[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE PRESIDENT OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE FEDERATED ENGINE DRIVERS' AND FIRMEN'S ASSOCIATION OF AUSTRALASIA.

Ex parte THE AUSTRALIAN AGRICULTURAL COMPANY LIMITED AND OTHERS.

H. C. of A. 1916.

MELBOURNE, *Oct.* 11, 12.

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

Prohibition—Commonwealth Court of Conciliation and Arbitration—Want of jurisdiction—Existence of dispute—Plaint in respect of matters covered by award and agreements.

On an order *nisi* in the High Court for prohibition to the President of the Commonwealth Court of Conciliation and Arbitration against proceeding upon a plaint by an organization of employees against a number of employers on the ground that there was no jurisdiction to entertain the plaint inasmuch as the matters claimed by the plaint were covered by a subsisting award of the President or by subsisting industrial agreements registered under the *Commonwealth Conciliation and Arbitration Act*, so that no dispute existed,

Held, that prohibition should not go :

By *Griffith* C.J. and *Barton* J., on the ground that as the plaint related to a subject over which, on the face of the plaint, the President had jurisdiction, the grounds relied on for prohibition were matters of defence on the merits and not a plea to jurisdiction ;

By *Isaacs*, *Gavan Duffy* and *Rich* JJ., on the ground that a clear case of want of jurisdiction had not been made out.

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ORDER *nisi* for prohibition.

An order *nisi* was on 12th September 1916 obtained by the Australian Agricultural Co. Ltd. and a number of other companies and firms and individuals, all of whom carried on business in New South Wales, calling upon the President of the Commonwealth Court of Conciliation and Arbitration and the Federated Engine Drivers' and Firemen's Association of Australasia, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act*, to show cause why a writ of prohibition should not issue directed to the President prohibiting the Arbitration Court from proceeding with the hearing of a certain plaint, No. 24 of 1915, filed in that Court by the Association. The grounds were :—

"1. That there is no industrial dispute between the said" Association "and the said applicants extending beyond the limits of any one State existing at the present time. If the original dispute existing at the date of the filing of the said plaint extended into two States, the agreements completed have now left the dispute as a dispute existing only in the State of New South Wales.

"2. That the said applicants and the said" Association "are already bound by an award and certified agreements under sec. 24 of the *Commonwealth Conciliation and Arbitration Act* which are still in force and unexpired, and which cover the subject matters of the dispute alleged in the said plaint and the amendment."

In 1910 the Association had instituted a plaint, No. 6 of 1910, in the Arbitration Court against a large number of persons, firms and companies including the present applicants, upon which, on 20th November 1913, the President had made an award binding a large number of the respondents to the plaint including some of the present applicants but not others of them. That award was to come into operation on 27th November 1913, and was to continue in force for five years. It fixed the rates of wages for different specified classes of employees, the hours of labour and certain conditions of employment. Some of the present applicants who were not bound by the award in 1913 and 1914 entered into agreements with the claimant Association, which were certified and filed pursuant to the *Commonwealth Conciliation and Arbitration Act.*

By those agreements, which were to continue in force during substantially the same period as the award, the rates of wages and conditions of employment fixed by the award were adopted. On 24th August 1915 the Association filed the plaint No. 24 of 1915 in the Arbitration Court to which a large number of companies, firms and individuals, including the present applicants, were made defendants. Early in 1916 the President, pursuant to a motion by the Commonwealth Government, made an award as to wages and hours of labour binding upon those of the respondents to the plaint No. 24 of 1915 who carried on mining operations at Broken Hill in New South Wales and smelting operations at Port Pirie in South Australia, and upon their employees.

It was now alleged on behalf of the applicants that the claims made by the plaint of 24th August 1915 were in respect of matters which had been dealt with by the award of 20th November 1913 and by the several agreements hereinbefore referred to.

J. A. Ferguson, for the Federated Engine Drivers' and Firemen's Association of Australasia, showed cause.

Starke, for the applicants. If it be shown clearly that the whole of the claims made by the plaint of 24th August 1915 are covered by the award of 20th November 1913 and the agreements adopting it, then there is no dispute existing, and the Arbitration Court has no jurisdiction to proceed with the plaint, and prohibition should go. The grant of prohibition is not a matter of discretion or of course, but it is a matter of right on showing that the Court has no jurisdiction to proceed.

[ISAACS J. referred to *Mayor &c. of London* v. *Cox* (1).]

On the evidence the subject matter of the present plaint is covered by the award and agreements.

Ferguson was not called upon to reply.

GRIFFITH C.J. This application is for a prohibition directed to the President of the Commonwealth Court of Conciliation and

(1) L.R. 2 H.L., 239, at pp. 284 *et seqq.*

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Arbitration to prevent him from entertaining a plaint depending in that Court, No. 24 of 1915, which alleged the existence of a dispute extending beyond the limits of one State. The plaint is good upon its face. The present applicants, who are respondents to that plaint, now ask for a prohibition on the ground that there is no dispute now existing which extends beyond one State, since, if there ever was such a dispute, it had before the date of the plaint been settled by an award then in force and by certain agreements having the effect of awards which were then in force. This is the substance of the two grounds set out in the order *nisi*. It now appears that the reference to the alleged agreements is inaccurate, and that what really happened was the making of another award by the Court upon a reference after a compulsory conference. Those allegations may or may not be true. The plaint on its face is good, but, if these allegations are true, it is inconceivable that the Court will entertain it, if it thinks that the awards operate as a judicial determination of the present question between the parties which should prevent it from being raised afresh. That is a matter, partly of mixed law and fact which I think the Court has jurisdiction to determine, and partly of discretion. The rule as laid down by Lord *Cranworth* in *Mayor &c. of London* v. *Cox* (1) is that " where an inferior Court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior Court sets up a defence on some ground raising an issue which the inferior Court is incompetent to try." This doctrine does not, of course, extend to want of jurisdiction arising from the absence of extrinsic facts essential to the existence of the jurisdiction.

In this case the plaint relates to a subject over which, on the face of the plaint, the Arbitration Court has jurisdiction. It is alleged that the jurisdiction has been ousted by reason of a judicial determination between the same parties. Such a defence is not really a plea to the jurisdiction, but a defence on the merits. In my opinion the defence of *res judicata* may be entertained and decided by any Court in which it is pleaded. It may be that in one view of the law such a defence cannot be pleaded to a plaint

(1) L.R. 2 H.L., 239, at p. 293.

in the Arbitration Court. That is a possible view, but we are not called upon to decide that point now. Assuming that the defence of *res judicata* can be set up I cannot doubt that the President has jurisdiction to deal with it. I cannot conceive how any Court of Justice can be incompetent to entertain such a plea. I have listened with surprise—if, indeed, I can be surprised at any argument in this Court—to an argument which denies the jurisdiction of the Arbitration Court to say whether, if on the day before it had decided the same point between the same parties, it could entertain the defence of *res judicata*. If the President determines it wrongly against the respondents they will be in no worse a position than they are now. If he determines it rightly in their favour no more will be heard of the case. Apart from the question of the legal effect of such a plea if established, I cannot suppose that the President, having once decided a matter, will proceed to decide it over again. Until the defence has been set up in the Arbitration Court I do not think that this Court can grant a prohibition to prevent the Court from going on to deal with a case which, on the face of the proceedings, is within the jurisdiction of the Court. The case of *South Eastern Railway Co.* v. *Railway Commissioners* (1) is in accord with this conclusion.

For these reasons I think that the rule *nisi* should be discharged.

BARTON J. I agree.

ISAACS J. This is an application for a prohibition to the President of the Commonwealth Court of Conciliation and Arbitration. That Court is not a tribunal created under the judicial power of the Commonwealth at all, but it is a tribunal erected by the Commonwealth Parliament by virtue of sec. 51 (xxxv.) of the Constitution to settle industrial disputes extending beyond the limits of any one State. The Parliament has passed an Act giving that tribunal power to settle disputes, but conditional upon the disputes existing. That has been laid down by this Court more than once. It is perfectly plain to me that unless there is a dispute existing that Court has no jurisdiction to do anything as an Arbitration Court, although

(1) 6 Q.B.D., 586.

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it has certain functions conferred upon it for enforcing an award already made. But for making an award its power of moving is entirely conditional upon the existence of a dispute. It may, of course, for the purpose of the day, conclude there is a dispute and proceed, but that is subject to legal examination in the ordinary way.

The applicants come forward to this Court and say that the condition does not exist. They say that it does not exist because the dispute which formerly existed has ended. I do not call the way it ended a *res judicata* at all, because no Court of Justice has ever dealt with it. The question is whether it still exists or has ceased to exist. If Mr. *Starke* had convinced me that there was no dispute in existence at the present time, I should have felt myself bound, in accordance with the law laid down in *Mayor &c. of London* v. *Cox* (1), to assent to his application for a prohibition. In addition to the passages I have read from the judgment of *Willes* J., I will read another (2) :—" As to the practice since the Statute 1 Will. IV. c. 21, it has been uniform to the effect that prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the Court below, or even after a plea therein giving the go-by to that question. It was so decided by Justice *Wightman*, in the case of a prohibition to the County Court : *Sewell* v. *Jones* (3); and such has been the constant practice in like cases." Therefore I should have felt bound to issue a prohibition. But the ground upon which I agree to the refusal is that laid down by *Jervis* C.J. in *In re Birch* (4) : " A prohibition is not a matter of absolute right : the party asking for it is bound to make out a clear case." By " a matter of absolute right " he means " a matter of course." *Cresswell* J. said (5) : " We are not bound to grant a prohibition . . . unless we are *clearly satisfied* that the inferior jurisdiction is about to exceed its powers." That, I understand, is clear, and in *Farquharson* v. *Morgan* (6) Lord *Halsbury*, *Lopes* L.J. and *Davey* L.J. laid it down most emphatically that prohibition is not a matter of discretion. If want of jurisdiction is shown, then prohibition must go.

(1) L.R. 2 H.L., 239.
(2) L.R. 2 H.L., at p. 291.
(3) 1 L. M. & P., 525.
(4) 15 C.B., 743, at p. 755.
(5) 15 C.B., at p. 756.
(6) (1894) 1 Q.B., 552.

On the single ground, therefore, that Mr. *Starke* has not clearly satisfied me that jurisdiction would be exceeded, I agree that the application should be refused.

GAVAN DUFFY J. Mr. *Starke* has not succeeded in convincing me that there is not a dispute sufficient to give jurisdiction to the Commonwealth Court of Conciliation and Arbitration. That in itself is enough to make me think that the order should be discharged. In the circumstances it is unnecessary for me to express any opinion on the general law of prohibition.

RICH J. In my opinion the rule should be discharged on the ground that the applicants have not made out a clear case of want of jurisdiction.

Order nisi discharged with costs.

Solicitors for the applicants, *Hedderwick, Fookes & Alston*, for *Sly & Russell*, Sydney.

Solicitor for the respondent Association, *H. H. Hoare.*

B. L.