[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

HIBBLE AND OTHERS.

EX PARTE THE BROKEN HILL PROPRIETARY COMPANY LIMITED.

H. C. OF A. 1920.

SYDNEY, *Nov.* 29, 30; *Dec.* 1, 16.

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

High Court—Jurisdiction—Prohibition—Person or tribunal acting without jurisdiction—Nothing further to be done by person or tribunal—Special tribunal—Award made by chairman—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (v.)—*Industrial Peace Act* 1920 (*No.* 21 *of* 1920), *secs.* 13-17, 27, 28.

A Special Tribunal was constituted under the *Industrial Peace Act* 1920 in respect of the coke industry. The Tribunal consisted of H., as chairman, and eight other persons. An award (so-called) was issued by H., who signed as "Chairman, Coke Industry Special Tribunal." An order *nisi* was issued from the High Court calling upon H. and the eight other members of the Tribunal and the Union that asked for the award to show cause why a writ of prohibition should not issue prohibiting the members of the Tribunal and the Union "from further proceeding" upon the award. There was no power for the Tribunal to enforce the award.

Held, by the whole Court, that the alleged award was invalid, as not being the award of the Tribunal but of H.

Held, by *Knox*, C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Higgins* and *Rich* JJ. dissenting), that a writ of prohibition should issue to H., directing him not to further proceed with the alleged award.

ORDER *nisi* for prohibition.

On the application of the Broken Hill Proprietary Co. Ltd. an order *nisi* was issued by the High Court calling upon Charles Hibble, Chairman, and Frank Howard Flemming, Henry Alfred Mitchell,

Ivo Clarke, James Manners Dixon, John Marcus Baddeley, Albert C. Willis, Albert Edward Phillips and John Michael Walker, members of the Coke Industry Special Tribunal, and the Australasian Coal and Shale Employees' Federation, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, to show cause why a writ of prohibition should not issue to prohibit the said persons and the said organization from further proceeding upon a certain award purporting to be promulgated by the Chairman of the Coke Industry Special Tribunal; or, in the alternative, why a writ of certiorari should not issue to remove the proceedings held before the Coke Industry Special Tribunal into the High Court. The only material ground of the order *nisi* was "(9) that the alleged award is not the act of the said Coke Industry Special Tribunal and does not purport to be such."

A motion was also made to the Full High Court by the Broken Hill Proprietary Co. Ltd., on notice to the Australian Coal and Shale Employees' Federation, under sec. 27 of the *Industrial Peace Act* 1920 for a decision on certain matters which, in the events that happened, it is not material to state.

The material facts are set out in the judgment of *Knox* C.J. and *Gavan Duffy* J. hereunder.

Watt K.C. (with him *J. A. Ferguson* and *Owen Dixon*), for the prosecutor. That which purports to be an award is bad on its face. The Special Tribunal appointed under sec. 13 of the *Industrial Peace Act* 1920 consists of representatives of employers and employees and a chairman (sec. 14), and an award must be made by all or at least by a majority of all of them. Here the award, in so many words, is made by the Chairman alone, and the award is not that of the Special Tribunal.

Flannery K.C. (with him *Cantor*), for the respondent organization. Prohibition will not lie under the circumstances of this case. The Tribunal, having made an award, is *functus officio*, and there is nothing for prohibition to act upon. Accepting the decision in the *Builders' Labourers' Case* (1) that prohibition would lie to the Commonwealth Court of Conciliation and Arbitration, it proceeded on the assumption that that Court had power to enforce its awards. Here the

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

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Special Tribunal has no power to enforce its award (sec. 17). The power to vary the award is not sufficient to support prohibition, because the Court cannot vary an award of its own volition. The rule as to common law prohibition, which is the same as to a prohibition under sec. 75 (v.) of the Constitution, is that prohibition will not go unless something can be done by the tribunal by way of enforcement of the order which is said to be made without or in excess of jurisdiction (*Roberts* v. *Humby* (1); *In re Poe* (2); *In re Knowles* v. *Holden* (3); *In re Denton* v. *Marshall* (4), and cases collected in *Curlewis & Edwards on Prohibition*, pp. 374 *et seq.*).

[KNOX C.J. referred to *Tramways Case* [*No.* 1] (5); *In re London Scottish Permanent Building Society* (6); *Farquharson* v. *Morgan* (7); *Jones* v. *Owen* (8); *Marsden* v. *Wardle* (9).

[ISAACS J. referred to *Serjeant* v. *Dale* (10).]

Certiorari will not lie, for it only lies where a tribunal is exercising a common law jurisdiction by procedure outside the common law. It does not lie to Courts exercising statutory jurisdiction (see *Halsbury's Laws of England*, vol. x., pp. 160, 192).

[ISAACS J. referred to *Colonial Bank of Australasia* v. *Willan* (11).]

The mere fact that the award is published in Hibble's name is not conclusive that it was not the award of the Special Tribunal. On the evidence the award was promulgated with the prior consent of all the members of the Tribunal except Mitchell. A majority of those present may act for the Tribunal if all have been summoned (*Veley* v. *Burder* (12)).

Leverrier K.C. (with him *Jaques*), for the Commonwealth intervening. Prohibition will not lie where another tribunal has to enforce the determination (*Chabot* v. *Lord Morpeth* (13); *Ex parte M'Innes* (14)).

Watt K.C., in reply.

Cur. adv. vult.

(1) 3 M. & W., 120.
(2) 5 B. & Ad., 681.
(3) 24 L.J. Ex., 223.
(4) 1 H. & C., 654, at p. 660.
(5) 18 C.L.R., 54.
(6) 63 L.J. Q.B., 112.
(7) (1894) 1 Q.B., 552, at p. 559.
(8) 5 Dowl. & L., 669.
(9) 3 El. & Bl., 695.
(10) 2 Q.B.D., 558.
(11) L.R. 5 P.C., 417.
(12) 12 Ad. & E., 265, at p. 303.
(13) 15 Q.B., 446.
(14) 4 N.S.W.L.R., 143.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This was a motion to make absolute an order *nisi* calling on Charles Hibble, Chairman of the Coke Industry Special Tribunal appointed under the *Industrial Peace Act* 1920, the members of that Tribunal and the Australian Coal and Shale Employees' Federation, to show cause why a writ of prohibition should not issue to prohibit the said persons and Federation from further proceeding on the award purported to be promulgated by the Chairman on 15th October 1920. The order *nisi* was granted on a number of grounds, of which it is necessary to consider only one, viz., (9) that the alleged award is not the act of the said Coke Industry Special Tribunal and does not purport to be such.

By notice published in the *Commonwealth Government Gazette*, No. 83, dated 8th October 1920, it was notified that the Governor-General in Council, in pursuance of the *Industrial Peace Act* 1920, had appointed a Special Tribunal, to be known as the Coke Industry Special Tribunal, for the prevention or settlement of any industrial dispute or disputes which had arisen or might arise in the coke industry, such Tribunal to consist of the nine individuals named as respondents ; the respondent, Charles Hibble, being appointed Chairman.

The alleged award now in question was published in the *Commonwealth Government Gazette*, No. 92, of 25th October 1920, and is in the following terms :—" To all coke workers in New South Wales, being members of the Australasian Coke and Shale Employees' Federation, I award as follows : (1) All adult day wage workers, an increase of 3s. per day ; (2) contract workers, an increase of 17½ per cent. ; (3) boys and youths, an increase of 20 per cent ; (4) all existing rates, customs and conditions not expressly altered by this award are to remain in force ; (5) this award shall be operative on and from Monday, the 27th day of September 1920, and shall remain in force until varied or rescinded. Dated at Sydney, in the State of New South Wales, this 15th day of October 1920.—Charles Hibble, Chairman, Coke Industry Special Tribunal."

The original award was not produced in evidence before us, but it was not disputed that the copy published in the *Gazette* was a true copy. It is plain, on the face of the award as published in

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the *Gazette*, that it purports to be the award not of the Special Tribunal but of Mr. Hibble as Chairman thereof—the operative words are " I award " and the signature is that of Mr. Hibble. Mr. *Flannery*, for the respondent Federation, contended that, although this was so, the question whether the award was or was not the award of the Special Tribunal could not be decided by merely looking at the form of the award as it appeared in the *Gazette*, and that the evidence showed that it was in fact if not in form the award of the Tribunal. In support of this contention he relied on the transcript record of the proceedings of a conference held on 5th October, at which all the persons who were afterwards appointed members of the Special Tribunal were present. This meeting appears to have constituted itself a "*voluntary tribunal*," the Coke Industry Special Tribunal not having been appointed until 8th October. It is sufficient to say that the transcript record shows that at that meeting Mr. Hibble, after some discussion had taken place, announced his intention of making an award as soon as the Special Tribunal should be constituted, and there and then announced the terms of his proposed award, which had obviously not been previously submitted to those present at the meeting. It is abundantly clear from the transcript that the proposed award was announced as being the award of Mr. Hibble alone. Of course the Tribunal, which was constituted subsequently, could not be bound by any arrangement arrived at at this meeting, but it is clear that if anything was assented to by those present at that meeting, it was that Mr. Hibble should make an award in the terms then indicated. He neither asked for nor received the concurrence of the other persons present in the making of the award as *their* award.

The Special Tribunal having been appointed on 8th October, a meeting was held on 15th October, at which Mr. Hibble as Chairman, Mr. J. M. Walker representing the Federation and Messrs. I. Clarke, H. A. Mitchell and J. M. Dixon representing the employers were present. The purpose of the meeting appears from the following statement of Mr. Hibble :—" This is a sitting of the Tribunal known as the Coke Industry Special Tribunal, formed under the *Industrial Peace Act* 1920. Its constitution is gazetted on Friday 8th instant—*Commonwealth of Australia Government Gazette*, No. 83.

(The Chairman read the official notification.) I formally lay the authority on the table under which this Tribunal is constituted. It will be within your recollection that prior to the issue of the *Gazette* constituting this Tribunal we met under what was known as the Coke Industry Tribunal. That was a voluntary body constituted of the same representatives, with myself as Chairman. Under that Tribunal of 5th October 1920 an award was issued. This award was eventually, it was understood between the parties, to be finally issued under the authority of the *Industrial Peace Act*. In the meantime the Tribunal has been gazetted and constituted under that Act. I have received an application from the proprietors of the coke works that the Tribunal shall be called together for the purpose now of promulgating this award, so that it should have full force and authority. You have been summoned here to-day for that purpose."

Upon this statement being made, Mr. Mitchell immediately denied that the Broken Hill Proprietary Co. Ltd. had made any application for Mr. Hibble to make an award, and lodged objections to the jurisdiction of the Tribunal. After some discussion the following conversation took place:—"The Chairman (to Mr. Walker): You are representing the employees now sitting as a tribunal under the *Industrial Peace Act* on behalf of the Australasian Coal and Shale Employees' Federation, and do I understand that you refer to this Tribunal the same dispute as was in existence when the matter was dealt with by the voluntary tribunal? Mr. Walker: Exactly. The Chairman: I formally ask the proprietors' representatives if they accept that submission. Mr. Clarke: Yes. Mr. Mitchell: No; so far as the Broken Hill Proprietary is concerned, they say you have no jurisdiction. Mr. Dixon: We accept it. The Chairman: I would ask the Tribunal if they will accept the notes which have already been taken under the coal tribunal and the coke voluntary tribunal as a record of the proceeding of this Tribunal under the *Industrial Peace Act*. Mr. Clarke: Yes, certainly. The Chairman: I have received these objections from Mr. Mitchell as to the jurisdiction of the Tribunal; I have perused them and I treat them with every possible respect. Mr. Mitchell: They are submitted with the greatest respect to you. The Chairman: At the

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same time I formally overrule all the objections, and I shall now deliver this award under the *Industrial Peace Act*, that is to say, that to all day wage coke workers in New South Wales who are members of the Australasian Coal and Shale Employees' Federation I award an increase of 3s. per day, and in the case of contract workers being also members of the said Federation, an increase of 17½ per cent on their contract rates, and to the boys and youths, being also members of the said Federation, working in the coke industry, I order that their wages shall be increased by 20 per cent., and I further order that the payment shall date on and from 27th September 1920. The whole of the existing customs and conditions of the industry, except as varied by this award, shall continue and remain in force and the award itself shall be operative from the said 27th day of September 1920, and shall remain in force until it is varied or rescinded. I shall now take immediate steps to have the award sent on to the Federal Government for gazettal."

Under these circumstances it is, in our opinion, impossible to hold that the award in question was the award of the Tribunal or of any one except Mr. Hibble. There were only five members present at the meeting, and, even assuming that this was not merely an award of Mr. Hibble personally and that an award made by a majority of a Special Tribunal is an award of that Tribunal, it appears clearly that this award had not the assent of more than four out of nine members of the Tribunal, and so was not the award of the majority of the members. But it is clear that no member of the Tribunal except Mr. Hibble took any part in framing or promulgating the award; for the transcript shows that at the meeting in question, after the award had been read, Mr. Dixon required information as to whether the award applied in favour of coke workers who were not members of the Federation, and Mr. Hibble described the award as "the award which I have made." We are therefore of opinion that the award was neither in form nor in fact the award of the Special Tribunal.

It was not disputed that this objection, if sound, was fatal to the validity of the award as an award under the *Industrial Peace Act*, but Mr. *Flannery* for the Federation and Mr. *Leverrier* for the Commonwealth raised the point that inasmuch as the award had

been made the Tribunal was *functus officio*, and that it was too late for this Court to interfere by way of prohibition. It was assumed that if the application for prohibition had been made before the award was completely made the applicants would have been entitled to a writ of prohibition, but it was said that as nothing more remained to be done *by the Tribunal* in the matter, prohibition would not lie. This objection appears to us to be founded on the assumption that prohibition will not lie to a Court or person acting in a judicial or quasi-judicial capacity unless the applicant can establish that such Court or person has power to take some step to enforce the order which is found to have been made in excess of jurisdiction. The answer to this objection is that the practice of this Court has consistently been to grant prohibition to the Arbitration Court after award, and its power to do so was asserted in (among others) the *Builders' Labourers' Case* (1)—see per *Griffith* C.J. at pp. 236-237, *Barton* J. at p. 238 and *Powers* J. at p. 272. In our opinion there is no ground for departing from the conclusions arrived at in that case.

The real object of the writ was not merely to prevent an individual being vexed by an order which might affect him in his person or property, made by a person or tribunal assuming to have jurisdiction to make such an order, but having no such jurisdiction, but also to prevent any person or tribunal from assuming a jurisdiction which has not been conferred on him or it. So far as the writ is regarded as a means of protection for the individual who has not disentitled himself by his conduct, the necessity of the case demands that it shall be granted at any time until all possible operation of the order complained of has been completely exhausted. If, on the other hand, the issue of the writ be regarded as intended to keep an inferior Court within the limits of its jurisdiction, it should never be too late to get rid of what might be regarded in the future as a precedent for the exercise of a jurisdiction which is not really justified by the law.

In our opinion, so long, at any rate, as a judgment or order made without jurisdiction remains in force so as to impose liabilities upon an individual, prohibition will lie to correct the excess of jurisdiction. This view is supported by the decisions in *Roberts* v.

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

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Humby (1)—see per *Alderson* B. at p. 127; *Farquharson* v. *Morgan* (2); *Buggin* v. *Bennett* (3); *Ex parte Thackeray* (4); *Marsden* v. *Wardle* (5); *Leman* v. *Goulty* (6); *Bridge* v. *Branch* (7); *Macnamara* v. *Bell* (8).

Now, assuming this so-called award to remain in force, it imposes on every person engaged in the coke industry in New South Wales who employs therein a member of the respondent Federation the obligation of complying with the terms of the award, and this obligation is to continue until the award is rescinded or varied by the Special Tribunal. It is true that the Special Tribunal is not invested with the power of enforcing the award, but by sec. 17 of the *Industrial Peace Act* an award of a Special Tribunal is made binding on the parties and is to be enforced as an award of the Arbitration Court, *i.e.*, by proceedings in a District, County or Local Court or Court of summary jurisdiction (see sec. 44 (1) of the *Commonwealth Conciliation and Arbitration Act* introduced by amending Act No. 39 of 1918). On principle, it appears to us quite irrelevant whether the enforcement of the order made without jurisdiction is left in the hands of the Court which made that order or is committed to some other tribunal. No doubt the test usually applied in cases decided in England for the purposes of determining whether the operation of the order complained of has been exhausted is to inquire whether the Court which made the order can proceed to enforce its performance, but probably the reason for this is that in those cases the order if enforceable at all would be enforceable in the Court which made the order. So far as we can ascertain, no case has been brought before the Courts in England in which the tribunal which made the order had thereby completely performed its function, the enforcement of the order, when made, being taken out of the hands of that tribunal and committed to another tribunal of a judicial or quasi-judicial character.

Order absolute for prohibition against respondent Charles Hibble. No order as to costs.

The motion by the Broken Hill Proprietary Co. Ltd., being

(1) 3 M. & W., 120.
(2) (1894) 1 Q.B., 552.
(3) 4 Burr., 2035.
(4) 13 S.C.R. (N.S.W.), 1, at pp. 76-78.
(5) 23 L.J. Q.B., 263.
(6) 3 T.R., 3.
(7) 1 C.P.D., 633.
(8) 26 N.Z.L.R., 1231.

contingent on the Court holding that it had no jurisdiction to issue prohibition, need not now be dealt with. No order.

ISAACS AND RICH JJ. (delivered by ISAACS J.). This is an application to the Court in its original jurisdiction under sec. 75 (v.) of the Commonwealth Constitution for a prohibition restraining certain persons as members of a Federal tribunal called "The Coke Industry Special Tribunal" from "*further proceeding upon the award purported to be promulgated by the Chairman*" of the Tribunal on 15th October 1920. This is the only order in the nature of prohibition that the Court is asked to make or can make. We shall refer to the members as a whole as "the Tribunal" in contradistinction to Hibble, the Chairman, who, however, like all the rest, is only proceeded against as an integral portion of the Tribunal. It is of course the "Tribunal" as such which is sought to be prohibited—nothing short of that is claimed, or, if granted, would affect its members for the time being officially. There is in the order *nisi* an alternative claim for certiorari; but for various reasons that was dropped, and need not be considered. The prohibition, however, is sought also against "The Australasian Coal and Shale Employees' Federation," who are not "officers of the Commonwealth."

Among the many grounds taken in the order *nisi* are grounds going to the constitution of the Tribunal, the existence of a dispute, the inter-State nature of the dispute if any existed, the status of the organization in relation to the dispute, the reference of the dispute to the Tribunal, the constitutional power of the Parliament to enact certain portions of the new Act, the jurisdiction of the Tribunal to make such an award, and, finally, that the alleged award was not in fact and does not purport to be the award of the Tribunal sought to be prohibited. It will be perceived, therefore, that the proceedings challenge the jurisdiction of the Tribunal and the jurisdiction of Parliament. It happens that the questions raised as to the jurisdiction of Parliament and of the Tribunal have not been argued, since, in the view taken by the Court, they are unnecessary. In this case the validity of the legislation and of the constitution of the Tribunal is assumed. The one defect acted on is the fact that the award is not in reality and does not purport to be the award of

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the Tribunal, but only of one member of it, Mr. Hibble, the Chairman. Greatly as we regret there should be any difference of opinion on a matter of such great public importance, we are unable to concur in the decision to grant a prohibition in this case. In the first place, we shall state succinctly the steps of reasoning which guide our minds to the conclusion we have reached, and then as some of those steps involve considerations more or less controverted or complex, but all of them very important to the Commonwealth in many aspects, we later on state in detail the reasons for each successive step.

1. The first question which this Court has to consider in this case is its own jurisdiction to do what is asked. As the only power it possesses for the purpose is under sec. 75 (v.) of the Constitution, it is necessary that the Coke Tribunal should itself be amenable in the circumstances. Otherwise no prohibition can be granted against the Federation of Employees, whatever a common law Court might do in such a case; our own opinion, however, being that even at common law the position would be the same.

2. The duty of this Court to consider well its own jurisdiction in the particular circumstances in all cases where its interference with Commonwealth industrial awards is invoked, we are strongly of opinion, should, as a matter of principle, be very strictly pursued, in view of the clearly expressed will and policy of Parliament, repeated emphatically in the latest Act, that while full opportunity should be and is afforded for the assistance of this Court to industrial tribunals pending arbitration proceedings, yet in the interests of industrial peace absolute finality should exist, once an award is made. This principle, in our opinion, follows directly from the Constitution, which makes Parliament within the ambit of its powers the supreme interpreter of the will of the Australian people. We regard as by far the most important feature of the present case our outstanding duty to be specially careful that, unless the most absolute necessity is forced upon us by the facts, we should not interpose our authority so as in any way to oppose or counteract the distinct policy of Parliament for the peaceful progress of industry by *assuring disputants that awards after arbitration are as reliable as settlements after strikes.*

3. That duty consists on all occasions of insisting on a "clear case" being established by the applicant for prohibition against proceeding with a decision that the tribunal sought to be prohibited *is either proceeding*, or *has a present intention to proceed*, further in relation to *that* decision. And in an application such as this a specially "clear case" should, as we have said, be required.

4. In the present case the decision complained of is the award actually "promulgated," and not any new award or varied award, and on high authority an applicant for prohibition should be held strictly to his case.

5. Assuming that award to be an award of the Tribunal, so far from the facts showing a "clear case" of intended proceeding by the Tribunal the document indicates that the Tribunal has finished entirely with the matter so far as it can at present see, and does not intend, as far as appears, to do anything more.

6. In any case—both as to the Tribunal as a whole and as to Hibble the Chairman—whoever it was that made the award was *functus officio*. The award was not the act of a Court, which makes and follows up its orders till they are obeyed. It was not an exercise of the judicial power of the Commonwealth, but—according to the expressed views of four of the present members of this Court, found in this and previous cases—an act in aid of legislation. That is to say, it is part of the method required by the Constitution under sec. 51 (xxxv.) to be followed by the Parliament in determining the statutory obligations of industrial disputants, and, once declared, it is of a final character, enduring until, by Parliamentary authority, it either ceases or another statutory rule applies in its place.

7. Future variation by the Tribunal should not in any event be assumed unless an application were made, and the fear that a a variation might be made upon such an application is not a legal ground for prohibition.

8. But the ninth ground of the applicant's rule *nisi* is that the award promulgated is *not in fact an award of the Tribunal and does not even purport to be an award of that Tribunal*. We agree with that and consider it, as a determinative fact among the various circumstances we have to consider, absolutely fatal to the success of the application.

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9. Inasmuch as the ninth ground is true, it follows necessarily that the statement as to *variation and rescission* in the award is not and does not purport to be a statement *by the Tribunal*; and it would be absurd to suggest and no one has suggested, for it would be futile in every way, that Hibble alone intends or is able to vary or rescind an award on his own personal independent authority.

10. On the applicant's own case, therefore, not only is there nothing to support its claim to prohibit the Tribunal or its members as such on the ground that the circumstances show an intention in fact on its or their part ever to proceed on the award, but the fact is conclusively established to the contrary.

11. Finally, there is no right as contended for to prohibit the Federation of Employees on the ground that, apart from any intended action on the part of the Tribunal, the award creates an obligation which, if not declared unlawful, might be enforced before some ordinary Court of justice. Consequently, in our opinion, on all grounds the prohibition should be refused.

We now proceed to deal in order more fully with each of the matters we have indicated.

1. On the very threshold of this case, as we have said, stands the question as to the jurisdiction of this Court in the circumstances to interfere at all. Prohibition is for the avowed purpose of maintaining the strict letter of the law in relation to jurisdiction, and solely to prevent any attempted usurpation of judicial power. In *Cowan's Case* (1) *Abbott* C.J. said for the whole Court: "The Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own." To fail in this would be *exempli pessimi* in any case, for it would be not law but despotism; but in a case like the present we cannot but feel the strongest obligation to observe very special care not to exceed the limits of the power the law has given us. The case arises—as nearly every similar case in this Court has arisen—under the Federal enactments by which Parliament, as representing the will of the people, has sought to preserve without interruption by internal disputes the continued operation of the national industries of Australia. Recently, in promotion of this

(1) 3 B. & Ald., 123, at p. 130.

object, a further enactment was passed called *The Industrial Peace Act* 1920, and under this Act the Tribunal referred to was appointed.

2. Beyond controversy, the Constitution controls Parliament. But it also controls this Court; and it controls this Court in various ways. First, it is unquestionably our duty, where occasion strictly calls for it, to declare regardless of consequences the pre-eminence of the Constitution over any attempted legislation unauthorized. But it is equally the duty of the Court where its judicial action is invoked, to respect and, if necessary, to enforce the directions of Parliament as the sole interpreter of the national will unless such directions are upon due occasion and argument solemnly adjudged to be invalid. And further it is the duty of this Court, whatever be the validity or invalidity of any Parliamentary enactment, *not* to interfere unless the Constitution either directly or through the authority of Parliament confers, in the particular instance, the power and the duty upon the Court to interfere. Otherwise the interference of the Court, whether the matter in question be valid or invalid, is an unwarrantable intrusion and a breach of law as great as any it assumes to correct. (See per *Fry* L.J. in *London and Blackwall Railway Co.* v. *Cross* (1).) In some instances, it is true, no practical injury immediately results; nevertheless, it is unlawful and is a usurpation. In the present case, for example, the result might or might not be eventually the same. But the magnitude of the evil cannot be measured by the particular result of a case. The point that presses us most in the present application is that Parliament in fact has, beyond all question, in attempting to cope with widespread industrial unrest taken into account competing considerations for the general welfare, and has selected as the best upon the whole a definite expedient, the principle of which is well known, and is clearly expressed in *Tabernacle Permanent Building Society* v. *Knight* (2) by Lord *Halsbury* L.C. On the one hand, it had the possible course of settling industrial disputes once and for all by means of appointed tribunals, and, while giving directions to its tribunals, yet trusting those tribunals to observe the directions, and providing amply for obtaining from this Court the fullest directions

(1) 31 Ch. D., 345, at p. 371. (2) (1892) A.C., 298, at p. 302.

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as to law while the arbitration was pending, yet not permitting any errors which tribunals might inadvertently fall into to invalidate their final action. On the other hand, it had the possible course of allowing employers and employees after the supposed settlement of their disputes and at any period of time after the award, when perhaps evidence had disappeared and men and women were relying on the assurance of the public tribunal, to drag each other through the law Courts contesting every step, insisting on rigid adherence to technical provisions at the peril of destroying the arrangement arrived at, and leaving the opposing parties in the same state of antagonism as before, but exasperated by additional litigation, and one side at least embittered by the struggle, defeat and loss, and at the same time leaving the public at large individually and collectively to suffer. Parliament, having weighed both sets of considerations and after several prohibitions by this Court, followed by suggestions from some of its members, has, in the interests of public peace, in fact and beyond controversy deliberately chosen the former (sec. 28 and other sections) whatever its powers to do so might be, and its powers are not now passed upon. We may add that even if its powers were in this respect exceeded—though apart from sec. 75 (v.) of the Constitution we do not even suggest they were—the mere enactment of public policy is a very weighty consideration in our minds. We conceive it to be our duty on all such occasions as this to scrutinize with the utmost care the case presented by those who invite us to use the weapon of prohibition after an award is made, and thereby act in opposition to the expressly declared will and purpose of Parliament by annulling a settlement in fact arrived at; and we believe it to be our judicial duty, having regard to the authority of decided cases, to insist that the legal necessity for our intervention shall in this case be established beyond all reasonable doubt.

3. It is settled law both in England and Australia that before a person can obtain a prohibition, even in a matter of ordinary importance, he must make out a "clear case." So said *Jervis* C.J. in *Re Birch* (1). And in the same case *Cresswell* J. said (2): "We are not bound to grant a prohibition . . . unless we are *clearly satisfied*

(1) 15 C.B., 743, at p. 755.

(2) 15 C.B., at p. 756.

that the inferior jurisdiction is *about to exceed its powers.*" This principle was recognized in *Elston* v. *Rose* (1) by Judges of great eminence, and was followed by this Court in *R.* v. *President of Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Agricultural Co.* (2). In the interests of public peace, in the clear line of our duty to respect the high public policy which Parliament, as the expositor of the public will, has established so far as it can to settle, and not to have again unsettled, the industrial struggles which if left to continue must paralyse the progress of this or any nation, we deem it our special obligation to follow the high judicial authority cited by us, and previously followed by this Court. We therefore closely scrutinize the facts before us, and unless we find a "clear case" is established, one which "clearly satisfies" the Court that the Coke Tribunal, whatever has happened in the past, is *in fact about to proceed in the future upon an unlawful course*, we are of opinion the Court ought to refuse the prohibition asked for.

In passing, and before inquiring whether there exists this "clear case" as to the Tribunal itself, we desire to say that with respect to the "party" sought to be prohibited we are by no means satisfied, inasmuch as the Employees' Federation is not an "officer," that there exists any power in any circumstances to grant the prohibition. Not being a common law Court, and having only defined statutory powers, we have no jurisdiction to extend it to cases which other Courts possess by virtue of common law powers more extensive. We say this, however, mainly in order to prevent future misunderstanding. In the view that prevails, this is immaterial in the present case, because that view maintains the liability of the Tribunal itself to prohibition. But it may be important to remember for future cases, and, as we shall presently point out, it is very important even here incidentally, having regard to one of the arguments addressed to us.

4. Now, as to the Tribunal, the prohibition sought, as already stated, is against "*further proceeding on the award promulgated.*" That means according to all fairness and common sense that the Tribunal is to be ordered not to proceed further to carry out or enforce the award *as it stands*—not some other award, not a different

(1) L.R. 4 Q.B., 4. (2) 22 C.L.R., 261.

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award, not even that award altered in some particulars, but *that* award, letter for letter as it has been "promulgated." It is laid down by the Court of Appeal in England (*R.* v. *Commissioners for General Purposes of Income Tax for Kensington* (1)) that even the *grounds* for a prohibition should be stated in the rule, and, as Lord *Sterndale* (then *Pickford* L.J.) said (2), in the absence of amendment the party should be confined to the grounds stated. *A fortiori*, as it seems to us, should he be confined to the *thing* sought to be prohibited. Nothing should be strained in favour of prohibition against industrial awards. If the law affords a remedy by way of defence in the ordinary course, it is open to every one concerned. If the established public policy of the law is to deny the power of impeaching an award in the ordinary way, we think that is a reason for this Court being extremely cautious not to defeat that public policy unless we are absolutely driven to do so by the most inexorable duty. Now, so far from there being a "clear case" that the Tribunal is about to proceed with the award "promulgated," we think the contrary is established. There is not a word or a syllable to prove or even suggest that the Tribunal has ever threatened or attempted to "proceed" with the award. There is not a word to indicate that the Tribunal has any present intention to take the least step to enforce or even alter the "award" as made and published. No one has ventured to suggest the contrary. It is urged, however, that proceeding with the award "promulgated" includes "varying" it—that is, making it different, or "rescinding it," that is, annihilating it; and that for these purposes sec. 16 of the new Act confers all the powers of the Court upon the Tribunal, including the power contained in sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act*, namely, "to vary its orders and awards and to reopen any question," and that by par. 5 of the award in this case reference is made to variation and rescission. To that contention, assuming, contrary to our opinion, its relevancy to this case, there are several potent answers. First, on the face of the section, the suggested power is not given. The Arbitration Court's powers incorporated by sec. 16 are all limited by the words "for that purpose," which means the purpose of the "power to hear and

(1) (1914) 3 K.B., 429.

(2) (1914) 3 K.B., at p. 444.

determine any industrial dispute," and that is only the very first power of the Court in sec. 38, namely, that in par. (*a*). Next, even if the Tribunal had the power suggested, the power of variation is a power conditioned by sec. 39 of the same Act, and requires as a prior event an application. Consequently, in the absence of any declared intention in fact to vary before that essential event occurs, none can be implied, and here the prior event has not occurred. Authority is hardly needed for so plain a proposition, but it exists. As an early case, in *Gould* v. *Gapper* (1) Lord *Ellenborough* C.J. acted on the principle that the superior Court has no reason to suppose the inferior tribunal will determine wrong. As a later case, there is *Wills* v. *Luff* (2). There a judgment for foreclosure absolute having been given, *Chitty* J. held that the case was "at an end," notwithstanding the well known power of the Court (see *Campbell* v. *Holyland* (3)) to reopen the matter, and alter the judgment to permit the defendant to redeem. But unless and until such an application is made, the Court, as the learned Judge held, is powerless to add a line to the judgment. We do not think any one would venture to say that because of that conditional power *Chitty* J. was attempting to exercise the jurisdiction of reopening the foreclosure. But that is the analogue of "variation" in relation to an award. We should by parity of reasoning—as we think—be constrained to hold the same even in the case of the *Arbitration Court*, particularly since the decision in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) denying to that tribunal the judicial powers of enforcement. For, if the argument pressed be sound as to awards under the new Act, it certainly throws open to prohibition *at any time* awards under the Court's Act. It should be mentioned, in view of the reference during the argument to the *Builders' Labourers' Case* (5), that not only what was there prohibited was a delegation of judicial functions purporting to be continuous (see pp. 226 and 252), but the opinions of *Griffith* C.J. and *Barton* J. were avowedly based on what, with deep respect, we hold without hesitation to be a mistaken view of what one Judge—not the presiding Judge—said in *Roberts* v. *Humby* (6), a view, furthermore,

(1) 5 East, 345, at p. 364.
(2) 38 Ch. D., 197.
(3) 7 Ch. D., 166.
(4) 25 C.L.R., 434.
(5) 18 C.L.R., 224.
(6) 3 M. & W., 120.

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that, if correct as to the common law, is not correct with respect to our Constitution. There has never been any decision of this Court that—on the assumption of the Arbitration Court not having judicial powers—an award dealing with arbitral matters can be prohibited. In those circumstances we think what Lord *Parker* said, when Judge of first instance, applies to this case. In *Wigan* v. *English and Scottish Law Life Assurance Association* (1) that learned Judge, when asked to assume from a prior decision that some particular point was necessarily involved, said: "I do not know how that may be, but I do not think that any inference can be drawn from a case of that sort which would justify me in treating it as a decision of law on a matter with which the Judges were evidently not intending to deal in the slightest degree." And in any event the question is one of fundamental law, which we hold as we have stated, and particularly of constitutional law, which is superior to any unauthorized slips in practice. *A fortiori* should the reasoning we have set out as to the Tribunal being *functus officio* with respect to arbitration be applied to the Coke Tribunal. A case very much in point is *In re London Scottish Permanent Building Society* (2). Prohibition was sought against the Judge of the City of London Court in respect of two orders he had made, one being dated 23rd March and the other dated 13th June, which discharged the first order and directed the payment of costs. The two learned Judges who composed the Court expressed very important opinions which are relevant here. *Charles* J. for the purpose of the order of 13th June assumed that the order of 23rd March was within jurisdiction, and on that assumption held that the later order was without jurisdiction. But why? His Lordship said (3): "For a Judge to *discharge* or *vary* his own final order without the consent of the parties is clearly an excess of jurisdiction warranting an application for prohibition." *Wright* J. held (3) "prohibition must go against the order of the 13th of June, which the Judge had clearly no power to make, since he was *functus officio* in regard to the whole matter." The words "discharge or vary" in the judgment of *Charles* J. are very pertinent to this case, and, as it would in any case be an unauthorized act to proceed to vary or rescind an award however

(1) (1909) 1 Ch., 291, at p. 303.
(2) 63 L.J. Q.B., 112.
(3) 63 L.J. Q.B., at p. 115.

good without a prior application, why are we to assume either that a party who desires to retain the award as it is will ever move to rescind or vary it, or that the Tribunal will ever do anything so unlawful as to attempt to rescind or vary without the necessary application? And if the Judge prohibited were *functus officio*, as *Wright* J. thought he was, after making the order of 23rd March, which was in the ordinary course of winding up the Society under the *Building Societies Act* 1874, a jurisdiction clearly conferring general and continuous powers on the Court much larger than those of the Coke Tribunal, it is difficult to see any escape from the conclusion that the Tribunal or Hibble was *functus officio* here.

5. But as a third reason, which is one of fact, par. 5 of the award in our opinion looks entirely the other way from that suggested. It indicates a distinct intention to retain indefinitely the award as made and published or, using the expression in the order *nisi*, as "promulgated," and it means that, having to give some intimation as to continuance, the award is to be regarded and acted on as in effect permanent. The Tribunal, or whoever made it, has done with it. It is to stand, so far as appears, as a definite final statement of the opinion of the Chairman as to the proper remuneration of coke workers, but, as to its effect in law and its binding character and its enforcement, that depends, not on the Chairman's will, not on the Tribunal, but on the Act itself (sec. 17). The Tribunal has finished and is *functus officio*, as soon as its award—if it is its award—is "promulgated." If we ascribe a present intention to "vary" because the word "varied" occurs, we must ascribe a present intention to "rescind"; and who could imagine such a thing?

6. The "award" is not an exercise of the judicial power of the Commonwealth: it is not like an order of a Court, as to which, as the House of Lords has said, the Court is not *functus officio* until the order is fully obeyed. It is a part, and a necessary part, of the method of legislation by sec. 51 (xxxv.), and when the Arbitrator's opinion (for that is all the award amounts to) as to the dispute is announced, the statute takes it up (sec. 17) and stamps it with legislative force as a legal obligation, the duty of enforcement being in the hands not of the Coke Tribunal but of the ordinary Courts. We

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have fully expounded our views as to this in *Alexander's Case* (1); and our brother *Powers's* view at p. 485 is, as we read it, in accordance with our own. It is also held by our brother *Higgins* in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2), basing it, as we have based it in *Alexander's Case*, on the principle laid down by the Privy Council in *Powell* v. *Apollo Candle Co.* (3). It stands, therefore, on the authority of four, that is, an absolute majority, of the present members of this Court, that an award is of a "legislative" nature because it is a "factum" on which the law operates. The Tribunal, then, is *functus officio* unless and until it is by law put again in motion, but only for the purpose of creating a different "factum" either wholly new or by way of variation. But in the meantime, and with regard to the completed award, how can it reasonably or legally be said that the Tribunal is about to do anything? And, still more, for that is what should determine our right to issue prohibition, how can it be said that a "clear case" of such intended action is made out?

7. The utmost that could be said, so far as the Coke Tribunal is concerned, is that *if* an application should be made and *if* the Tribunal were to entertain it, it might, according to the attitude of the Tribunal when applied to, evidence an intention to proceed. Putting that into simpler language, it means that there *is a fear* of a possible usurpation of jurisdiction. Lord *Dunedin*, for the Privy Council in *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.* (4), has very plainly stated what a party must prove *quia timet* even where that is a valid reason for interference. But nothing is better established in relation to prohibition than that prohibitions are not granted *quia timet.* That has been acknowledged law for about three hundred years (*Hill* v. *Bird* (5)), has been acted upon recently by the Lord Chief Justice of England in circumstances much more indicative of intention to proceed than exist in this case (*Ex parte Burns* (6)), and we think, for all the reasons stated, we are bound to adhere to it and act upon it. We are therefore clearly of opinion that, even treating Hibble as the Tribunal for this purpose, prohibition is not competent.

(1) 25 C.L.R., at pp. 462-464.
(2) 10 C.L.R., 266, at p. 332.
(3) 10 App. Cas., 282, at p. 291.
(4) (1919) A.C., 999, at p. 1005.
(5) Aleyn, 56.
(6) 86 L.J. K.B., 158, at p. 160.

8. But further, one of the grounds, indeed the very first one argued, for upholding the prohibition to the *Tribunal* (ground number 9 in the rule), is that the award *does not even purport to be that of the Tribunal, and was not in fact that of the Tribunal.* Now, as there is nothing in the facts to support the case against the "Tribunal" as attempting a usurpation of jurisdiction except something which, as the applicant says—and effectively says—neither is nor purports to be the award of the "Tribunal," we regard it as entirely inconsistent and legally impossible to go on and urge that there is a sufficient or rational proof of intention to proceed in order to maintain prohibition against the *Tribunal.*

9. Hibble, the Chairman, personally, it is said and with truth, is not the "Tribunal" for the purpose of the award; how, then, is the Tribunal to be made identical with him for the purpose of the prohibition? If Hibble and not the Tribunal is the person who *purports* to have made the award and who actually made it, must not Hibble and not the Tribunal be also regarded as the person who *purports to intend and does intend*—if anybody does—to "vary or rescind it." But nothing is sought against him apart from his membership of the Tribunal—any such claim would be useless as well as outside the present application, for nobody imagines he so intends.

10. In our view the applicant's position taken altogether in relation to the Tribunal is not only impossible to be maintained on the admitted facts, but has been disproved if intention to proceed is a necessary element in prohibition as we think it is, and we accordingly reject it.

11. In the circumstances, however, we have to consider still another contention advanced by the applicant. It is one which has on several occasions, over many years, been pressed upon this Court; it has often, including the present case, occupied a considerable portion of public time and evoked diverse expressions of opinion on the part of members of this Court. Hitherto a judgment on that point has not been found necessary; it is now necessary, having regard to our opinion on the rest of the case. We believe it desirable, and that in the long run it will conduce to the greatest economy of time so far as we are concerned, if we state once and for

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all with as much clearness as we can command the views which we entertain and have from time to time expressed, and in which renewed examination of the authorities on the present occasion confirms us. We regret that, as frequently happens, a mere reference to the cases is insufficient, because different views are held as to their effect. It is necessary to examine them carefully.

The final proposition of the applicant may be thus stated: Wherever any decision has been given without or in excess of jurisdiction, and at any time so long only as the decision retains any obligatory force, prohibition lies against the tribunal that gave the decision and also against the successful party, and notwithstanding the tribunal is *functus officio* and has no actual intention of taking any step in relation to its decision. The reason urged in support of that proposition is that prohibition lies in every case where by reason of a decision without jurisdiction a party is exposed to liability in some way dependent on the decision, and that consequently the tribunal itself is subject to prohibition, but that, whether or not the tribunal is subject to prohibition, the party always is. We conceive that to be fundamentally erroneous, and to be due to a radical misapprehension of the nature of prohibition and, it may be, of some expressions to be found in the books if read detached from their setting, but which, read with their surroundings, we think are not open to a construction which would support the proposition relied on. There is, to begin with, no decision, in any English Court which will support that proposition—a proposition which as applied to industrial awards we regard as disastrous. There is, as far as we can see, only one case which lends even colour to part of it, and which is to some extent exceptional. But that case, in that respect, is not only contrary to principle and prior authority but has to that extent been discountenanced in England and America. It must be remembered *in limine* that, since Parliament has not so far affirmatively given it, there would, but for sec. 75 (v.) of the Constitution, be no original jurisdiction whatever in this Court in a case like the present to issue a writ of prohibition. And, as the provision indicates, the " officer " is certainly *necessary* to the jurisdiction. Whether he is not the only person subject to that constitutional power is not before us for determination. But without him

it is beyond argument incompetent to prohibit the party, even conceding for the moment that a common law Court could do so by virtue of the principle stated by *Willes* J. in *London Corporation* v. *Cox* (1). It is indispensable therefore in this Court, acting under sec. 75 (v.) of the Constitution, to establish the right to prohibit the Tribunal itself even though the common law were otherwise. We desire, however, having regard to the general importance of the subject and the argument so often addressed to us, to say that to our minds the common law is the same. There might be practical difficulties—as the absence of the tribunal from the Realm—in exercising power over the tribunal about to assume jurisdiction improperly, but apart from that, as *Willes* J. points out (2), there was no difference between the proceedings against the party and the Court, except in the expressions "*sequi placitum*," "*trahere in placitum*," "*multipliciter fatigare*," and the like, for the one, and "*tenere placitum*," for the other. In short, the prohibition went against the Court to "hold plea," or its equivalent, down to complete execution of its judgment, and against the party from "following plea," or its equivalent, down to complete execution of the judgment *in that Court*. It must be "*the same Judge*" (*Smallbrook* v. *Slader* (3)), that is, the same "tribunal"—a condition which the proposition contended for entirely overlooks. Reason, indeed, precludes any other view. For instance, assume some inferior tribunal to pronounce a decision openly beyond its jurisdiction and assume the successful party to sue upon it in the Supreme Court of a State, could it be said that prohibition could be granted against the party restraining him from proceeding in the Supreme Court? Only one answer is possible. The basis of prohibition would there be wanting, namely, the usurpation of judicial authority by the tribunal concerned. And the answer to an application would be that the Supreme Court would have jurisdiction to pronounce on the validity of the decision. With reference to such a situation *Rowlatt* J. in *R.* v. *Chester Licensing Justices*; *Ex parte Bennion* (4) said :—"A more grotesque view of the remedy by prohibition I have never heard of. Prohibition is granted to prevent an inferior tribunal usurping jurisdiction, and it

(1) L.R. 2 H.L., 239, at p. 280.
(2) L.R. 2 H.L., at pp. 280-281.
(3) 1 Keb., 731.
(4) (1914) 3 K.B., 349, at p. 354.

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involves this, that the inferior tribunal *is doing something* which it ought not to do."

The essential nature of the writ of prohibition is thus stated by *Blackstone* (3 *Comm.*, 112): "A writ . . . directed to the *Judge and parties* of a suit in any inferior Court, commanding them to *cease* from the *prosecution thereof*." Observe the word "thereof." In *Worthington* v. *Jeffries* (1) *Brett* J., after referring to the standard authorities, said:—"These authorities show that the ground of decision, in considering whether prohibition is or is not to be granted, *is not whether the individual suitor has or has not suffered damage*, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all." At p. 383 he said it issues when the Court is clearly convinced that an inferior Court is *acting* without jurisdiction or is *exceeding* its jurisdiction. *Willes* J., in *Cox's Case* (2), quotes *Coke's* passage: "Prohibitions by law are to be granted, *at any time*, to *restrain* a Court to *intermeddle with or execute* anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." And we would add that the mistake is not less, when the words "at any time" are read without reference to the expressions which follow, namely, "restrain" and "intermeddle with or execute." So long as "intermeddling or execution" is possible and "restraint" is necessary to prevent the same, it is never too late to apply the remedy. But restraint connotes a real danger of intermeddling or executing in the future, either because it is actually in progress or threatened, or is in the ordinary course of practice of the tribunal. So in *Fitz-Herbert* (*Nat. Brev.*, 46) it is said: "*After judgment given and execution awarded* in the county or in other Court baron, which hath not power to hold plea . . . the party defendant shall have a writ of prohibition unto the bailiffs, or unto the sheriff or officer of *the Court, that they do not execution*; and if they have distrained the party to make satisfaction, that then they *release the distress, and that they revoke what they have done therein.*" Revocation there, of course, means revocation of authority to

(1) L.R. 10 C.P., 379, at p. 382. (2) L.R. 2 H.L., at p. 254.

proceed further, because, as held in *Hall* v. *Norwood* (1), the Court of King's Bench laid down the principle that after judgment and execution (which in *Keble* appears to have been completed) it was too late to move for prohibition, the Court observing, "since there is *no person to be prohibited, and possessions are never taken away or disturbed by prohibitions.*" That case was cited and acted on by Lord *Denman* in *In re Poe* (2), where the learned Judge added, quoting *Darby* v. *Cosens* (3), that there "something remained to be done," that is, of course, by the tribunal. As is said in *Short & Mellor's Crown Practice*, 2nd ed., at p. 253, the difference between an injunction and a prohibition is that the latter is "directed to the Court itself."

We do not refer to *Roberts* v. *Humby* (4) as an exceptional case, although, as has happened on prior occasions, it has been quoted as if it were by reason of Baron *Alderson's* judgment. The case was one of prohibition against the Court of Requests to restrain that Court "from proceeding." A judgment had been given for debt and costs against Humby, and he had been notified that execution would be issued unless he paid on or before 20th November. Apart from the question whether the Court below had jurisdiction to make the order, the only matter in contest was whether after sentence prohibition would lie notwithstanding execution had not been issued. The Court on 25th November, the rule having been granted some days before, held that it would. Lord *Abinger* C.B. said (5) that prohibition is "to restrain the inferior Court from proceeding." *Alderson* B. said (6): "I think a writ of prohibition may be granted even after execution." He then quotes the *Articuli Cleri* from *Coke's Institute* to support his opinion. But the learned Baron could not have intended to say anything inconsistent with what Lord *Abinger* had said, nor with what he himself had said *in arguendo* (7) when he used the expression "to restrain the inferior Courts from proceeding upon a sentence passed." Nor could he have imagined that when a party who "for his long continued disobedience is laid in prison upon the writ of *excommunicato*

(1) Sid., 165; 1 Keb., 614.
(2) 5 B. & Ad., at p. 687.
(3) 1 T.R., 552.
(4) 3 M. & W., 120.
(5) 3 M. & W., at p. 125.
(6) 3 M. & W., at p. 127.
(7) 3 M. & W., at p. 123.

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capiendo " is there otherwise than by reason of the continuous act of the Court in enforcing its sentence. In *Austen* v. *Dugger* (1) Sir *John Nicholl* said: " This Court is not *functus officio* till it has enforced the execution of its decree." Lord *Selborne's* reference to that case in *Mackonochie* v. *Penzance* (2) ought, we think, to place the matter beyond controversy. *Roberts* v. *Humby* (3), consequently, is no exceptional case, nor did *Alderson* B. attempt any revolutionary step. A case of *Bridge* v. *Branch* (4) cited during the argument was relied on to support the view supposed to be adopted by *Alderson* B., namely, that a judgment given without jurisdiction is subject to prohibition, although the Court that gave it is *functus officio*. The Mayor's Court had given a judgment which had been removed under statute to the Court of Common Pleas. That Court, nevertheless, granted prohibition to the Mayor's Court, but it did so under circumstances which make the case an authority against the view contended for. The rule *nisi* was twofold: (1) to set aside the judgment so far as it was a judgment of the superior Court, and then (2) to prohibit the Mayor's Court from enforcing it. The Court took the first step, which in law restored the judgment to the Mayor's Court, and *only then* prohibited that Court. So far there is no case diverging from the strict line of prohibition. The really exceptional case is *Jones* v. *Owen* (5). In that case *Patteson* J. held that where a rule for prohibition was obtained while the unauthorized execution proceedings were in progress, it might be made absolute though in the meantime they had come to an end, and that the rule should be drawn up ordering restitution, which indeed was the only effective order that could be made. The judgment in that case was based on the fact that the rule was obtained before the execution was completed, and that would be sufficient to distinguish it from this case. But it is inherently wrong. In *In re Denton* v. *Marshall* (6) *Pollock* C.B. held, in somewhat similar circumstances, that there was nothing to prohibit. *Martin* B. held similarly; and *Channell* B. agreed that " the application was too late." *Martin* B. (7) expressly declined to admit the authority of *Jones*

(1) 1 Add., 307, at p. 310.
(2) 6 App. Cas., 424, at p. 435.
(3) 3 M. & W., 120.
(4) 1 C.P.D., 633.
(5) 5 Dowl. & L., 669.
(6) 1 H. & C., 654.
(7) 1 H. & C., at p. 661.

v. *Owen* (1). In *United States* v. *Hoffman* (2), in circumstances very similar to those in *Jones* v. *Owen* and where that case and *Roberts* v. *Humby* (3) and other cases were cited, it was held (*Miller* J. delivering the judgment) that the writ of prohibition cannot do more than stay any further proceedings by the prohibited Court. *Hoffman's Case* is well worth perusal. And *Jones* v. *Owen* is opposed so far as restitution is concerned, and therefore as to the actual decision of the case, to the recent case of *Kensington Income Tax* (4), to be presently dealt with.

Besides the authorities above cited, there are two classes of cases which should be mentioned: first, cases in which affirmative expressions are found enunciating the principle of prohibition, expressions which we think would be misleading unless they were regarded as implying a negative; and a second class of cases which expressly determine the negative.

Among the first class are these: (a) *Paxton* v. *Knight* (5); (b) *Veley* v. *Burder* (6), as cited by *Willes* J. in *Cox's Case* (7); (c) *White* v. *Steele* (8), as cited by *Willes* J. in *Cox's Case* (9); (d) *Thompson* v. *Ingham* (10), the declaration in which averred that the respondents "are still proceeding in the said plaint"; (e) per *Bayley* J. in *Byerley* v. *Windus* (11); (f) *Ellis* v. *Fleming* (12); (g) *In re London Scottish Permanent Building Society* (13), where *Wright* J. said "an application for prohibition is never too late so long as there is something left for *it* to operate on" ("it," of course, means the prohibition, not the decision); (h) *Kavanagh* v. *Herbig* (14); (i) *Combe* v. *De la Bere* (15), where *Chitty* J. felt compelled to ascertain whether the Ecclesiastical Court was *functus officio*, before he had jurisdiction to grant a prohibition; (j) *Re Hogg*; *Ex parte Parkin* (16) (in this case the objection was taken that the application was too late; Lord *Phillimore* (then *Phillimore* J.) said: "As to the application being too late, it must be recollected that . . . *the*

(1) 5 Dowl. & L., 669.
(2) 71 U.S., 158.
(3) 3 M. & W., 120.
(4) (1914) 3 K.B., 429.
(5) 1 Burr., 314, at p. 315.
(6) 12 Ad. & E., at p. 309.
(7) L.R. 2 H.L., at p. 270.
(8) 13 C.B. (N.S.), 231, at p. 234.
(9) L.R. 2 H.L., at p. 278.
(10) 14 Q.B., 710, at p. 711.
(11) 5 B. & C., 1, at p. 22.
(12) 1 C.P.D., 237.
(13) 63 L.J. Q.B., at pp. 113-114.
(14) 9 W.A.L.R., 121.
(15) 22 Ch. D., 316.
(16) 14 T.L.R., 210.

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proceedings were not terminated, for though judgment was recovered there was still something left to be done"); (k) *Kensington Income Tax Case* (1). The latest of the cases mentioned of the first class, namely, the *Kensington Income Tax Case* (2), should be specially stated. The General Commissioners for Kensington had confirmed assessments on a taxpayer called Aramayo for the years 1908, 1909, 1910 and 1911 respectively; a prohibition was sought in respect of all the assessments. The Court of Appeal held that the assessments were all made without jurisdiction, that the Commissioners were subject to prohibition in a proper case, that the prohibition should be granted as to all the assessments except one, and that it should be refused in the one instance because, the amount having been paid, there were, as *Swinfen Eady* L.J. said (3), "not any further proceedings to prohibit." That meant "proceedings" by the Commissioners. *Pickford* L.J. said as to that one case (4), "there are no further proceedings to be taken." On appeal to the House of Lords, the decision was upheld (5). There are two points to observe as to that case:—(1) Prohibition was refused where payment had been made. This makes it quite clear that prohibition does not lie merely to declare null and void a judgment given without jurisdiction; and it shows that what Lord *Denman* C.J. said in *Bodenham* v. *Ricketts* (6) as to "a precedent if allowed to stand without impeachment" has reference to a judgment not entirely completed by execution. And it also shows that in *Farquharson* v. *Morgan* (7), what the language of that case appears to us to indicate independently, the underlying assumption of the learned Judges was that something still remained to be done by the Court that was prohibited, namely, to enforce its award—the only contest being whether, the want of jurisdiction being patent, the applicant could contract himself out of the right to prohibition. (See as to this *R.* v. *Kensington Income Tax Commissioners*; *Ex parte Princess Edmond de Polignac* (8).) (2) Prohibition was granted to restrain the *Commissioners from proceeding* on the assessments. That had

(1) (1914) 3 K.B., 429; approved (1916) 1 A.C., 215.
(2) (1914) 3 K.B., 429.
(3) (1914) 3 K.B., at p. 443.
(4) (1914) 3 K.B., at p. 447.
(5) (1916) 1 A.C., 215.
(6) 6 N. & M., 170, at p. 176.
(7) (1894) 1 Q.B., 552.
(8) (1917) 1 K.B., 486, at p. 517.

reference to their powers of "recovery" given by the *Taxes Management Act* 1880, secs. 86 to 89, by which they can distrain and sell, and even imprison. (See *Lumsden* v. *Burnett* (1) and *Elliott* v. *Yates* (2).)

Among the second class, which, of course, are the more decisive, are: (a) *Chabot* v. *Morpeth* (3); (b) *Serjeant* v. *Dale* (4); (c) *United States* v. *Hoffman* (5); (d) *Ex parte M'Innes* (6); (e) *Ex parte Bennett* (7); (f) *Ex parte Fangett* (8). In *Chabot* v. *Morpeth* the material facts were as follows:—The Commissioners of Woods and Forests gave notice to take Chabot's lands; and, no agreement as to compensation being come to, the Commissioners issued their warrant to the sheriff to summon a jury to determine the amount of compensation. At the inquiry the sheriff, at the instance of the Commissioners' counsel, directed the jury to inquire into the plaintiff's title as to some of the land, and on that basis a verdict for only £756 was returned, for which sum the sheriff gave judgment. The sheriff had not recorded the verdict or the judgment, nor had the Commissioners. A prohibition was moved for against the sheriff to restrain him from recording the verdict and judgment and against the Commissioners to restrain them from using the verdict or judgment. Lord *Campbell* C.J. held (1) that the sheriff was *functus officio*; (2) that the duty of recording was not cast on him; and (3) that therefore, apart from any other reason, no prohibition lay against the sheriff. And it is significant that, as the Lord Chief Justice pointed out (9), the "recording" still might take place, but by a body other than the sheriff or the Commissioners. As to the Commissioners it was refused because they were not judicial but executive officers. The all-important points to observe are: (1) a judicial error, possibly amounting to want of jurisdiction, had resulted in a judgment operative against the party; (2) the Court that erred was *functus officio*; and (3) one party to the judgment was able to use the judgment to the detriment of the party complaining. Nevertheless, prohibition was refused by a Court composed of Lord *Campbell* C.J.

(1) (1898) 2 Q.B., 177.
(2) (1900) 2 Q.B., 370.
(3) 15 Q.B., 446.
(4) 2 Q.B.D., 558.
(5) 71 U.S., 158.
(6) 4 N.S.W.L.R., 143.
(7) 19 N.S.W.L.R., 139.
(8) 8 W.A.L.R., 195.
(9) 15 Q.B., at p. 458.

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and *Patteson*, *Wightman* and *Erle* JJ. In *Serjeant* v. *Dale* (1) a prohibition was moved for, directed to the Arches Court of Canterbury, to restrain further proceedings in a case where a monition had been issued, then an inhibition, and lastly a sequestration. *Lush* J. (for himself and *Mellor* J.) held that prohibition should go, but only because "if not stayed it" (the sentence) "will or may end in deprivation" (2). After the case of *Mackonochie* v. *Penzance* (3) it is established beyond discussion that deprivation is a step in the proceeding, a mode of execution of the sentence. One can hardly imagine anything more permanently affecting the rights of a party than a sentence which, if deprivation had already taken place or had been impossible, would clearly, in the opinion of the Court, not have been open to "prohibition." *Hoffman's Case* (4) has already been referred to. In *Ex parte M'Innes* (5) Sir *James Martin* C.J. stated the law with his accustomed clearness and precision. A magistrate had on appeal made a municipal assessment. Prohibition was sought both against the municipality and the magistrate. The Chief Justice held (among other grounds) that prohibition would not lie against either, saying (6):—"A municipality is not a tribunal, and a prohibiiton only issues to a Court or pretended Court which assumes to exercise judicial functions. To the magistrate it cannot go, because he has nothing further to do, the enforcement of the assessment not depending on the order made by him, the municipality having the power independently of him to enforce the assessment or not." In *Ex parte Bennett* (7) the Supreme Court of New South Wales, in a case where a local Land Board made a certain finding on which the Minister could act, held that the Board, having dealt with the matter, had nothing further to do, and, the Minister not being a judicial tribunal, prohibition would not lie. In *Ex parte Fangett* (8) *Parker* C.J. dealt with a case where a magistrate had made an order to estreat recognizances, which order was attacked by prohibition for want of jurisdiction. But the order had passed into a judgment of the Supreme Court, and there was nothing which the magistrate could do. Prohibition

(1) 2 Q.B.D., 558.
(2) 2 Q.B.D., at p. 568.
(3) 6 App. Cas., particularly at pp. 436, 444, 448, 449, 451, 457.
(4) 71 U.S., 158.
(5) 4 N.S.W.L.R., 143.
(6) 4 N.S.W.L.R., at p. 149.
(7) 19 N.S.W.L.R., 139.
(8) 8 W.A.L.R., 195.

was held inapplicable either as to the magistrate or the complainant.

Those are our reasons for holding that this application should be dismissed. But inasmuch as the view which according to law must prevail is to the contrary, we have to accept that as the decision of the Court, and state our agreement that the ninth ground is established, namely, that in actual fact the Coke Tribunal neither made nor purported to make the award promulgated, and as to which it is sought to be prohibited.

HIGGINS J. The rule *nisi* for prohibition has been obtained against the Chairman and the other eight members of a Special Tribunal, which the Governor-General purported to appoint under sec. 13 of the *Industrial Peace Act* 1920, "for the prevention or settlement of any industrial dispute or disputes which have arisen or which may arise in the coke industry." The Act was assented to on 13th September. The appointment of the Tribunal was announced in the *Commonwealth Gazette* of 8th October, but the date of the appointment is not mentioned. In the *Gazette* of 25th October there is announced an award of 15th October, containing the words which have been set out in the judgment of the Chief Justice. There are twelve grounds stated in the rule and urged by the Company as justifying a prohibition; but the Court has required the respondents to confine themselves in argument for the present to grounds 9 and 11. If the award is invalid on any ground, that is enough. It is to be clearly understood, however, that the Court does not overrule any of the other grounds. These grounds, 9 and 11, are: "(9) that the alleged award is not the act of the said Coke Industry Special Tribunal and does not purport to be such; (11) the alleged award purports to prescribe a common rule for the industry." I concur with what the Chief Justice has said to the effect that the award on its face, and in fact, is the award of Mr. Hibble, the Chairman, and that the (so-called) award is therefore not binding under the Act on employers of coke workers in New South Wales, including this Company. I am also of opinion that the award purports to prescribe a common rule for employers and employees of coke workers in New South Wales, whether they are in dispute or not, and even though the dispute (if any) does not

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extend beyond New South Wales, and that it is for this reason also invalid (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1)).

But it is objected by the respondents that prohibition cannot be granted against the tribunal as it is *functus officio*, does not intend to proceed any further. The rule *nisi* is for a writ of prohibition directed not only to the Chairman and the other eight members of the Tribunal but also to the Australasian Coal and Shale Employees' Federation, "to prohibit the said persons and Federation . . . from *further proceeding upon the award.*" The Tribunal is not going to proceed further. Under sec. 16 of the Act, power is conferred on the Tribunal (assuming it to be properly constituted) to "*hear and determine* any industrial dispute of which it has cognizance"; and "*for that purpose*" the Tribunal has all powers which are given to the Court of Conciliation as regards an industrial dispute of which the Court has cognizance. That is to say, it is enabled to "hear" a dispute, just as the Court of Conciliation can hear a dispute under sec. 23 of the *Conciliation and Arbitration Act*, and it can "determine" the dispute (if there be no agreement), just as the Court of Conciliation can determine a dispute under sec. 24. There the power of the Tribunal ends. In my opinion, all the powers conferred are confined to the purpose of the hearing and determination of the dispute before it (see Conciliation Act, sec. 38 (*a*)). But even if the Tribunal could be regarded as having power to vary its award, as under sec. 38 (*o*) of the Conciliation Act, it cannot vary an award which is not the award of the Tribunal but of Mr. Hibble; and certainly not unless and until a distinct application be made to it. The Tribunal's power is, at the best, not higher in this respect than that of the Court of Conciliation, and, under sec. 39 of the Conciliation Act, although the Court has power to do many things of its own motion, it is provided as follows: "But no order or award shall be varied and no submission shall be reopened except on the application of an organization or person affected or aggrieved by the order or award." The position, then, is that, as matters stand, until a distinct application be made for a variation (if even then) the Tribunal cannot vary the award, cannot proceed further; and prohibition will not be granted against a tribunal unless there be

(1) 11 C.L.R., 311.

something still to be done by it, unless it be "further proceeding" with the matter before it. There is certainly no power given to the Tribunal to execute the award, or to enforce it by imposing a penalty.

I concur with my brother *Isaacs* in his opinion that prohibition will not lie against a Court or tribunal unless something remains for it to do. Prohibition is against future acts; and the claim here is, actually and appropriately, for a prohibition against "further proceeding upon the award." What further proceeding is contemplated here by the Tribunal? What proceeding is even possible? In the case of Courts which can execute their judgments, a writ of prohibition may be claimed at any time before the execution is complete, but not afterwards (*Heyworth* v. *London Corporation* (1); *Hall* v. *Norwood* (2); *Yates* v. *Palmer* (3); *In re Poe* (4); *In re Denton* v. *Marshall* (5)). In *Jones* v. *Owen* (6) the rule for prohibition was obtained before possession was given under the judgment; in *Darby* v. *Cosens* (7) the costs had not been paid; in *Marsden* v. *Wardle* (8) there had been no levy. The dictum of *Alderson* B. in *Roberts* v. *Humby* (9) that prohibition will lie even after execution was not necessary to the decision (for there had been no execution), and it probably refers to the case of execution not having been completed by full satisfaction. In *Jones* v. *Owen* the rule was made absolute after complete execution, but the rule had been obtained before complete execution by possession given, and the Judge had to insert a clause in the rule commanding restitution of possession. The power of the Judge to insert such a clause has been doubted (*In re Denton* v. *Marshall*). There has been no case cited which supports the argument that prohibition lies against a Court for mere "jactitation" of its judgment (or award), or for failure to admit its error in doing what it had already done. It is true that the rule is also directed against the Australasian Coal and Shale Employees' Federation, the union which obtained the award; and it is said that the union might proceed in the Police Court for a penalty for breach of the award (secs. 38 (*d*), sec. 44 of Conciliation

(1) Cab. & El., 312.
(2) Sid., 165.
(3) 6 Dowl. & L., 283.
(4) 5 B. & Ad., 681.
(5) 1 H. & C., 654.
(6) 18 L.J. Q.B., 8.
(7) 1 T.R., 552.
(8) 23 L.J. Q.B., 263.
(9) 3 M. & W., 120.

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Act; sec. 16 of *Industrial Peace Act* 1920). But the Federation does not propose to proceed further before the Tribunal. Prohibitions are granted against a tribunal exercising judicial functions, and against those who move the tribunal to act. The party interested in urging the tribunal to act has to be heard, because the tribunal itself has no pecuniary or material interest in acting as moved, and may not appear against the rule. There is now no judicial proceeding to take place *before the tribunal*, and there is nothing to prohibit as regards any action, or proposed action, of the tribunal. (See *Chabot* v. *Morpeth* (1).)

This opinion, however, as to prohibition being inapplicable after award, does not seem to be consistent with prohibitions which have been granted as to awards made by the Court of Conciliation; but this objection to prohibition does not seem to have been pressed, or, in some cases, even taken by counsel in the arguments (see per *Gavan Duffy* and *Rich* JJ. in the *Builders' Labourers' Case* (2)). At the time that these prohibitions were granted, however, it had not yet been established that the Court of Conciliation has no power to enforce its own awards (see *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3)). Moreover, the provisions of sec. 39 of the Conciliation Act do not appear to have been brought to the attention of the Full Court. I was not a member of the Full Court that heard the applications for prohibition, and I have often wondered how the difficulty was surmounted—the difficulty that the Court of Conciliation did not propose to proceed any further. As it appears clearly now that the Tribunal does not propose to proceed any further, I feel myself free to treat the objections as fatal.

In my opinion, although the award is invalid, prohibition must be refused. But should proceedings be taken for a penalty before a Court of summary jurisdiction, it would be apparent on its face that the award is not the award of *the Tribunal*, and that therefore sec. 28 (1) of the *Industrial Peace Act* does not cover the award with its protection.

(1) 15 Q.B., 446.

(2) 18 C.L.R., at p. 253.

(3) 25 C.L.R., 434.

STARKE J. The document dated 15th October 1920 cannot be supported as an award of the Special Tribunal appointed by the Governor-General for the prevention and settlement of disputes which had arisen or which might arise in the coke industry. And I am also satisfied that this Tribunal never made any award. The reasons for this conclusion are sufficiently set forth in the opinions of the Chief Justice and my learned brethren.

It is true that the Chairman (Mr. Charles Hibble) assumed to exercise the powers and authorities of the Special Tribunal under some mistaken construction of the *Industrial Peace Act* 1920, but the exercise of power was without any lawful warrant. The provision contained in sec. 28 (1) of the Act, whatever its effect may be, cannot prevent a person challenging a determination which is not, as a fact, the award or order of a Special Tribunal.

A number of other grounds were raised in support of the order *nisi* for prohibition, but, in view of the decision of the Court on the point already mentioned, it becomes unnecessary to express any opinion upon them.

The question whether prohibition can issue after an award has been made, whether by a Special Tribunal or by some person purporting to exercise the powers of a Special Tribunal, though of little importance in this case, is a matter which calls for decision.

The Constitution, sec. 75, provides that "In all matters . . . in which a writ of . . . prohibition . . . is sought against an officer of the Commonwealth the High Court shall have original jurisdiction." In the *Tramways Case* [No. 1] (1) it was held that the jurisdiction to issue prohibition to a tribunal acting without or in excess of its jurisdiction is in its nature original and not appellate jurisdiction. It was further held that the President of the Commonwealth Conciliation and Arbitration Court was an officer of the Commonwealth within the meaning of sec. 75 of the Constitution, and that he exercised powers of a judicial or quasi-judicial character. There seems no reason to doubt that the members of a Special Tribunal appointed under the Act No. 21 of 1920 are in the same position as the President and Deputy President of the Court of Conciliation and Arbitration.

(1) 18 C.L.R., 54.

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The writ of prohibition was issued at common law to keep the Judges of inferior Courts within their jurisdiction, but the remedy was also applicable to restrain persons claiming to exercise powers of a judicial character where none existed (*Tramways Case* [No. 1] (1)—*Isaacs* J. at p. 71 ; *Lloyd's Law of Prohibitions*, p. 8). It follows, in my opinion, that this Court has jurisdiction to issue a writ of prohibition directed to the members of a Special Tribunal exceeding their jurisdiction or to any person who assumes to usurp the jurisdiction of a Special Tribunal. Objection has, nevertheless, been made that it is too late now to issue a prohibition though the usurpation of jurisdiction is beyond dispute.. It is clear law, however, that whenever the want of jurisdiction appears on the face of any proceedings prohibition will go after judgment and even after sentence (2 *Inst.*, 602 ; *Roberts* v. *Humby* (2)). But there are some cases in the books showing that the Courts have refused a writ of prohibition after a judgment or sentence has been fully executed and there is nothing capable of being restored. *Poe's Case* (3) is perhaps the strongest of this line of cases. In that case the sentence of a Court Martial had been confirmed by the King and carried into execution. The Court itself was dissolved. All the important cases of this kind are, I believe, collected in *Lloyd's Law of Prohibition*, pp. 16-23, and fully explained. They rest, in my opinion, upon the futility of any action being taken by the Court. There was nothing, as *Lloyd* says (p. 22), " capable of being restored or to which prohibition could attach." The case of *Jones* v. *Owen* (4) illustrates the limits of the doctrine. A rule *nisi* for a prohibition had been obtained in this case to restrain a County Court Judge from proceeding in a matter relating to the delivery up of possession of certain premises. The Judge had given judgment with immediate execution, and possession was delivered to the plaintiff the day after the rule *nisi* was drawn up, but before it was served. It was objected that prohibition was too late as execution was complete. *Patteson* J. found no difficulty in making the rule absolute, and he even commanded restitution. *Gardner* v. *Booth* (5),

(1) 18 C.L.R., 54.
(2) 3 M. & W., 120.
(3) 5 B. & Ad., 681.
(4) 18 L.J. Q.B., 8.
(5) 2 Salk., 548.

Parker v. *Clerke* (1) and *Leman* v. *Goulty* (2) are further illustrations in support of the same view. In this Court the practice has been in accordance with these decisions (*Builders' Labourers' Case* (3)). I also refer to the remarks of two illustrious Judges:—*Holt* C.J., in *Parker* v. *Clerke* said that "it is never too late to move B. R. for a prohibition where the spiritual Court had no original jurisdiction." *Brett* L.J., as he then was, in *R.* v. *Local Government Board* (4), said: "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." I have not overlooked the comments on this opinion in *In re Local Government Board*; *Ex parte Kingstown Commissioners* (5).

In the present case the award of Mr. Hibble has not been executed. It is, to use the words of *Lush* J. in *Serjeant* v. *Dale* (6), "still in operation," and if not stayed it may lead to further proceedings, if not before the Special Tribunal, at all events before other tribunals. The provisions of the award itself purport to reserve power to the usurping authority to vary and rescind it. "The object of prohibitions in general is, the preservation of the . . . ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every Court; for by the same reason that one Court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice": *Bacon's Abridgment*, tit. *Prohibition*, vol. VI., p. 564. It is true that the award in the present case is a nullity, but what if an award were in fact made by a Special Tribunal in excess of its jurisdiction? It was said in argument that it would be too late to exercise the power

(1) 3 Salk., 87.
(2) 3 T.R., 3.
(3) 18 C.L.R., 224.
(4) 10 Q.B.D., 309, at p. 321.
(5) 16 L.R. Ir., 150, at p. 159.
(6) 2 Q.B.D., at p. 568.

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to grant a prohibition under sec. 75 of the Constitution, and that sec. 28 of the *Industrial Peace Act* 1920 prevented the award being then challenged by prohibition or otherwise in any other Court on any account whatever. I say nothing as to the true limits of sec. 28, but a decision refusing prohibition in this case makes such an argument possible, and if it were ultimately successful nothing but "confusion and disorder in the administration of justice" could result.

In my opinion prohibition should issue to Mr. Charles Hibble restraining him from further proceeding on the award of 15th October 1920. It should not issue to the other members of the Special Tribunal, for they have made no award nor are they parties to Mr. Hibble's award.

Finally, I express my concurrence in the order proposed by the Chief Justice on the motion made by the Broken Hill Proprietary Co. Ltd. under sec. 27 of the *Industrial Peace Act* 1920.

Order absolute for prohibition against respondent Charles Hibble.

Solicitors for the prosecutor, *Minter, Simpson & Co.*, for *Moule, Hamilton & Kiddle*, Melbourne.

Solicitors for the respondent organization, *Cecil A. Coghlan & Co.*

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.