Court to decide. The answers to the questions should be: Question 1, Yes; Question 2 (*a*), Yes; Question 2 (*b*), Yes.

Questions answered in the affirmative.

Solicitors for the claimant, *Brennan & Rundle.*

Solicitors for the respondents, *Derham, Robertson & Derham.*

B. L.

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FEDERATED CLOTHING TRADES OF THE COMMONWEALTH OF AUSTRALIA *v.* ARCHER.

[HIGH COURT OF AUSTRALIA.]

THOMAS ALFRED POWELL . . . . APPELLANT;
DEFENDANT,

AND

THE FARLEIGH ESTATE SUGAR COMPANY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Sugar-Cane—Awards—Central Sugar Cane Prices Board—Jurisdiction—Effect of making of new award upon prior award—Subsequent application to alter prior award—Statute—Construction—Regulation of Sugar Cane Prices Act 1915 (*Qd.*) (6 *Geo. V. No.* 5), *secs.* 3, 6, 7, 8, 12, 14.

By secs. 3, 6 and 7 of the *Regulation of Sugar Cane Prices Act of* 1915 (Qd.), Local Boards, and, on their default, a Central Board, are empowered to make awards determining the price of sugar to be paid and accepted by mill-owners and cane-growers respectively, and incidental matters, which, when made, shall have the force of law. Sec. 8 provides that an award made under that Act is to take effect from a fixed date and remains in force for such period not exceeding twelve months as is specified, and after "the expiration of that period shall continue in force, unless the Central Board otherwise order, until

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Isaacs, Gavan Duffy and Rich JJ.

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a new award has been made." By sec. 12 (5) every award is deemed to contain a provision that the base price fixed by the award may from time to time be changed by the Central Board on the application of any party bound by the award. Sec. 14, which contains provisions relating to enforcement of the award (including penalties for breach of award), enacts, by sub-sec. 4, that "For the purposes of this section the making of an award shall be regarded as an agreement entered into between each cane-grower and owner bound by such award, and nothing herein contained shall be construed to deprive any person or company bound by the award of any civil right or remedy against any other person or company so bound to compel observance of the award according to its tenour or in respect of any breach of agreement or otherwise."

While an award for the 1917 sugar season was in force an application was made to the Central Board by a mill-owner bound by the award for a change in the base price fixed by the award. Before the application was heard and determined a new award was made by the Local Board for the 1918 season, and the Central Board refused to proceed with the hearing on the ground that it had no jurisdiction.

Held, that upon the making of the 1918 award the award of 1917 had ceased to have effect, and the right to change the base price after the award had expired was not an accrued contractual right preserved by sec. 14 (4) of the Act; that the provisions of sub-sec. 4 of sec. 14 are limited to the purposes of that section—they are for enforcement purposes only, and do not operate to destroy the primary character of an award, which constitutes the law of the land governing the conduct of the parties: and therefore that the Central Board had no jurisdiction to hear and determine the application.

Decision of the Supreme Court of Queensland: *R.* v. *Central Sugar Cane Prices Board*, (1918) S.R. (Qd.), 254, reversed.

APPEAL from the Supreme Court of Queensland.

On 4th July 1917 the Farleigh Local Sugar Cane Prices Board, being the Local Board constituted under the *Regulation of Sugar Cane Prices Act of* 1915 in respect of the sugar-mill of the Farleigh Estate Sugar Co. Ltd. and the lands assigned thereto, had failed to make an award for the 1917 season. On that date, therefore, the Central Board, pursuant to the provisions of sec. 7 (*i*) of the Act, proceeded to exercise the functions and jurisdiction of the Local Board by making an award for the 1917 season, which provided that the award should take effect as from 1st June 1917, and should remain in force until further order, and pending such further order until 31st March 1918. By sec. 8 of the Act its operation was extended thereafter until a

new award was made. On 12th December 1917 the Company applied to the Central Board to change the base price fixed by the award. The application was adjourned to 26th March 1918, and on the latter date the Company applied for a further adjournment by reason of the occurrence of a cyclone. No order was made, but without prejudice to the respondent's right to make a fresh application. On 7th May 1918 the Local Board made a new award, which was to take effect as from 1st July 1918. On 12th July 1918 the Company renewed its prior application to the Central Board. Thereupon certain cane-growers, including Thomas Alfred Powell, took the preliminary objection that the Central Board had no jurisdiction to hear or determine the application. This objection the Board upheld.

On 23rd August 1918 the Full Court of the Supreme Court of Queensland made absolute an order *nisi* obtained by the Company, for a writ of mandamus calling upon the Central Board to hear and determine the application : *R.* v. *Central Sugar Cane Prices Board* (1).

From this decision Powell now, by special leave, appealed to the High Court.

Feez K.C. (with him *Macgregor*), for the appellant.

Stumm K.C. (with him *Wassell*), for the respondent.

[During argument reference was made to *In re Chaffers* ; *Ex parte Incorporated Law Society* (2) ; *Abbott* v. *Minister for Lands* (3) ; *Starey* v. *Graham* (4) ; *Welby* v. *Parker* (5) ; *Watson* v. *Winch* (6) ; *Lemm* v. *Mitchell* (7) ; *Steavenson* v. *Oliver* (8).]

Cur. adv. vult.

July 25.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This is an appeal from a judgment of the Supreme Court whereby

(1) (1918) S.R. (Qd.), 254.
(2) 15 Q.B.D., 467.
(3) (1895) A.C., 425.
(4) (1899) 1 Q.B., 406.
(5) (1916) 2 Ch., 1.
(6) (1916) 1 K.B., 688.
(7) (1912) A.C., 400.
(8) 8 M. & W., 234.

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a mandamus was granted to compel the Central Sugar Cane Prices Board to hear and determine an application by the present respondent to change the base price fixed by an award. So far as concerns the issue of a mandamus the case has no permanent importance since the enactment of sec. 9E of the recent Act. But with respect to the substantial question of the effect of the making of a new award upon the rights and obligations of the parties bound by a prior award which is superseded, the importance continues. The Central Board will, of course, be guided in the future by the view which is now declared to be the right view of the law. The question is undoubtedly a difficult one.

The position, divested of all immaterial considerations, comes ultimately to this : The application to change the base price of the 1917 award was made, on 12th July 1918, upon a notice sent by the respondent to the Central Board on 25th June, 1918 ; the award for 1918 had already been made on 7th May 1918 and gazetted on 18th May 1918, and provided, by clause 11, that it should take effect as from 1st July 1918. The question, therefore, is : Was there on 12th July 1918 any power in the Central Board by reason of the provision contained in sec. 12 (5) of the Act to change the base price of the 1917 award ?

The Central Board thought that the power did not exist. The Supreme Court has held that the power did exist. If it existed, it had of course to be exercised. All the learned Judges came to the same conclusion, but two separate judgments were delivered—one being the judgment of the learned Chief Justice and *Chubb* and *Lukin* JJ., and the other that of *Shand* J.

It will conduce to a better understanding of the problem before us if we state succinctly the grounds upon which their Honors came to their conclusion. In the first judgment it was held, firstly, that the passing of the new award did not operate to obliterate retrospectively the accrued rights, liabilities, obligations and duties of the parties created by the old award as if it had never been passed and never operated. It was held, in the second place, that on the making of the 1917 award the parties, by the joint operation of sec. 12 (5) and sec. 14 (4), became bound by a statutory agreement which defined and regulated their rights and liabilities ; that the old

award, notwithstanding the making and operation of the new award, still continued in force as to all operations, so long as anything remained to be done between the parties with respect to them. In the third place it was held that, even if it could be said that the award itself entirely ceased on 7th May 1918, the statutory agreement did not. The situation is thus summed up in the first judgment (1): "It seems to us, then," (1) "that the statutory agreement which came into force by reason of the 'making of an award' continued to exist in law until all the terms thereof have been completed and discharged, and that such statutory agreement is not in any way affected by the ceasing of the continuance of the award, which gave it birth;" (2) "that the duty of the Central Board to consider whether the 'circumstances or conditions existing when the award was made have so changed that a change in price is fair and just,' and, if they have, 'to change the price so fixed,' is concurrent with the statutory agreement, and ceases when the statutory agreement comes to an end—that is, on its discharge in the ordinary course and not before." It will be observed that their Honors regard the provision of sec. 12 (5), not as part of the statutory agreement, but as "concurrent with" it. This last consideration may eventually prove to be the pivotal feature of the case. *Shand* J., in his separate judgment, seems to regard the right of application under sec. 12 (5) as an accrued right under the award as an award, and therefore the power of the Central Board continued. It is a necessary, and indeed an acknowledged, corollary of the view taken by the Supreme Court, that no limitation of time exists, except the complete termination in the ordinary way of all relations between all mill-owners and cane-growers. It must follow, as will be seen from the terms of sec. 14 (4), that, inasmuch as that sub-section creates an agreement between *each* grower and owner, the power must exist between any one grower yet unpaid and the mill-owner, even though it has ceased as to all the rest of the growers who have been settled with—that the one grower unpaid could have the base price changed, and, if changed for him, changed necessarily for all the rest who had been finally settled with. Indeed, if the application were for an increase, the view held would concede

(1) (1918) S.R. (Qd.), at p. 263.

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the power, even though the end of the season had come and all payments had been made under the award as it then stood in accordance with the final paragraph of clause 2, whereby all contractual relations had been satisfied as the award actually stood.

To test the correctness of the views above summarized, it is necessary to examine the Act with great care.

It may be observed, at the outset, that the Act of 1915 established a statutory scheme with respect to the relations between cane-growers and mill-owners. The sale and purchase of sugar-cane and the settlement of prices were no longer to be left to voluntary bargaining, but the prices were to be compulsorily determined by Local Boards and a Central Board.

The first provision material to the present purpose is sec. 6, which says: "A Local Board may, with respect to the lands and the mill for which they have been constituted, make an award determining the price or prices to be paid and accepted by the owner or owners of the mill and cane-growers, respectively, for sugar-cane sold and taken delivery of at the mill concerned, and determining all matters relating to such supply of sugar-cane and payment therefor." Under sec. 7, however, inasmuch as the Local Board had not made any award by 7th May 1917, "all the functions and jurisdiction of the Local Board" passed to and were to be exercised by the Central Board constituted under the provision of sec. 4.

The Central Board, on 16th July 1917, made an award for the area, by clause 1 of which (*inter alia*) "the base price of sugar-cane for the season 1917" was fixed. Clause 2 includes a provision that "payment for cane to groups shall be 28s. 6d. per ton on delivery. The balance to be adjusted at the end of the season in accordance with the above scale." The award contained various conditions relative to the supply and delivery of cane, as to incidents, the expense or cost of which was to be adjusted between mill-owner and growers. Deductions were dealt with under sec. 12 (3). Clause 9 (the final clause) runs thus: "This award shall take effect as from the first day of June 1917, and remain in force until further order, and, pending further order, until the thirty-first day of March 1918." The award was gazetted on 27th July 1917.

Sec. 8 of the Act enacts that the "award of a Local Board"—

and, reading this with the provision in sec. 7 (*i*) that "the award of the Central Board when made shall have the effect of an award under this Act," and with the definition of "award" in sec. 3, we may add "and the award of the Central Board"—"shall, from a date fixed . . . take effect *and have the force of law*, and shall not be in any manner liable to be challenged or disputed, and shall be binding on all owners of sugar-mills and cane-growers upon the lands to which the award applies." Stopping there for a moment, it is to be noted that, in providing that the award "shall have the force of law," the Parliament of Queensland has so far given to an award the same effect as to a statutory regulation (say) of the Governor in Council or to a rule of Court. The Act, standing behind the award, declares that its determinations shall be obeyed.

Passing for the present to sec. 14, in order to further elucidate the nature of an award, that section provides for what is to happen in case of breach of award. Sub-sec. 1 enacts that if a cane-grower fails to supply the mill with his cane, or disposes of it to another mill, then, in addition to any penalty to which the grower is liable, the mill-owner may himself harvest the crop, paying the value "*pursuant to the award*" less expenses. Sub-sec. 2 declares failure to carry out the terms of the award a breach of the award. Sub-sec. 3 imposes penalties for breach—an individual is liable up to £50, a company, firm or association up to £500, and an order in the nature of an injunction may be granted against further breach. Disobedience to the order entails further penalty, including, in the case of an individual, imprisonment with or without hard labour up to three months. Then comes an important provision, namely, sub-sec. 4: "For the purposes of this section the making of an award shall be regarded as an agreement entered into between each cane-grower and owner bound by such award, and nothing herein contained shall be construed to deprive any person or company bound by the award of any civil right or remedy against any other person or company so bound to compel observance of the award according to its tenour or in respect of any breach of agreement or otherwise." This last provision is governed by its opening words: "For the purposes of this section." These words have not been

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touched upon in the judgments referred to. They are of the utmost importance. Their effect has to some extent been recognized in the first mentioned judgment, because it is stated, as already noted, that the provisions of sec. 12 (5) are " concurrent with," not " part of," the statutory agreement. But their full force has yet to be perceived. It is clear that when the Legislature has limited the operation of sec. 14 (4) to the purposes of that section, its provisions cannot extend to sec. 8 or sec. 12 (5). For all purposes except sec. 14, which is for " enforcement " purposes only and not for " creation" or " alteration " of duties and obligations, we must leave par. 4 of sec. 14 out of consideration. There is nothing in that paragraph which destroys the primary character of an award as an act external to both mill-owners and cane-growers, a compulsory act of governmental regulation, authorized and enforced by the Act, and, as so enforced, constituting the law of the land governing the conduct of the parties bound.

Now let us consider what the effect of sec. 12 (5) would be apart from sec. 14, since sec. 14 (4) does not extend beyond the purposes of that section, and those purposes do not include the *making* of an award. To ascertain its effect we first have to read sec. 8. Part of its provisions have been read, namely, those giving to the award the force of law. That is to say, it is law the instant it is " made," though like an Act it may not " take effect " then, but only from the date fixed. But then comes the all-important question : How long is that law to continue ? Sec. 8, after making the provision already quoted, enacts that the award " shall remain in force for such period *not exceeding twelve months* as the Local " (we may add " or Central ") " Board may decide, and *after the expiration of that period* shall continue in force, unless the Central Board otherwise order, *until a new award has been made.*"

Now, apart from the further provision in the Act contained in sec. 12 (5), the position seems clear. The 1917 award remained in force, in all its terms, exactly as made and promulgated for the whole period ending 31st March 1918. Those terms were to be *law*, and, so far, during that period were not alterable in any respect. The Central Board, having made its award, was *functus officio* and could not change it. But by being limited to twelve months, as a

matter of personal discretion, and having selected the limit of 31st March 1918, the utmost period of continued force of the award, so far as the Central Board itself could affirmatively declare, had been reached. That, however, left the possibility of a gap, when the relation of the mill-owners and the cane-growers would be unregulated by the Statute, and this period was provided for by the Legislature itself. By force not of any declaration of the Board but of the will of Parliament itself, the award, though intrinsically limited to 31st March 1918, was continued (in the absence of any negative declaration by the Central Board) for a further indefinite period, *the terminus ad quem* of which was to be the *making* of a "new award." Observe: it is to continue "until a new award has been *made*"—not until the new award "takes effect." Sec. 7 and sec. 8 draw an unmistakable distinction between the words "make" and "take effect." For instance, so long as the Local Board's award for the year is "made" by 7th May, whenever it is to "take effect," the Central Board does not, under sec. 7 (*i*), get power to make the award. But directly a new award is *made*, it becomes in turn the law of the land governing the relation of the parties as from the date it is appointed to take effect, and the former award from the time the new award was "made" ceases to be the existing law in any respect or for any purpose. Whatsoever effect it had produced remained; whatever rights it had created still subsisted, but those rights could not be changed or affected by it, nor could any new obligations or liabilities arise by virtue of its provisions. That accrued rights and liabilities remain we unreservedly assent to. But regarding the award supported by the Act, *as a law*, the right to change the base price after the award had expired was not an accrued right (*Abbott* v. *Minister for Lands* (1)).

A living law may be made retrospective in its operation; but a dead law cannot operate at all. To change retrospectively the terms of an expired enactment the breach of which is punishment would be *ex post facto* legislation of the most objectionable kind, because in the case of price increased after the expiry of the award it might subject parties to liabilities under sec. 14 for breach, which might necessarily be held to exist. Nothing but the very clearest words

(1) (1895) A.C., 425.

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should lead to that result. It is said, however, that the provisions of sec. 12 (5) enable that to be done. Sec. 12 is concerned with matters relating to settling the terms of the award, that is, declaring the mutual rights of the parties, which, *when declared, they are bound to observe*. Sub-sec. 5 is a legislative declaration that every award shall be deemed to contain the specific provision set out. Now, that provision is one to secure the elasticity that otherwise would be precluded by the provision of sec. 8 declaring that "the award," that is, the precise terms of the award as originally framed by the Board, should be "in force" for the period stated. This specific provision is confined, however, to one term of the award, namely, the base price; nothing else can be altered, and as to all the other terms of the award sec. 8 applies in its undiminished vigour. But as to "base price," which apparently means the price of cane unaffected by circumstances of inferiority, it shall be changed if the Board so desire, they being satisfied that "the circumstances or conditions existing when the award was made have so changed that a change in price is fair and just." The concluding words, viz., "And the base price fixed by this award shall *thereupon* be charged in accordance with such decision," is a legislative declaration that, when the Board has decided to change the base price, then, notwithstanding sec. 8, the changed price shall henceforth prevail. But all that connotes the existence of the "award" at the time one of its terms is changed, and it connotes that the new price is to be "in force," instead of the old price. It is unnecessary to express or even to form any opinion as to the effect of an application made before the expiry of the award. It may or may not be that a decision given afterwards might relate back to the date of the application and operate *nunc pro tunc*. It was sought to establish that such a situation existed here, one contention being that the new award was not effectively made until 1st July 1918, and it being further argued that the notice sent to the Central Board on 25th June 1918 was such an application (reg. 11 (2)). But, the first step being unsustainable because the award was "made" on 7th May 1918, the argument falls, even if the second step were satisfactorily proved, which is doubtful. Consequently, there cannot be any relation back, therefore both in fact and in law any change of base price would on the facts of this

case be in respect of an application made after the whole award had ceased to operate, and therefore, when the provision in sec. 12 (5) so far as it was deemed to be contained in the award had ceased to operate, and therefore, finally, when the new base price could have no operation.

It is to be remembered that any penalties incurred for breach of award are recoverable notwithstanding the cessation of the award, because sec. 14 always remains operative. So that sec. 14 preserves all accrued rights and liabilities, private and public. So far we have considered the effect of sec. 12 (5) as if sec. 14 (4) did not exist. And so far we have shown that we do not accept the view of *Shand* J. But it remains to be seen how the view of the majority, nevertheless, stands. How does sec. 14 (4) extend the power of the Central Board by virtue of the statutory agreement? The majority, as pointed out, do not include sec. 12 (5) in the statutory agreement. We think that is correct.

The purpose and meaning of sec. 14 (4) are plain. Without that provision the only remedy for the new statutory obligation would have been the new express statutory remedy enacted (*Pasmore* v. *Oswaldtwistle Urban District Council* (1), and see *Hulme* v. *Ferranti* (2)). In such case, the grower, for instance, could not sue by civil process to recover the price if it remained unpaid. Nor could the mill-owner sue a grower for loss occasioned by breach of some provision in the award inserted for the protection of the mill-owner. Therefore it is enacted "for the purposes of this section"—that is, for enforcement purposes, and to exclude the legal presumption that the statutory remedy so far provided was the only remedy for the new statutory right—that "the making of an award shall be regarded as an agreement entered into between *each* cane-grower and owner." That is to say, it is not a collective or joint statutory agreement; it is not an *agreement* between *all* the growers and the mill-owners, as the award is or may be an *award* between them or some of them in groups, but it is in law, for the purposes of sec. 14, to enable *each* person in all cases to sue individually in respect of the benefits *he* is to get, or to be liable individually for *his* individual breach. But the breach or debt sued for must depend on what the

(1) (1898) A.C., 387. (2) (1918) 2 K.B., 426.

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terms of the award *are*, and not to secure a *change* in those terms. Sec. 12 (5) is a supplemental provision enabling the award to be changed as to base price, and it is impossible to conceive of any breach of that provision so as to constitute a cause of action under sec. 14 (4). It resembles a clause in a Constitution enabling amendments to be made in the constitutional provisions. It would disappear with a repeal of the Constitution. *It is outside sec.* 14 (4) *altogether*, and consequently any conclusion based on the assumption that it is an accrued *contractual* right—accrued, that is, the moment the award is made—and included in the statutory agreement that emanates from the award, must fall.

Further, so far as the right must depend on sec. 14 (4)—that is, on several agreement—it is difficult to see how a mandamus can lie against the Central Board, which is no party to the agreement. The right to the mandamus against the Central Board must therefore stand upon its duty as a public tribunal existing apart from sec. 14 (4), and that must be by reason of the character of the award as a law.

The effect of the award as a law having ended on 7th May 1918, it follows, in our opinion, that the duty did not exist as to that award, and therefore the mandamus should have been refused.

Appeal allowed. Rule nisi for mandamus discharged with costs. Respondent to pay costs.

Solicitors for the appellant, *Gorton & Hartley*, Mackay, by *Tully & Wilson*.

Solicitors for the respondent, *C. F. Nielson*, Bundaberg, and *S. B. Wright & Wright*, Mackay, by *Morris & Fletcher*.