H. C. OF A. 1917.

SANDS & MCDOUGALL PROPRIETARY LTD. v. ROBINSON.

We agree that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell*, Melbourne, by *Macnamara & Smith.*

Solicitor for the respondent, *P. J. O'Donnell.*

B. L.

Cons Taxes, Commissioner of (NT) v Tangentyere Council Inc (1992) 2 NTLR 76

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[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN SUGAR PRODUCERS' ASSOCIATION LIMITED . . . PROSECUTORS, } APPELLANTS;

AND

THE AUSTRALIAN WORKERS' UNION . DEFENDANTS, } RESPONDENTS.

H. C. OF A. 1916-1917.

1916. SYDNEY, *Nov.* 27; *Dec.* 7, 8, 22.

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

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

*Practice—High Court—Extra-judicial opinion—Public urgency.*

1917. MELBOURNE, *Jan.* 3, 4, 5, 11.

Griffith C.J., Barton, Isaacs, Higgins, Powers and Rich JJ.

*Employer and Employee—Award—Validity—Retrospective award—"Industrial matters"—Food for employees—Jurisdiction—Severability—Industrial Peace Act* 1912 (*Qd.*) (3 *Geo.* V. *No.* 19), *secs.* 3, 6, 7, 13, 16, 31—*Industrial Arbitration Act* 1916 (*Qd.*) (7 *Geo.* V. *No.* 16), *secs.* 3, 8.

*Per Griffith* C.J.—The High Court should not refrain from expressing an extra-judicial opinion in a case in which a formal error in procedure may

prevent them from giving formal judgment, but in which such an expression of opinion may avert a great public calamity.

*Per Barton* J.—Whether an individual Judge is under such circumstances to give his opinion immediately or to postpone the expression of it to a later stage is a matter for each Judge to determine for himself upon his view of his duty.

*Per Isaacs* J.—Where the jurisdiction of this Court to decide a question is disputed or where a preliminary question arises as to whether the law makes the determination of that question by another Court unchallengeable, this Court should not express any opinion with regard to the question disputed until its own jurisdiction to do so is established and the power to challenge the prior determination is also found to exist, because both those are prior considerations which go to the root of the right of this Court to pronounce its opinion on the question in dispute.

By sec. 6 of the *Industrial Peace Act of* 1912 (Qd.) a Court is constituted called the "Industrial Court," which, by sec. 7, "subject to this Act" has jurisdiction over "all industrial matters and industrial disputes in any calling which are submitted to it," and "may make such awards and orders as it thinks proper." By sec. 13 it is provided (1) that the award of the Court in any industrial matter or industrial dispute "shall, subject to any variation ordered by the Court, take effect and have the force of law within the locality specified in the award, and continue in force for a period to be specified in the award not exceeding twelve months from the date thereof unless sooner rescinded or varied"; and (2) that "after the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made."

*Per Griffith* C.J. and *Barton* J.—The Industrial Court has no jurisdiction by an award to direct that the award shall take effect as from a date anterior to that of the making of the award, and the effect of such a direction in an award fixing the rates of remuneration in the sugar industry is to invalidate the whole award.

By sec. 3 of the same Act the term "industrial matters" is defined as "matters or things affecting or relating to work done or to be done or the privileges rights or duties of employers or employees in any calling to which this Act applies, or of persons who intend or propose to be employers or employees in any such calling, not involving questions which are or may be the subject of proceedings for an indictable offence: Without limiting the ordinary meaning of this definition, the term includes all or any matters relating to—(*a*) The wages, allowances, or remuneration of any persons employed or to be employed in any calling . . . (*c*) The sex, age, qualification, or status of employees, and the mode, terms, and conditions of employment, including the question whether any persons shall be disqualified for employment in a calling for any reason other than their membership or non-membership of any industrial association . . . (*j*) All questions of what is fair

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and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of the community as a whole." By sec. 31 it is provided that "where any employer employs any person who does any work for him for which an award has fixed the lowest prices or rates, then such employer shall be liable to pay and shall pay in full in money, without any deduction whatever, to such person the price or rate so fixed" &c.

An award of the Industrial Court in effect required every employer to provide and maintain a well-stocked provision store, and to supplement it by a staff of cooks for the benefit of his employees, who were, on their part, free to take advantage of it or not, at their option; and the award also directed that under no circumstances should more than £1 or 19s. be deducted from the prescribed wages.

*Per Griffith* C.J.—These matters were not within the jurisdiction of the Industrial Court, and as, without them, what was left of the award would have an entirely different operation, the whole award was bad.

APPEAL from the Supreme Court of Queensland.

On the application of the Australian Sugar Producers' Association Ltd., an order *nisi* was obtained from the Supreme Court calling upon the Industrial Court and the Acting Judge thereof and the Australian Workers' Union to show cause why a writ of prohibition should not be issued prohibiting them, and each of them, from proceeding or further proceeding upon a certain award purporting to have been made by the Industrial Court on 29th August 1916, on the ground that the award was made without and in excess of jurisdiction. On 23rd October 1916 the Full Court by a majority (*Real*, *Chubb* and *Shand* JJ., *Cooper* C.J. and *Lukin* J. dissenting) ordered a writ of prohibition to issue directed to the Australian Workers' Union, restraining them from proceeding on the award *quoad* those portions of it which were made in excess of jurisdiction, that is to say: (*a*) so much of the award as provided that the award should take effect or have the force of law as from 1st June 1916 or any date before the pronouncement of the award; (*b*) so much of the award as provided that any agreement should contain clauses relating to the *Masters and Servants Act of* 1861; (*c*) so much of the award as dealt with wages, food and accommodation of cooks; (*d*) so much of the award as provided that any agreement should contain clauses authorizing, or as purported to authorize, the officials of organizations not being employees to enter upon

premises without the consent of the owner of such premises; and (*e*) so much of the award as related to the definition of "stand-over cane" except so far as such definition might be in accordance with any agreement admitted by the prosecutors. The minority of the Court were of opinion that, by reason of the provision in the award that it was to take effect as from 1st June 1916, the whole award was invalid: *R.* v. *Industrial Court and Australian Workers' Union*; *Ex parte Australian Sugar Producers' Association Ltd.* (1).

The prosecutors now, by special leave, appealed to the High Court from so much of the judgment of the Full Court as adjudged that the award was not wholly invalid.

The other material facts are stated in the judgments hereunder.

*Rolin* K.C. and *Grove*, for the appellants.

*Leverrier* K.C. and *Armstrong*, for the respondents.

*Cur. adv. vult.*

Dec. 22, 1916.

GRIFFITH C.J. read the following judgment:—

*First Part.*—I understand that, owing to a doubt entertained by some members of the Bench on the question whether under the Queensland *Industrial Peace Act of* 1912 prohibition lies from the Supreme Court of Queensland to the Judge of the Industrial Court after an award has been made, it will not be possible for judgment in this case to be formally pronounced until that point has been argued. Under such circumstances the usual course would be simply to direct the case to stand for argument on that point. But, as the case is a very exceptional one, I feel called upon to state my reasons for taking a different course. The case was heard at the present sittings in Sydney, instead of in Brisbane, because of its extreme urgency. The question whether the cultivation of sugar cane in Queensland by white labour was possible was for many years a subject of bitter controversy. After a long struggle the possibility of such cultivation on terms reasonably profitable was established, and the greater part of the sugar consumed in

(1) (1917) S.R. (Qd.), 50.

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Australia of an annual value of some millions has for many years been derived from that source. In the present time of peril to the Empire the continuance of the industry is of Imperial importance. It is alleged that the award which is impeached in this case will, if enforced, have the effect of practically putting an end to the industry, but that if its invalidity is now established there is still a chance of keeping it alive, as it is but a short time since the planting season began and it is probable that many planters who had intended to discontinue operations altogether may, if the award is out of the way, resume their operations. The continued existence of the industry involves hundreds of thousands of pounds' worth of property and the welfare of many thousands of persons, as well as the future history of white settlement in tropical Australia, to say nothing of its especial present value as an Imperial asset. Hence the urgency of an early decision.

In the *Builders' Labourers' Case* (1) it was held by my brothers *Barton* and *Powers* and myself, and, as many persons including the law reporter thought, by my brother *Isaacs*, that prohibition lies to the Federal Court of Conciliation and Arbitration so long as anything remains to be done under an award. My brothers *Duffy* and *Rich* expressed a doubt on that point. The present appellants, naturally relying on this decision as reported, applied to the Supreme Court of Queensland for a prohibition, which was granted as to part only of the relief sought, and the present appeal is brought from the refusal of the Court to grant the remainder. No question was raised by the respondents as to the competency of the Supreme Court to grant the prohibition. If it is incompetent, the reason is not because the subject matter is beyond the jurisdiction of the Court but because of a mistake in the form of procedure. As apropos to the question of the duty of a Court under such circumstances, I think the observations of *Farwell* L.J. in the case of *Dyson* v. *Attorney-General* (2) are relevant. After quoting the language of *Lyndhurst* C.B. in *Deare* v. *Attorney-General* (3), "it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the

(1) 18 C.L.R., 224.

(2) (1911) 1 K.B., 410, at p. 423.

(3) 1 Y. & C., 197, at p. 208.

way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred," he added: "I venture to hope that the former salutary practice may be resumed." I think that *mutatis mutandis* this applies *à fortiori* to Courts of Justice. It is at any rate consonant with the practice of the Judicial Committee and of British Courts of Justice in general not to refrain from expressing an extra-judicial opinion in a case in which a formal error in procedure may prevent them from giving a formal judgment, but in which such an expression of opinion may avert a great public calamity. In my opinion, it would be a lamentable thing indeed, if a Court should under such circumstances hold itself bound by any legal technicality to allow by its reticence the destruction of a great industry and great Imperial asset. In such a case legal technicalities have, to my mind, the same weight as rules of professional etiquette should have to the mind of a physician irregularly summoned to the bedside of an apparently dying man. For these reasons I not only feel at liberty but think that it is my imperative duty to express an opinion upon the merits of the case, and I venture to hope that some at least of my brothers on the bench will do likewise. If a majority of them think that the award is good, the appellants will fail on the merits, and will be relieved from their suspense and deprived of their hope, and the appeal should be dismissed at once without further argument, which is only to be directed to the objection that prohibition does not lie to the Industrial Court after an award has been made. This, however, is a matter for their own discretion.

I proceed to express my opinion on the merits of the case.

*Second Part.*—This is an appeal from a decision of the Supreme Court of Queensland refusing, by majority, to make absolute *simpliciter* a rule *nisi* for a prohibition directed to the Industrial Court and the Judge thereof and the respondents in respect of an award purporting to have been made by the Industrial Court on 29th August 1916 in respect of the callings of sugar mill workers and sugar field workers. The Supreme Court made the rule absolute as to certain portions of the award, but refused to grant a prohibition as

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to the remainder. This appeal relates to the matters as to which the Supreme Court refused to grant the prohibition.

Two substantial points have been raised: (1) that the award purports to have, and is intended to have, retrospective effect, that the Industrial Court had no jurisdiction to give it such effect, and that if the award is treated as having a prospective effect only it is substantially different in its operation from an award operating for the whole period which it was intended to cover; (2) that the award deals with matters beyond the jurisdiction of the Industrial Court, which matters are, in their nature, so substantially bound up with the provisions of the award dealing with matters within the jurisdiction of the Court that, if they are omitted, the operation of the award would be substantially different from that which it would have if wholly valid. I will deal with these points in order.

(1) The *Industrial Peace Act of* 1912 (Qd.) constitutes (sec. 6) a Court, called the Industrial Court, which "subject to this Act" has jurisdiction over all industrial matters and industrial disputes in any calling which are submitted to it, and may make such awards and orders as it thinks proper. The callings to which the Act applies are enumerated in Schedule II., and include sugar millers and sugar field workers. The term "sugar mill workers" used in the award has been, and I think fairly may be, treated as a verbal inaccuracy, meaning sugar millers. I will refer to the definition of the term "industrial matters" in dealing with the second point.

Sec. 13 provides that the award of the Court in any industrial matter shall, subject to any variation ordered by the Court, that is, ordered during its continuance, take effect and have the force of law within the locality specified in the award, and "continue in force for a period . . . not exceeding twelve months from the date thereof unless sooner rescinded or varied. After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made." An employer who fails to observe an award is liable to a penalty of £250.

The "submission," as it is called, that is, the plaint submitted

to the Court, in the present case asked that certain existing awards might be rescinded and that a new award might be made in terms specified by the claimants, which were afterwards materially altered by amendment. The award, which, as already stated, was made on 29th August, directed that it should "be as of and take effect and have the force of law within the locality specified as from the first day of June 1916 and remain in force for twelve months from that date," that is to say, until 31st May 1917.

The appellants contend that the Industrial Court had no jurisdiction to make a retrospective award. They maintain, first, that the general rule which requires that legislative enactments shall be construed as dealing with the future only unless it clearly appears that they were intended to have a retrospective operation applies also to the interpretation of laws establishing subordinate legislative bodies, and to their ordinances, and that the words of the Statute do not purport, either directly or by necessary implication, to confer any such retroactive power upon the Industrial Court. It may be that, as an abstract question, it would be desirable that the Court should have such a power in some cases, but that is nothing to the purpose. If a claim expressly asked for the laying down of a retrospective rule—retrospective at least so far as to the date of lodging the submission—it is possible that the Court might, but for another provision to which I will presently refer, have power to make by way of settlement of an existing dispute an award taking effect from the date of the claim. On that point I express no opinion. But that is not this case. There is nothing on the face of the submission to suggest that such an award was asked for. On the contrary every claim made was introduced by words of futurity, "shall be" or "shall not be."

In my opinion the language of the Act does not purport to confer upon the Industrial Court any retroactive jurisdiction. Even if it could otherwise be inferred from the suggested necessity of the case that it was to have such powers, the inference is negatived by the express words of the concluding sentence of sec. 13, which declares that an award once made shall (unless varied) continue in force until a new award has been made, that is, as I understand the words, until a new judicial pronouncement has been made defining

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the terms which are thenceforth to be observed by persons engaged in the calling. This provision negatives the possibility that the Court can by a later award rescind an existing award retrospectively. The Supreme Court were unanimously of this opinion. The purpose of the enactment is plain enough, namely, that persons who are engaged in such callings may know from day to day and every day what is the extent of their liabilities, and shall not, after they have carried on an industry, perhaps for many months, be retrospectively loaded with new burdens, which, if they had known of them, might have deterred them from engaging in the industry at all.

A question then arises as to the effect of such an excess of jurisdiction. In some cases an award might be severable, so that the future part of it might stand alone. But in the case of the sugar industry very special conditions exist. The cutting and milling of the cane begins about 1st June, and continues for a period of five or six months. To do this work large numbers of men come to the sugar districts of Queensland, of whom a large proportion migrate from the Southern States at a considerable expense of money and loss of time. At the end of the cutting and milling season they return to their homes. An award which fixes their rates of remuneration not by direct reference to that loss of time and money but by an average wage to be spread over the whole period of employment is manifestly a very different thing from an award the operation of which is limited to daily wages for half or less than half of the period. In my judgment, to uphold the validity of the award under such circumstances would be in effect to make a new and different award. The same principles that have been applied by this Court when examining the validity of a Statute passed by a legislature of limited authority are, in my opinion, equally applicable to such a case. It is nothing to the purpose to conjecture that if the Judge of the Industrial Court had had this point present to his mind he might have made an award even more favourable to the employees. The award, when limited to its permitted period, has a substantially different operation from that of the award as actually made. In my judgment, therefore, this objection is fatal to the validity of the award.

(2) I pass to the second point. The *Industrial Peace Act* thus defines the term "Industrial matters":—"Matters or things affecting or relating to work done or to be done or the privileges rights or duties of employers or employees in any calling to which this Act applies, or of persons who intend or propose to be employers or employees in any such calling, not involving questions which are or may be the subject of proceedings for an indictable offence: Without limiting the ordinary meaning of this definition, the term includes all or any matters relating to—". Then follows an enumeration of matters of detail numbered (*a*) to (*j*) of which the only relevant parts are: "(*a*) The wages, allowances, or remuneration of any persons employed or to be employed in any calling, . . . (*c*) The sex, age, qualification, or status of employees, and the mode, terms, and conditions of employment, including the question whether any persons shall be disqualified for employment in a calling for any reason other than their membership or non-membership of any industrial association"; and "(*j*) All questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of the community as a whole."

With regard to (*c*), I am of opinion that the context shows that the phrase "conditions of employment" refers to matters antecedent to actual employment. The phrase is, no doubt, susceptible, in a different context, of covering all the conditions of actual employment, including hours of work, remuneration, accommodation, food, and every other matter that can be relevant to carrying on an industry. If read in that sense, all the rest of the definition would be superfluous, and I cannot so read it.

With regard to (*j*), it must first be ascertained whether the matter in question is an industrial matter before any question can arise as to what is fair and right in relation to it. This, therefore, does not help us. In my opinion, the governing words are "matters or things affecting or relating to work done or to be done or the privileges rights or duties of employers or employees." These are, no doubt, very wide words, and they give rise to a difficulty analogous to that which has so often arisen out of the words of the Workmen's Compensation Acts as to accidents arising "out of and in the course

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of " the employment. In one sense every event that happens in the course of work affects the work. But, in my opinion, the words " affecting or relating to work " mean " affecting or relating to the doing of the work," and not " affecting or relating to the person who does the work in the course of the day or week or other period during which his employment continues, irrespective of the work itself."

The definition nowhere mentions the question of food, except so far, if at all, as it may fall within the phrase in (*a*) " wages, allowances, or remuneration." It is, no doubt, a well known fact that it is a common practice in many callings for employers to supply to their employees a fixed quantity of specified food under the name of " rations," which is usually, but not always, supplied in an uncooked condition, and I will assume that such a supply may be regarded as a form of allowance or remuneration.

The part of the award now impeached which relates to sugar field workers first prescribes a minimum rate of wages (Part I., cl. 1). It then prescribes the working hours (cl. 2), and the accommodation to be provided (cl. 3). This last provision was held by the Supreme Court to be beyond the jurisdiction of the Court for reasons not relevant to the present inquiry. Cl. 4, which is headed " Food," is as follows :—" (*a*) On plantations or farms where ten or more men are employed, the employer, if desired by the employees, shall supply all food and rations, which shall be of sufficient quantity, sound, well cooked, and properly served. All food as required shall be served on the table, and when reasonably procurable the following goods shall be supplied as rations." Then follows a list of nearly 100 articles of food, comprising all sorts of edibles, many of which may fairly be described as luxuries. If they are regarded by field workers as necessaries, I can only remark that the standard of living upon which the new doctrine of the " living wage " is based is much higher than prevails in the walk of life to which I am accustomed. The clause proceeds :—" Where less than ten employees are employed, arrangements for the supply of food and rations shall be mutually agreed upon, subject to the provisions of clauses (*c*) and (*d*) hereof : Provided always that the employer shall, if desired by the employees, provide all uncooked food and rations at reasonable cost."

Clauses (*c*) and (*d*) are as follows :—"(*c*) The value of such food shall be taken to be £1 per week in the Northern District and 19s. per week in the Southern District, and no further sum shall be deducted by an employer in respect thereof from the wages prescribed herein. (*d*) Under no circumstances is an employer to insist upon an employee taking his remuneration partly in food and (or) accommodation; every employee is to be at liberty to stipulate for the whole of his wages in cash."

The part of the award which deals with the calling of sugar millers is substantially the same, except that it applies to all cases, however few the number of employees.

The appellants contend that the directions contained in this provision do not deal with industrial matters at all. Before dealing with this argument I will say a word or two as to the meaning and effect of the directions.

They require every employer to provide and maintain a well-stocked provision store, and to supplement it by a staff of cooks for the benefit of the employees, who are, on their part, free to take advantage of it or not, at their option. Apparently, every employee is to be allowed every day to prescribe his menu for three meals of his own choice.

The cost of these meals might easily rise to £5 a week per man, but under no circumstances is more than £1 or 19s. "to be deducted" from the prescribed wages. It was evidently contemplated by the gentleman who framed the award that the remuneration should, at the option of each individual employee, be taken either wholly in cash or partly in cash and partly in food. Sec. 31 of the Act provides that when an award has fixed the lowest prices or rates for work the employer shall pay it in full in money without any deduction. The award, however, evidently intends that if an employee chooses to take his food from the employer, cooked or uncooked, it shall be valued at £1 or 19s. per week, and that the wages paid shall be reduced by that sum. It is argued that this, though a "reduction of" wages is not a "deduction from" wages, and the case of *Archer* v. *James* (1) was referred to. In the view I

(1) 2 B. & S., 61.

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take of the matter it is not necessary to decide the point, which is a rather fine one.

The respondents contend that all these provisions deal with matters "affecting or relating to work done" just as much as the supply of uncooked or cooked rations. A direction to supply such rations to persons who are not members of the employer's household may or may not be within the jurisdiction of the Industrial Court. In ordinary cases no one would think it worth while to raise the question. If an industry could not be practically carried on without such supply, I think the Court would have jurisdiction. But it does not follow that the Court has therefore jurisdiction to direct the supply of anything it thinks fit in unlimited quantities in every case whatever. Still less does it follow that the Court has jurisdiction to order an employer to keep a provision store stocked with luxuries and a restaurant for the optional use of the employees. In my opinion such a direction cannot on any reasonable construction of the words be regarded as a matter "affecting or relating to work done or to be done or the privileges rights or duties of employers or employees." It is argued that the difference between the two cases is merely one of degree. The argument reminds me of the often reprobated, and as often followed, practice of construing a will by comparing it with another very like it, and so on until at last the construction of one will is held to be governed by some ancient decision as to the construction of another will totally unlike it. It is said:—Rations are food: In some cases it may be practically necessary for the employer to supply food for his employees, as in the case of household employees and employees in out-of-the-way localities: Therefore, the supply of food by an employer to employees may be necessary. Therefore, whether necessary or not, it is in all cases a matter affecting or relating to the work done: The quantity or kind of the food is a matter of degree: Therefore, in all cases, the supply of any kind of food whatever, and on whatever conditions and in whatever quantities, by an employer to an employee is a matter affecting or relating to the work done within the meaning of the Act, and the Industrial Court has uncontrolled authority to lay down any rules it thinks proper. I am unable to follow this line of reasoning.

There is also another distinction which I conceive to be material between such a provision as that now under consideration and an allowance of rations by way of remuneration. The term "rations," as used in Australia, certainly connotes fixity of quantity. Such an allowance may, therefore, in reason, be taken into consideration in fixing the amount of pecuniary wages. But if, as in the present case, the allowance of food is uncertain, and dependent both in kind and quantity upon the daily caprice of each individual employee, it is, in the nature of things, impossible to make any comparison between the value of the allowance of food and the total remuneration for work. In my opinion, it is of the essence of a valid award under the Act as to remuneration that it should be certain and definite. The present point is not exactly whether the award is on this point valid, but whether the provisions objected to are within the jurisdiction of the Industrial Court. For the reasons I have given I am of opinion that the provisions objected to differ *toto cœlo* from an award of a fixed food allowance by way of part remuneration, and are unauthorized.

They are, however, the very centre and pivot of the award as to remuneration, and cannot be separated from the rest of it. It follows that, if they are treated as null and void, what is left of the award would operate as a very different pronouncement from that which the Industrial Court actually made. In my judgment, therefore, this objection also is fatal.

For both reasons I think that the appeal should be allowed, and the rule *nisi* made absolute *simpliciter*.

BARTON J. read the following judgment:—The course taken by the learned Chief Justice in giving his opinion on the question which the parties came to argue and did argue, and as to which the decision of this Court is sought by them, has made it necessary for me to determine in my own case whether I ought to pursue a similar course or whether I should postpone the expression of my views on this question until after the conclusion of the intended argument on another point since raised. Whether an individual Judge is to give his views now on the question argued or is to postpone them to that later stage, is a matter for each of us to determine

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for himself, according to his view of his public duty. All that I claim for myself I cordially concede to my learned brethren.

Either the immediate statement or the deferring of one's views on this part of the case is attended with disadvantage. On the whole, and after anxious consideration, I have come to the conclusion that it is just to the parties and the public, and also consonant with the public interest, that I should not defer the expression of my views on the merits of the question already argued.

The present question is whether the award, which the Supreme Court of Queensland held bad as to part and on that ground partially prohibited, is bad in the whole. The prohibition as to part is not appealed from.

The respondents filed in the Industrial Court of Queensland a "submission" by not less than twenty employees (*Industrial Peace Act of* 1912, sec. 7 (1) (*c*) ) in each of the callings of sugar mill and sugar field workers, notifying that the Court would be moved that "the whole of the existing awards in the State of Queensland for the said callings be rescinded, and that the claim of the Australian Workers' Union herewith submitted be substituted in lieu thereof." On the same date (26th February 1916), and as part of the same proceeding, they submitted "claims" specifying their demands in detail in respect of each of the callings mentioned.

Answers were filed, and Acting Judge *Dickson* heard the matter in the Industrial Court on many days and at various places, and made an award, dated 29th August 1916, to cover both the Northern and Southern Districts of Queensland, which award as to duration prescribed as follows: "This award shall be as of, and take effect and have the force of law within the locality specified herein as from, the first day of June 1916, and remain in force for a period of twelve months from that date."

The terms of the submission and of the claims were alike prospective. As an instance, the first paragraph of each claim was as follows: "The rates of wages to be paid to employees shall not be less than the scale set forth in Schedule A hereto." The award, however, must be interpreted according to its purport. The division of opinion in the Supreme Court of Queensland was not as to the grant of prohibition. The order *nisi* was made absolute *quoad*

those portions of the award which the majority held to have been made in excess of jurisdiction. The dissenting minority held that it should be made absolute as to the whole award.

The provisions relied on by the appellants in support of the minority judgment were those relating to the "duration of the award" as already quoted and those under the heading "Food."

First, as to the period of the award. Sec. 13 (1) of the Act is as follows: "The award of the Court in any industrial matter or industrial dispute . . . shall, subject to any variation ordered by the Court, take effect and have the force of law within the locality specified in the award, and continue in force for a period to be specified in the award not exceeding twelve months from the date thereof unless sooner rescinded or varied."

In the absence of a controlling context, which I cannot find in the Act, an award made under this provision must operate prospectively; it must not be antedated; the period which it is to specify must begin no earlier than the day on which it is made—"the date thereof." I have already pointed out that the submission and claims did not ask for a retrospective award. Had they done so, they would have been confronted by the second sub-section of sec. 13, which applies to the last pre-existing award of which the rescission was sought. For, after the expiration of the period specified in that pre-existing award, and in the absence of any order of the Court to the contrary during its period, that award continued in force until the making of the new award. That being the express provision of the law there was already in existence an award of statutory force operating up to the making of the award in question. And there is no sign of any provision in the Act controlling sub-sec. 2 any more than there is as to sub-sec. 1.

Thus far the whole of the Supreme Court were of the opinion I now express. But the majority thought that the period of retrospection might be severed from the period of duration—that the award might be restricted so as to operate only on and from its date, that is, for a period of 2 months and 28 days less than the 12 months which it specified. I am of the opinion suggested by my learned brother *Gavan Duffy* during the argument. It is not the same thing to make an award for a period of 9 months from now,

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and to make an award to operate for 12 months from a date 3 months past. The reason is that even if they were couched in the same terms in other respects, the award might in the one case be entirely equitable and in the other grossly inequitable. The one of such awards is substantially different from the other, and it cannot be said that the Court which made the one would have made the other. If the case be put conversely this becomes startlingly apparent.

When regard is had to the subject matter, namely, the sugar industry, the difference between two awards for the respective periods mentioned is palpable. The one of them takes in the whole period during which the cane would be cut, and concurrently crushed, during 1916. The other takes in only a small part of that period. It is impossible to suppose that an award which lays down conditions for the first-named period is the same thing as an award which lays down conditions for the other period. I do not expand my reasons on this head, because the learned Chief Justice has already mentioned certain considerations which are obviously sufficient to make the matter entirely clear.

I am of opinion, therefore, that the award in respect of each claim is entirely vitiated by the provision as to duration.

The learned Chief Justice has dealt with the provisions as to "Food." On these I do not express a decided opinion. My views on the first subject go to the root of the award, and are, I think, sufficient for a decision as to its validity. I do not dissent from what the Chief Justice has said on clause 4 of the award, but I entertain enough doubt to refrain from an express decision in view of my conclusion on the first point.

ISAACS J. read the following judgment:—In this case we are not to-day pronouncing any judgment. We are directing re-argument before the Full Bench of the question whether prohibition will lie to the Industrial Court of Queensland in respect of an award which has been completely made and gazetted, and there the matter rests. In those circumstances I do not propose to express any opinion one way or the other as to the validity or invalidity of the award. I think I ought to state why I consider it undesirable for me to give any such opinion at this juncture.

The question referred to the Full Bench involves the consideration of at least two branches. Argument may develop more, but so far only two are present to my mind. One is a common law question; the other is statutory. Both those branches go to the root of the power of the Court to entertain the question of the validity of the award. If prohibition will not lie in the circumstances, then whatever is said even by the fullest Bench of this Court would be *obiter*, and have no binding force. Still more is that so as to anything said by a portion only of the Bench as now constituted. At present there stands a unanimous decision of the Full Bench of Queensland —five Judges—that, apart from the effect of its retrospective provision on the whole award, the award is in the bulk valid. Two out of the five think that the food part is bad; and all think that the retrospective part is bad. But the award, in its main provisions, is unanimously upheld. That decision binds all Courts in Queensland until set aside. The only means of setting it aside is by this appeal, and the success of this appeal depends on whether prohibition lies. Consequently, if eventually we hold prohibition does not lie, the award stands—at least as the Supreme Court has left it; and no expression of our opinion could alter that fact.

Therefore, if the common law question alone were concerned, I should think myself bound to refrain from uselessly introducing doubt into a matter admittedly involving such wide and important, and almost vital, interests.

But there is another point, which impresses my mind—as a Judge having to decide it in the future—still more strongly. It is this:—Sec. 16 of the Queensland *Industrial Peace Act of* 1912 says, in the second paragraph: "No decision or proceeding of any kind whatever of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court or tribunal on any account whatever." Now, one of the matters we shall have to decide is whether that enacts in effect that every other Court or tribunal shall treat an award actually made as valid, and therefore that no other Court shall pronounce any opinion to the contrary. Of course I express no opinion whether that is the meaning of the clause, because that question is yet to be determined.

But what impresses me most strongly is this, that if I were to

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express any opinion as to the validity or the invalidity of the award, I should be deciding in advance as to the meaning of the clause, that I should be prejudging one of the very questions that remains to be argued, and, if the decision should eventually be that no Court has any right to express any such opinion, I should now, by expressing an opinion on the validity or invalidity of the award, be acting inconsistently with the ultimate decision. I should thereby embarrass myself, and without being able to give any binding effect to my words.

For these reasons, which I repeat I apply exclusively to myself, I abstain from stating whether in my opinion the award is valid or invalid. For the same reasons I refrain from referring to any other portion of the matters in controversy.

GAVAN DUFFY J. read the following judgment:—My silence must not be taken as tending to establish the validity of the award. I shall express no opinion on that subject unless and until I know that prohibition will lie in this case.

RICH J. As the question of jurisdiction has to be argued, I consider it inexpedient to discuss the case.

The COURT then directed the matter to be transferred to the Melbourne Registry for argument before a Full Bench of the question whether under the *Industrial Peace Act of* 1912 (Qd.) prohibition lies to the Industrial Court after the making of an award; and arguments were heard on 3rd, 4th and 5th January 1917 before *Griffith* C.J., and *Barton*, *Isaacs*, *Higgins*, *Powers* and *Rich* JJ.

During the course of the argument, in view of the fact that the prohibition was directed to the Australian Workers' Union only, special leave was granted to the appellants to appeal as against the Judge of the Industrial Court, joining him as a respondent, and to amend the notice of appeal by adding, as matter appealed from, the refusal of the Supreme Court to grant prohibition or *certiorari* as to the whole matter. It was further directed that service by telegram upon the Judge of the Industrial Court and the Crown should be good service.

*Knox* K.C. (with him *Rolin* K.C. and *Grove*), for the appellants.

*Armstrong*, for the respondents.

*Cur. adv. vult.*

GRIFFITH C.J. Since this matter was ordered to be set down for judgment it has come to the knowledge of the Court that on 18th December an Act was passed by the Parliament of Queensland called the *Industrial Arbitration Act of* 1916, which is to come into operation on a date to be proclaimed by the Governor in Council. I have ascertained by information from Queensland that it will be proclaimed to come into operation to-morrow. Amongst other provisions is one in sec. 3 that "all subsisting awards and orders made or purporting to have been made under the authority of the repealed Act"—which is the Act under discussion in this case—"shall be valid and binding, and until rescinded or superseded under this Act shall continue in force and shall be deemed to have been made under this Act. All such awards shall be deemed to have been made by the Court under this Act." One of the objections made to the award in this case was as to its retrospectivity. There is express provision in the new Act (sec. 8) that the Court may make an award giving retrospective effect to the award. That Act expresses the definite intentions of the Legislature of Queensland, and it is plain that in face of those express intentions this Court, if it thought it otherwise right to grant prohibition, cannot do so. Under these circumstances the Court cannot with propriety give any opinion upon the question now before it. The parties may desire to raise questions as to costs, and the proper course is to adjourn the matter *sine die*. Either party may make any application they may desire.

*Matter adjourned sine die. Liberty to apply.*

Solicitors for the appellants, *Morris & Fletcher*, Brisbane.
Solicitor for the respondents, *E. Quinlan*, Brisbane.

B. L.