellant challenges its correctness, but we are not called upon to say whether *Brandt's Case* was well decided or not. I say nothing on that point one way or the other, though there were certain strong reasons for supporting it. But, assuming it was rightly determined, it was so upon the special terms of the Act of 1908. Inconvenience of two rights or remedies co-existing was held by Lord *Cranworth* L.C. in *O'Flaherty* v. *McDowell* (2), following earlier authority, to be a legitimate ground for ascertaining the intention of Parliament that one of them should no longer exist. But that entirely depends upon the terms of the particular enactment. Now, the provisions of the Act of 1912 are markedly different in respect of the very groundwork of inconvenience which formed the *ratio decidendi* of *Brandt's Case* (1). And when after a decision Parliament deliberately alters its language with regard to the subject matter of the decision, it cannot be said without interpreting the later enactment that there is a legislative intention to preserve the original state of the law.

(1) 12 S.R. (N.S.W.), 105. (2) 6 H.L.C., 142, at p. 157.

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This case, then, must be determined independently of *Brandt's Case* (1), and upon a consideration of the terms of the present Act.

Now, first of all, we have to see what the claim is. It is an action to enforce payment of moneys due to the plaintiff, not by virtue of any contract, express or implied, but by virtue of a statutory obligation. I do not say that by reason of the existence of that statutory obligation a contract might not be implied, if the circumstances permitted it. If a workman were engaged to do a specific class of work to which an award attached a specific rate of pay, and nothing were said between employer and employee as to the rate of pay, it would, in my opinion, afford ground for an inference that both parties tacitly agreed to the specified rate of payment. And the declaration in such case would be based on the common law contract, leaving the circumstances to be proved as evidence in support of the allegation. Such a case might still be within the jurisdiction of the Supreme Court. It is not necessary to say whether it would or not.

But the present case is avowedly not based on contract at all. For a considerable time wages were paid and accepted as correct on a lower basis than, as is now considered by the plaintiff, the award attaches to the class of work done. And the unpaid balance is claimed as due by virtue, not of a common law contract, but of the statutory obligation which subsists notwithstanding any agreement to the contrary—no man being capable under the Statute of contracting himself out of his rights or obligations in this respect. The right claimed is a new right. It is a right which was unknown before to the law: a right to receive from an employer more than was bargained for. Parliament has on the ground of public policy found that that is a just and a necessary right. But it is a new one. And in the same section we find that Parliament has also enacted a new and special mode of enforcing that right. If the right had been simply created and no specific method of enforcement had been pointed out, the existing law itself would have provided a method through any Court already invested with jurisdiction to determine a claim of that nature (*Doe d. Bishop of Rochester* v. *Bridges* (2)). But a

(1) 12 S.R. (N.S.W.), 105.

(2) 1 B. & Ad., 847, at p. 859.

specific method having been created, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule, but upon the intention of Parliament appearing from the Act.

Primâ facie, where the same Statute creates a new right and specifies the remedy, that remedy is exclusive. The natural presumption to begin with is that Parliament in creating the novel right attaches to it the particular mode of enforcement as part of its statutory scheme. To that extent the enactment is a code. *Pasmore's Case* (1) is the leading authority. In *Barraclough* v. *Brown* (2) it was held that "where a Statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a Court of summary jurisdiction: he can only take proceedings in the latter Court." Lord *Herschell* said (3):—"The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is 'to recover such expenses from the owner of such vessel in a Court of summary jurisdiction.' I do not think the appellant can claim to recover by virtue of the Statute, and at the same time insist upon doing so by means other than those prescribed by the Statute which alone confers the right." Lord *Watson* said (4):—"The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary Court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other Court has any authority to entertain or decide these matters."

But on examination of the legislation, the legislative intention may be found to be different. In *Brain* v. *Thomas* (5) Lord

(1) (1898) A.C., 387.
(2) (1897) A.C., 615.
(3) (1897) A.C., 615, at p. 619.
(4) (1897) A.C., 615, at p. 622.
(5) 50 L.J.Q.B., 662, at p. 663.

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Selborne L.C., in speaking of a rule on conduct made under a certain Statute, said:—"The next argument was that the rule does not give any person who may be injured by its non-observance any remedy by way of damages against any person or persons who have not observed it. The ground is said to be that where a Statute creates an offence, and defines particular remedies against the person committing that offence, *primâ facie* the party injured can avail himself of the remedies so defined, and no other. I see no reason to call that rule in question. But it must be examined with reference to the terms in which the Statute deals with the subject."

So that the terms of this Statute must be looked at. If the fair reading of the Statute leads to the view that Parliament intended to create the right absolutely and independently of any specific form of remedy, the respondent's action is well brought. If on the other hand the proper construction is that the right and the remedy are inseparable, that they are combined and essential parts of a new scheme of public policy, then the action is wrongly conceived and the demurrer is right.

Reading sec. 49 of the Act of 1912, I come to the conclusion that the latter is the true construction. The group of sections, 49 to 52 inclusive, is headed "Breaches of awards and other offences," and the sub-heading of sec. 49 itself is "Payment of wages awarded." That helps to indicate that Parliament was proceeding to deal in Part VII. in the fashion of a code with breaches of awards, and in sec. 49 with the subject of payment of wages awarded including the provisions for an ultimate appellate tribunal specially fitted to work out the provisions of the Act, and the awards made under it. I cannot read the first sub-section of sec. 49 as entirely separable from sub-secs. 2, 3, and 4. It is the foundation of the remedial rights given in those sub-sections. Those rights are free from all the inconvenience pointed out in *Brandt's Case* (1), and the analogy between the law then existing and the present law fails. It is also in the highest degree improbable that the period of six months as a limitation would have been inserted if a period of six years, or possibly twenty years, were intended to be preserved. The

(1) 12 S.R. (N.S.W.), 105.

limitation of six months—extended from three months in the earlier section—is obviously for the purpose of affording underpaid employees a reasonable time to obtain arrears and at the same time of guarding against employers being ruined by an undue accumulation of stale claims, as to which there would be enormous difficulty in preserving evidence. That limitation is, in my opinion, a condition of enforcement of the right given by sub-sec. 1, and, if so, it ends the matter, because it is inconsistent with any action in the Supreme Court.

The fundamental notion on which the action was started, was that the Act left the contract of employment as at common law, but merely affixed a statutory rate of wages, and also provided an optional method of enforcement. That being erroneous, as the right to the statutory rate of wages is not part of the contract, but a new right with an inseparable new remedy, and the declaration being rested purely on the new right, the demurrer ought to prevail, and the appeal should succeed.

POWERS J. read the following judgment:—I agree that in this case, as the obligation was created by the Statute and a specific and sufficient mode of enforcing it has been provided by that Statute, and there is not anything in the Act to show that it was not intended to be exclusive, the obligation can only be enforced in the mode provided by the Statute. I agree that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Judgment for the defendant.

Solicitor, for the appellant, *F. Wegg Horne.*
Solicitor, for the respondent, *P. J. Clines.*

B. L.