[HIGH COURT OF AUSTRALIA.]

THE PROPRIETORS OF THE DAILY NEWS LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

THE AUSTRALIAN JOURNALISTS' ASSOCIATION . . . . . } RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 25, 31; *June* 1.

SYDNEY, *Aug.* 6.

KNOX C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Industrial Arbitration—Award—Breach—Liability—Successor of business of party bound by award—President of Commonwealth Court of Conciliation and Arbitration—Authority to appoint deputy—Validity—Industrial dispute—Journalists—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *secs.* 14, 29.

Sec. 29 of the *Commonwealth Conciliation and Arbitration Act* 1904-1918 provides that "The award of the Court shall be binding on . . . . (*ba*) in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party."

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Higgins* and *Rich* JJ. dissenting), that sub-sec. (*ba*) implies an award in the first place, and a succession following upon the operation of the award; and, therefore, that a company which before the making of an award took over the business of certain persons who, in respect of that business, were parties to the proceedings in which the award was afterwards made and who became bound by it, was not itself bound by the award.

Per Isaacs, *Higgins* and *Rich* JJ.:—(1) Sec. 14 of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, which purports to confer upon the President

of the Commonwealth Court of Conciliation and Arbitration authority to appoint a Justice of the High Court to be his deputy and in that capacity to exercise such powers and functions of the President as he thinks fit to assign to such deputy, gives the President authority to delegate his judicial powers to his deputy, and is not invalidated by reason of the authority so given being wide enough to include the delegation of the arbitral and enforcing powers which the Act purports to confer upon the President and the conferring of which has been held to be invalid. (2) A dispute between journalists and their employers is an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution.

Per Higgins J.: There is no ground in the words used for restricting the words of sec. 29 (*ba*) to the case of assignment made after the award, and the object to be attained is against it.

APPEAL from a Court of Petty Sessions.

On 6th May 1920 an information was heard by the Court of Petty Sessions at Melbourne, before a Police Magistrate, whereby the Australian Journalists' Association charged that the Proprietors of the Daily News Ltd. (who were sued under the name of the Daily News Proprietary Ltd.) had failed to furnish to the General Secretary of the Association certain entries, contrary to the provisions of an award made by *Isaacs* J. as Deputy President of the Commonwealth Court of Conciliation and Arbitration. The defendant was convicted and fined 40s. with £5 5s. costs.

From the conviction the defendant now, by way of order to review, appealed to the High Court.

The grounds stated in the order *nisi* were as follows:—(1) That the decision and conviction were erroneous in law in that (*a*) the award of *Isaacs* J. sitting as Deputy President of the Commonwealth Court of Conciliation and Arbitration was invalid and a nullity in law, for that the alleged dispute in respect of which the award was made was not an industrial dispute within the meaning of the Constitution; (*b*) that the award was invalid for that the persons in respect of whom it was made, namely, persons occupying positions of journalists such as are described in the plaint and award, cannot in law be parties to an industrial dispute within the meaning of the Constitution; (*c*) that the defendant was not a party bound by the award within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, and/or was incapable in law of being a party to the alleged industrial dispute in respect of which the same

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was made; (*d*) that the award made by *Isaacs* J. purporting to act as Deputy President of the Commonwealth Court of Conciliation and Arbitration was made by a person unauthorized in law; (*e*) that sec. 14 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, under which the Deputy was appointed by the President, was unconstitutional. (2) That the following essential facts had not been proved before the Police Magistrate: (*a*) the existence of an industrial dispute between the Australian Journalists' Association and the defendant upon which a valid award could be made; (*b*) the valid appointment of a Deputy President to make the award; (*c*) an award binding the defendant or purporting to bind the defendant in respect of the matters in question before the Police Magistrate. (3) That the Police Magistrate had no power under the *Commonwealth Conciliation and Arbitration Act* 1904-1918 to convict and/or fine the defendant.

The material facts are stated in the judgments hereunder.

Sir Edward Mitchell K.C. (with him *Stanley Lewis*), for the appellant.

Owen Dixon, for the respondent.

[During argument reference was made to *Federated Sawmill &c. Employees' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2); *Owners of s.s. Kalibia* v. *Wilson* (3); *In re Manitoba Initiative and Referendum Act* (4); *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (5); *Inland Revenue Commissioners* v. *Maxse* (6); *New South Wales* v. *The Commonwealth* (7); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (8).

Cur. adv. vult.

(1) 8 C.L.R., 465, at pp. 500, 513, 538, 552.
(2) 25 C.L.R., 434.
(3) 11 C.L.R., 689.
(4) (1919) A.C., 935, at p. 944.
(5) 26 C.L.R., 508, at pp. 547, 571, 583-584.
(6) (1919) 1 K.B., 647, at p. 650.
(7) 20 C.L.R., 54.
(8) 8 C.L.R., 419, at pp. 439, 449.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. (delivered by KNOX C.J.). The appellant Company was convicted on 25th May 1920 by Mr. E. Notley Moore, P.M., sitting as a Court of Petty Sessions, and fined 40s. with £5 5s. costs upon an information charging that the appellant Company failed to furnish to the General Secretary of the respondent Association certain entries, contrary to the award made by *Isaacs* J. as Deputy President of the Commonwealth Court of Conciliation and Arbitration. On the hearing before the Magistrate the plaint on which the award was made was put in evidence, and it appears that the appellant Company was not named therein as a party respondent; Messrs. Morgans, Lovekin and Thiel were joined as respondents in respect of the newspaper business now carried on by the appellant Company. The award of *Isaacs* J. was also put in evidence, the relevant portions of the award being as follows :—"I award, order, and prescribe as follows :—That all work to be performed by the members of the organization called the Australian Journalists' Association (other than as editor-in-chief or chief of general reporting staff of any daily morning or evening newspaper) for the respondents to this plaint or any of them in the various employments in the industry of journalism set out in the schedule hereunder shall in future be carried on and performed in the States of New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania, at the minimum salaries and rates and within the hours of employment and upon the other terms and conditions set out in the said schedule as applicable to each of such employments in each of the said States respectively. And I order and direct the payment of the said salaries and rates and the observance and performance of the said hours and other terms and conditions respectively by each and every member of the respondent Association, and by each and every of the said persons, firms and corporations joined as respondents herein and by the claimant organization and each and every member of such organization. . . . The names of all journalists employed by any of the respondents together with a statement as to the capacity, and/or grade or class in which they are employed shall be entered and when necessary added to or corrected by or on behalf of the

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respondents employing the journalists in a book to be kept by such respondents for the purpose at their office. A copy of such entries shall on application in writing by the General Secretary of the organization or the secretary of the local district of the organization, made at any time or times after 30th June 1917, be furnished by the respondent employer to any officer of the organization authorized in writing to receive it."

It was proved before the Magistrate that the appellant Company had failed to comply with the provisions of clause 16 (*b*) of the award, and there was evidence before him from which it appeared that the appellant Company was the assignee, and so succeeded to the business, of Messrs. Morgans, Lovekin and Thiel, proprietors of the newspaper in question, at a date antecedent to the making of the award, but no evidence was given to prove the precise date of the transfer of the business. It appeared from the transcript of the proceedings in the Arbitration Court, which was put in evidence before the Magistrate, that during the proceedings attention was drawn to the transfer of this business to the appellant Company, and that thereupon an order was made in the presence of a representative of the appellant Company for the amendment of the plaint by adding the appellant Company as a respondent thereto, but apparently by some oversight the amendment was not made, and, as the record now stands, the appellant Company does not appear thereon as a party to the proceedings.

A number of objections were raised by the appellant Company, both before the Magistrate and on this appeal, with one only of which we find it necessary to deal, namely: "The defendant (appellant) was not a party bound by the said award within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, and/or was incapable in law of being a party to the alleged industrial dispute in respect of which the same was made."

It is apparent from the facts stated above that the award does not purport directly to bind the appellant Company, which did not appear on the record as a respondent to the plaint, and the question for consideration is whether by force of sec. 29 of the Arbitration Act the award is made binding on the appellant Company so as to render it liable to a penalty for a breach of the conditions of the award.

Mr. *Dixon* contended that the appellant Company was so bound, by virtue of either sub-sec. (*a*) or sub-sec. (*ba*) of that section. The relevant portion of the section is in the following words: "The award of the Court shall be binding on (*a*) all parties to the industrial dispute who appear or are represented before the Court; (*b*) all parties who have been summoned to appear as parties to the dispute, or required to answer the claim, whether they have appeared or answered or not, unless the Court is of opinion that they were improperly made parties; (*ba*) in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party." The award has no force of itself. It is made effective by force of sec. 29. That section operates so as to effectuate, but not to enlarge, the directions or orders contained in the award, and makes them binding and enforceable in law. These observations define the true limits of sub-secs. (*a*) and (*b*). But when we come to sub-sec. (*ba*), a different set of persons is in contemplation. They are successors, &c., of the business of a party bound by the award. The plain words of the sub-section contemplate: (1) an award; (2) a party against whom some orders or directions have been made and who has become bound by force of sec. 29, sub-secs. (*a*) or (*b*); (3) a successor, &c., of the business of a party who has become bound in the manner already indicated. This necessarily involves the making of an award in the first place, and a succession following upon the operation of the award. The suggestion that the successor is a successor to or in the *lis* is not a natural construction of the words used, and, in truth, gives no force to the words "bound by the award" following the word "party" in sub-sec. (*ba*).

For these reasons we are of opinion that the Magistrate was in error in imposing a penalty on the appellant, and that his order and conviction must be set aside.

Having regard to the fact that the appellant in the course of the proceedings in the Court of Arbitration was ordered to be joined as a respondent, and that it succeeds in this appeal only by taking advantage of an accidental omission to add its name as a respondent

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in the record, we think there should be no order as to the costs of this appeal.

ISAACS J. The grounds of this appeal may be classified thus: (1) the award is a nullity, by reason of the constitutional invalidity of sec. 14 of the Act under which the President deputed his powers, and by reason also of journalism not being susceptible of an industrial dispute within the meaning of the Constitution; (2) the appellants are not bound by the award, as they are not parties to it, or proved to have succeeded Lovekin and Thiel as owners of the *Daily News*, since the award was made; (3) the Magistrate convicted the appellants instead of merely fining them. Reference to the evidence in this case will indicate the morality of the appellants in taking the first ground. Particularly I refer first to what is stated at p. 82 of the report of my judgment in the arbitration (*Australian Journalists' Association* v. *Sydney Daily Newspaper Employers' Association* (1))—the references on that page to the Perth *Daily Mail* should be to the *Daily News*; next, to evidence before me in the official transcript; then to the recitals in the formal sealed award itself, and lastly to the prohibition proceedings in which the present appellants were the moving party. These references show conclusively that the two legal contentions now made were expressly abandoned, and that jurisdiction to deal with the dispute upon its merits was—with one reservation as to grading—admitted by the appellants as fully as any person could possibly admit it. They show, moreover, that as early as 5th February 1917, when I proceeded, as I said, to "take the appearances," Mr. Conley announced, "I am representing the *Daily News*, Perth." Mr. Brickhill, representing the claimants, applied for the *addition* of the "Proprietors of the Daily News Ltd.," saying "That is a new company that has been formed to take over the *Daily News*." I proceeded to inquire how far that was consented to, and, in reference to the appellants, asked Mr. Conley "As to the proprietors of the *Daily News*, Perth?" He replied, "I agree to that." Several other applications as to parties were made and consented to, some were added and some struck out. Beyond question, these amendments were regarded as

(1) 11 C.A.R., 67.

formally made, being noted as they were in the official notes. I did not think it necessary to take the pen and alter the plaint itself. The case proceeded from that point—really the start—to its conclusion, on the basis that the amendments were made, and the appellants were in fact represented, and in fact fought the case through; in short, they were actually and formally, from 5th February 1917, parties in their own names, in addition to Lovekin and Thiel, Mr. Lovekin being taken as the medium of communication to Mr. Conley, their representative before me. It would be superfluous for me to designate with any epithet the attempt of the appellants now to go back upon the common understanding upon which the arbitration proceeded. On the prohibition proceedings they took, and properly took, their objection as to grading; they were fully heard, and the Court unanimously decided against them. That being settled, they are in no different position as to jurisdiction of the Arbitration Court from that of any of the respondents. The law, however, not for their sake but for the sake of guarding against unauthorized judicial action, permits the objection to be taken in such a case, regardless of the merits of the objector. I proceed, therefore, to consider it.

As to the alleged invalidity of sec. 14 of the Act, I am clear that the point is untenable. That section can and must be read so as to refer only to such powers and functions as the President lawfully possesses. It occurs in the part of the Act dealing with the Constitution of the Court, and sec. 14 is an adjunct to secs. 11 and 12. Secs. 11 and 12 enact that some powers and functions thereafter to be determined are to be vested in the President, though what they are to be depends upon what the Legislature may say in the subsequent sections. Sec. 14 is an authority to delegate some of those powers and functions, whatever they may be. It follows that since *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) decides that the arbitration and the enforcement provisions of the Act are severable and stand independently, the powers and functions of the President and of the Deputy President under each head must be severable and independent. If the appellants' argument were allowed to prevail, the result would be disastrous. Many awards made by

(1) 25 C.L.R., 434.

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Powers J. under the authority of sec. 14 would be invalid, and as there are still enforcement provisions in the Act attached to the President's Court (see secs. 38 (*d*), (*da*) and (*e*)), as well as the common rule provisions, and the stated power to deal with State industrial employees, I do not see how even the new sec. 14 in Act No. 39 of 1918 could be maintained, or even the powers of the President himself could be supported. No doubt, if we were convinced that the appellants' arguments were sound, the Court would be bound to give effect to them regardless of consequences. But I should require absolute certainty before I would adopt the appellants' invitation to burn the whole social edifice for the sake of roasting their egg.

The second point as to nullity is that journalism is a profession that is incapable of an industrial dispute. I have so recently, in conjunction with my learned brother *Rich*, dealt with the subject of industrial disputes in *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1) that it is needless to say very much now. While the basic meaning of "industrial disputes" within pl. xxxv. of sec. 51 of the Constitution remains the same, the progress of industry itself, its advancing reliance on science and art, must bring more and more instances within the ambit of the clause. A newspaper is a commercial enterprise, and the co-operators in its production, from the proprietors to the office boy, are engaged in one industrial operation. No line of principle separates the co-operators. Internally, duties are allocated, but in the aggregate the co-operators form one body, whose combined efforts result in the production of the one article of commerce, the newspaper. The point fails. In the result, the appellants' endeavour to escape from their accepted undertaking is futile. The law regards it as an attempt only.

The second head of objection is free from any express undertaking. It is merely an effort to evade, by a technicality, the responsibility of the actual facts. It is said on their behalf: "The Magistrate cannot look beyond the sealed award to see who were respondents: he cannot have regard to the actual fact that we were, in fact, added as respondents; that we fought the claimants, and were beaten; the absence of our names from the list in the sealed award entitles

(1) 26 C.L.R., 508.

us, in law, to disregard all the obligations of the award." If the technicality holds, they are, for the moment, safe. I say for the moment, because their omission was not intended: it was a mere clerical omission. Whoever drew up the heading and recitals of the formal document, overlooked certain pages of the transcript. That is evident from the fact that all the amendments as to parties as they appear on those pages have been overlooked. Thus: "The Brisbane Daily Mail Ltd." was made respondent, instead of "The Queensland *Daily Mail*"; "John Fairfax & Sons Ltd." were added, as well as "The Proprietors of the Daily News Ltd"; the name "W. R. Thomas" was omitted, and for it there were substituted "William John Sowden, Evan Kyffin Thomas and Geoffrey Kyffin Thomas"; for the names "Christopher Bennett and Walter Jeffery" there were substituted "Walter Jeffery and John Stinson," and the name of "Annabella Syme," who was deceased, was struck out. Not one of these amendments appears in the formal heading of the award as drawn up. It is the clearest case of inadvertence. Notwithstanding the slip, all the rest of the parties added have loyally adhered to their actual consents.

It may still be within the power of the President to correct the slips. I say "may be" because, notwithstanding the vigour of my expressions on this point during the argument, I recognize that it is a matter for argument. I have certainly a very strong impression, but parties must be heard before the judicial mind is definitely fixed, and, though in an ordinary litigation there could be no possible doubt, it may be a distinction could be shown in the present case. But at this moment the names are omitted, and we have to consider the effect.

It is perfectly plain that, apart from one technicality, the appellants are in fact, and are actually proved to be, within sub-sec. (*a*) of sec. 29. It is proved (1) that they, on 5th February 1917 and subsequently during the arbitration, admitted they were parties to the dispute; (2) that they were on 5th February 1917 formally made parties to the proceedings; (3) that thenceforward up to the conclusion of the proceedings they were represented by Mr. Conley; (4) that the award was in fact made against them; (5) that in the subsequent prohibition proceedings they

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themselves, as parties to the proceedings, and by asking for a partial prohibition only, admitted themselves party to the dispute. All these things are actually proved against them by evidence in this case, and without objection to any of the evidence. As against all that, the one point relied on is that the Magistrate was bound by the mere absence of the appellants' name from the heading, to hold that they are persons not bound by the award. As a first answer, I think on the facts of the case, and on the ground that those facts were proved without objection, the point fails.

If the respondents are forced to rely on sub-sec. (*ba*), the following seems to be the position:—It is, of course, undeniable that under sub-sec. (*ba*) the Magistrate can act on evidence *dehors* the recited parties in order to bind a successor, assignee or transmittee who became such a day after the award was sealed. The objection relied on, therefore, cannot rest on any notion of such a course being considered outside the capacity or function of the Magistrate. Nor can it rest on any notion of justice. The utmost retrospective limit to which sub-sec. (*ba*) can properly be taken is that the successor, assignee or transmittee must take from a person who is, at the time of succession, a party to the plaint. But between that point of time and the making of the award, months or even years may elapse. Transfers may take place in that period, they may take place secretly and thwart the whole proceedings or they may take place openly. If openly, it is clear that the successor may be added. But, if added, must the whole of the hearing be begun *de novo*, or must the new owner accept the state of the proceedings as at the date of his admission? If the former, it leads either to virtual destruction of the proceedings or to the exclusion of the successor; if the latter, it means the successor suffers no injustice, whether he is made liable under sub-sec. (*ba*) as a successor prior to the making of the award or as a successor after the award. The view that "a party bound by the award" means exclusively "a party against whom an award has already been made" not only introduces words not found in the section but also leaves a gap that seems to me to leave openings to fraud and to almost certain annihilation of the Act. The concealment of a transfer of a business pending the making of an award would enable both transferor and transferee to escape

the jurisdiction of the Court, and by systematically doing this the whole Act could be evaded. Now, if the words in question are fairly open to the broader construction which will mitigate the evil and advance the remedy, that construction ought, on recognized principles, to be adopted. In *Brunton* v. *Acting Commissioner of Stamp Duties* (*N.S.W.*) (1) Lord *Parker*, speaking for the Privy Council, said: "Where in a Statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail." The words in question, in my opinion, are not alone open to that wider construction, but have more probably that meaning when read along with their context. Before sub-sec. (*ba*) was passed, sec. 29 said: "The award shall be binding on (*a*) and (*b*)." In saying the award shall be binding on a party, it is only another way of saying "the party shall be bound by the award." So that "party bound by an award" includes a "party represented before the Court" (sub-sec. (*a*)). It is not contested that Lovekin and Thiel came within sub-sec. (*a*), nor that the appellants succeeded to Lovekin and Thiel. Since Lovekin and Thiel came within sub-sec. (*a*), they were at the time of the succession "parties" on whom the award is declared to be binding; in other words, they were parties "bound by the award" within the meaning of sub-sec. (*ba*).

In my opinion, therefore, the appellants' second head of objection should fail.

The third is based on the circumstance that the Magistrate orally used the word "conviction." It is, at most, a question of nomenclature, and could be amended if used in a formal record of conviction. It appears, however, that no such record was drawn up. The minute of decision does not use the word. The appellants' point is, apparently, due entirely to mistaken supersensitiveness.

In my opinion the appeal should be dismissed with costs.

HIGGINS J. The first argument—and longest—has been addressed to a difficult but paltry point raised by the appellant Company. A firm was mentioned in the plaint by the names of the partners,

(1) (1913) A.C., 747, at p. 759.

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Morgans, Lovekin and Thiel, described as "proprietors of the *Daily News*." Early in the arbitration proceedings, the representative of the claimant asked to have "The Proprietors of the Daily News Limited" added as a party to the plaint, that being the name of a company formed to take over the business; the representative of the employers (he represented the Company also) consented; and my learned brother *Isaacs* directed that the Company should be added; but the addition was not, in fact, made. The Company took part in the proceedings throughout; but the award as drawn up mentioned only "Arthur Lovekin and Paul Wm. Herman Thiel proprietors of the *Daily News*." (No point is made as to the absence of the name of Morgans.) The award by its terms imposed duties on the persons, firms and corporations "joined as respondents herein." Now, the Company was not actually joined as respondent; and it thinks fit to take the point that it is not bound by the award, and that the Police Magistrate was therefore wrong in imposing a fine of £2 with costs as for disobedience of the award.

Unless sec. 29 of the Act meets the case, the objection seems to be sound. No case of estoppel has been urged. It is no answer to the objection to say that the Company regarded itself as bound by the award, and was even a party to the previous prohibition proceedings. Sec. 29 of the Act says "the award of the Court shall be binding on (*a*) all parties to the industrial dispute who appear or are represented before the Court"; but this may mean all "parties" to the dispute as a Court proceeding. Sec. 29 (*a*) and (*b*) may merely mean that all parties named as such in the curial documents are bound if they have been summoned or required to appear, or if they appear or are represented. This view is favoured by the context of sec. 29, and particularly by sec. 21AA ("any party *to the proceeding*"), sec. 29 (*b*) ("improperly made parties"), sec. 38 (*j*) and (*p*). Therefore, I do not rely on sec. 29 (*a*). But sec. 29 (*ba*), inserted by an amendment of the Act in 1914, seems to fit the case exactly, unless we are forced by some implication to strain its meaning. The award is to be binding on "any successor, or any assignee or transmittee of the business of *a party bound by the award*, including any corporation which has acquired or taken over the business of such a party." This does not say that, to be

binding on the assignee, the assignment must be made after the award; it does not say "the business of a party who *has been* bound by the award"; it merely says, in effect, "You shall not evade the obligation of giving proper wages and conditions in your business by floating a company," &c. (Lovekin is managing director of this limited company.) If the named respondent is bound by the award, so is the assignee—and at the same instant. One main object was to prevent evasion of the award; and no form of evasion would be so likely as that of secretly assigning the business to a small family, firm or company. Why should we treat the words "after the award" as necessarily implied after the word "assignee"? Even if the words of sec. 29 (*ba*) may be treated as equally consistent with either meaning—either "after the award," or "before or after the award"—that meaning should be accepted which best furthers a main object of the provision, the meaning which prevents evasion of any obligation which may be created by the award. There is no difficulty here in establishing from the evidence that the Company took up in fact the burden of the dispute from its predecessors in the business if that is necessary to establish.

As for the other points raised in support of the appeal, I am of opinion that the President had power to commit to his deputy the function of acting as the Court (sec. 11), as well as any other of his functions.

Then it is urged that sec. 14 is invalid, and the appointment of the deputy invalid, inasmuch as sec. 14 covered, or might cover, the enforcing clauses as well as the arbitral clauses; and it has been held in *Alexander's Case* (1) that the Act is invalid so far as it purports to confer on the Court the enforcing power. It is said that the section is not severable and that the authority is not severable, and that they—the section and the authority—are wholly invalid, and even that the whole Act is invalid. Now, so far as the actual delegation of authority is concerned, the point of severability does not arise; for all that the instrument of delegation gives is authority "to exercise my power and functions in relation to the industrial dispute No. 1 of 1916 between" &c. If the President had no powers or functions as to the enforcement of the award, he simply did not

(1) 25 C.L.R., 434.

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delegate them. Moreover, so far as the section itself is concerned, *Alexander's Case* is conclusive to the effect that the functions are severable—that the appointment of the President to act as arbitrator can be severed from the appointment to enforce awards. Indeed, if I am not precluded from holding such an opinion by the decision in the *Kalibia Case* (1), I should say that it is our duty to carry out the intention of Parliament so far as it is legal, and that we ought not to refuse to carry out the legal part of the Act unless it be evident that Parliament would not have enacted it without the illegal part. I should say that our duty does not depend on the same words covering or not covering both the legal and the illegal, or on any rigid rule of that sort as to the form of the language, but on the intention of Parliament; we must carry out what Parliament intended within the limits of its powers, but not what it did not intend at all (and see *Jaehne* v. *New York* (2)). It is on this principle that the Courts of equity act in cases of excess in the execution of powers.

It is also contended that a dispute between journalists and their employers is not an "industrial dispute" within the meaning of the Constitution (sec. 51 (xxxv.)). But it was clearly the opinion of the majority of the Court in the *Municipalities' Case* (3) that employees other than manual workers could be treated as parties to an industrial dispute under the Constitution. The work of journalists is literary or quasi-literary; but how is the line to be drawn between clerks of high grade and reporters who jot down the news of the street? I adhere to the views which I expressed in that case.

In my opinion, the appeal should be dismissed.

RICH J. The facts in this appeal demonstrate that the appellants' case is devoid of merits, and the argument has not succeeded in evolving more than one arguable point. That is concerned with the construction of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act*. It was contended that the natural and only meaning of the phrase "party bound by the award" is a party

(1) 11 C.L.R., 689.
(2) 128 U.S., 189.
(3) 26 C.L.R., 508.

against whom an award has been made before the devolution of title, and that consequently the sub-section has no operation except where events have taken place in that order. I cannot accede to this contention. The phrase indicates the party rather than a condition or quality of the party. In effect the section reads thus:—The following parties shall be bound by the award: (*a*) all parties who appear personally or by representation; (*b*) all parties summoned, &c., whether they have appeared or answered or not, &c.; (*ba*) in the case of employers any successor or any assignee or transmittee of the business of any such party. Sub-sec. (*ba*) is in the nature of a statutory revivor or supplemental order made in equity proceedings after alienation or assignment *pendente lite*. *Lovekin and Thiel* appeared and were represented before the Court, and are in fact parties to the award. The appellant Company, as their successor, is the heir to the *lis*. *Lovekin and Thiel* were, in my view of the section, parties "bound by the award" at all material times. The point taken is a mere technicality, as the appellant Company was directed to be added as a party. The President or Deputy President is to exercise the powers conferred by the Act without regard to technicalities or legal forms (*Commonwealth Conciliation and Arbitration Act*, secs. 25, 28); they are expressly relieved and exonerated from all rules of practice and all technicalities and legal forms (*cf. Moses* v. *Parker* (1)). If we were to allow this technicality to prevail, we should be doing "the very thing from which the . . . Legislature has desired to leave the" tribunal "free and unfettered in each case" (*Moses* v. *Parker* (2)).

As this point fails, I must deal with the other objections raised by the appellants. It was contended that sec. 14 and the appointment of the Deputy President were invalid because the section includes enforcement as well as arbitral clauses. I read the section as referential and distributive. The powers are severable, and the meaning of the section is severable. *Alexander's Case* (3) is decisive on the question of severability. It was further objected that journalism is not susceptible of an industrial dispute. As to this objection, I adhere to what was said by my brother *Isaacs* and myself

(1) (1896) A.C., 245, at pp. 247-249. (2) (1896) A.C., at p. 248.
(3) 25 C.L.R., 434.

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PROPRIETORS OF THE DAILY NEWS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

in the *Municipalities' Case* (1). I trust that these points, which were supposed to be already laid to rest by the cases to which I have referred, will not be exhumed again.

The last objection as to the conviction calls for no comment other than that it is unsubstantial and untenable.

In my opinion the appeal fails.

Appeal allowed. Conviction set aside.

Solicitors for the appellant, *Lynch, McDonald & Elliott.*

Solicitors for the respondent, *Gillott, Moir & Ahern.*

B. L.

(1) 26 C.L.R., 508.

Cons *R v Lansbury* [1988] 2 QdR 180

Cons *O'Sullivan v Lunnon* 67 ALR 423

Cons *R v Lansbury* 33 ACrimR 12

[HIGH COURT OF AUSTRALIA.]

THURLEY . . . . . APPELLANT;
COMPLAINANT,

AND

HAYES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1920.

HOBART, *May* 3.

Knox C.J., Gavan Duffy and Rich JJ.

Police Offences—Insulting language—Calculated to provoke breach of the peace—Police Act 1905 (*Tas.*) (5 *Edw. VII. No.* 30), *sec.* 137 (IV.).

Sec. 137 of the *Police Act* 1905 (Tas.) provides that "No person shall, in any public place, or within the hearing of any person passing therein . . . (IV.) Use any threatening, abusive, or insulting words or behaviour with intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."