[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR LABOUR AND INDUSTRY (NEW SOUTH WALES) . } APPELLANT;

AND

THE MUTUAL LIFE AND CITIZENS' ASSURANCE COMPANY LIMITED . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *April* 28; *May* 1.

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

Prohibition—Jurisdiction of Supreme Court of New South Wales to grant common law prohibition—Complaint for offence before industrial magistrate—Complaint disclosing offence—Excess of jurisdiction by magistrate—Prohibition taken away by statute—Industrial Arbitration Act 1912 (*N.S.W.*) (*No.* 17 *of* 1912), *secs.* 50, 55, 58, 61, 73.

Sec. 55 of the *Industrial Arbitration Act* 1912 (N.S.W.) provides (1) that an appeal shall lie to the Court of Industrial Arbitration from "any order of the registrar, or any industrial or other magistrate or justices under this Act, imposing a penalty"; (2) that the registrar, or any industrial or other magistrate or justices, may . . . state a case for the opinion of that Court; and (4) that "no other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed."

Upon a complaint before an industrial magistrate, alleging a breach by the appellant of a regulation made by the Governor-in-Council under the *Industrial Arbitration Act* in that the appellant failed to pay to a certain employee the minimum rate of wages prescribed by the regulation, the defences were taken that the magistrate had no jurisdiction because the regulation did not apply to the appellant, and that the regulation was *ultra vires*. The magistrate having convicted the appellant,

Held, that a common law writ of prohibition would not lie:

By *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ., on the ground that, assuming the magistrate to have exceeded his jurisdiction, the effect of sec. 55

(4) was to exclude any interference with the decision other than by appeal to the Industrial Court under sub-sec. 1, or by way of case stated to that Court under sub-sec. 2;

By *Higgins* J., on the ground that the decision of the magistrate that the regulation applied to the appellant and that it was valid, even if erroneous, was within his jurisdiction.

Ex parte Brennan, (1915) 15 S.R. (N.S.W.), 173, in part overruled.

Decision of the Supreme Court of New South Wales: *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Minister for Labour and Industry*, (1921) 22 S.R. (N.S.W.), 16, reversed.

APPEAL from the Supreme Court of New South Wales.

Before the Chief Industrial Magistrate at Newcastle a complaint was heard on 12th August 1921 whereby Ralph Clifford Huntley, on behalf of the Minister for Labour and Industry, complained that the Mutual Life and Citizens' Assurance Co. Ltd., being the employer of one John Alfred Arms, an adult male person not receiving board and/or lodging or residence and not entitled to any customary privileges or payments in kind, did at Newcastle, between 1st and 17th May 1921, when the said Arms was there employed as such adult male person by the defendant Company, fail to pay to the said Arms the minimum weekly rate of wages of £4 5s., being the living wage rate prescribed for such adult male person by regulations made under the authority of the *Industrial Arbitration Act* 1912 (N.S.W.), and duly published in the New South Wales *Government Gazette* of 1st April 1921, as amended by a further regulation published in the *Gazette* on 6th May 1921, contrary to such regulations and the Act. It was contended at the hearing on behalf of the defendant Company (1) that, inasmuch as Arms was not employed by the Company in an industry to which any award or an industrial agreement made under the provisions of the *Industrial Arbitration Act* 1912 or any Act amending the same applied, the Industrial Magistrate had no jurisdiction over the Company to impose a penalty; and (2) that the regulations referred to in the complaint were *ultra vires* in so far as they purported to make it obligatory upon employers to pay the living wage of £4 5s. per week to every adult male whether employed or not in an industry to which an award or industrial agreement made under the provisions of the *Industrial Arbitration Act* applied,

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and in so far as they purported to impose a penalty for the breach of such regulations.

The Industrial Magistrate having convicted the defendant Company and ordered it to pay a penalty of ten shillings, a rule *nisi* was obtained in the Supreme Court by the defendant Company calling upon the Minister for Labour and Industry, the Chief Industrial Magistrate and Huntley to show cause why a writ of prohibition should not issue restraining them from further proceeding upon the order of the Magistrate. On the return of the rule *nisi* the Full Court, by a majority (*Cullen* C.J. and *Wade* J., *Pring* J. dissenting), made it absolute: *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Minister for Labour and Industry* (1).

From that decision the Minister for Labour and Industry now, by special leave, appealed to the High Court.

Flannery K.C. (with him *Cantor*), for the appellant. The complaint on its face showed no want of jurisdiction. To give the Magistrate jurisdiction it is sufficient to allege in terms a matter which can be within his jurisdiction in certain circumstances, whether those circumstances are of fact or of law. The offence was properly alleged, being stated in the terms of the regulation (sec. 145A of the *Justices Act* 1902 (N.S.W.), introduced by sec. 25 of the *Justices (Amendment) Act* 1909 (N.S.W.)). The Magistrate, having jurisdiction to enter upon the inquiry, had jurisdiction to determine any question of law or fact incidental to the inquiry, and he might determine it rightly or wrongly subject to appeal to the Industrial Court under sec. 55 (1) of the *Industrial Arbitration Act*. He had to construe the relevant sections of the *Industrial Arbitration Act* in order to determine whether the regulations under the Act were valid, and whether, if valid, they applied to the respondent. Whether his construction was right or wrong, he had jurisdiction, and prohibition will not lie. Even if the Magistrate acted without jurisdiction, common law prohibition is taken away by sec. 55 (4) of the *Industrial Arbitration Act*. When a Magistrate deals with the imposition of a penalty under sec. 61, he makes an order within the meaning of sec. 55. If

(1) (1921) 22 S.R. (N.S.W.), 16.

the matter of a complaint is apparently on its face within the jurisdiction of the Magistrate, prohibition is taken away by sec. 55 (4).

Langer Owen K.C. (with him *Redshaw*), for the respondent. In order that the Magistrate should have jurisdiction it was necessary that there should be a regulation validly made, and that that regulation should, under the Act, apply to a person in the position of the defendant. The Magistrate could not by an erroneous decision on those points give himself jurisdiction (*Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (1)). He had, as a preliminary to hearing the merits of the case, to decide whether he had or had not jurisdiction; and, by wrongly deciding that he had jurisdiction, he would not get jurisdiction, and prohibition would lie. (See *Ex parte Brennan* (2).)

[KNOX C.J. referred to *R.* v. *Commissioners for Special Purposes of Income Tax* (3).]

The prohibition to which sec. 55 (4) of the *Industrial Arbitration Act* is directed is the statutory prohibition given as a method of appeal by sec. 112 of the *Justices Act* 1902. An order made by a Magistrate in a matter as to which he has no jurisdiction, but has erroneously decided that he has jurisdiction, is not an "order" within the meaning of sec. 55 (4).

[ISAACS J. referred to *R.* v. *Dayman* (4).]

The whole of sec. 55 is qualified by the order being made "under this Act," and an order made without jurisdiction is not an order made under the Act.

Flannery K.C., in reply.

Cur. adv. vult.

May 1.

The following written judgments were delivered :—

KNOX C.J., ISAACS, GAVAN DUFFY AND STARKE JJ. On 21st June 1921 the appellant made a complaint against the respondent, under the *Industrial Arbitration Act* 1912, as amended by various Acts down to and including Act No. 19 of 1920. The complaint

(1) (1907) 5 C.L.R., 33, at pp. 42, 52.
(2) (1915) 15 S.R. (N.S.W.), 173.
(3) (1888) 21 Q.B.D., 313.
(4) (1857) 7 El. & Bl., 672.

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was in substance that in breach of a regulation under that Act, the respondent had failed to pay one of its employees the living wage rate prescribed by the regulation. The regulations prescribe for a breach a penalty not exceeding £50.

On 12th August 1921 the case came on for hearing before the Chief Industrial Magistrate. The defence raised was twofold: (1) that there was no award or industrial agreement applicable to the claim, and (2) that the regulations, so far as they purported to make the payment obligatory or to prescribe a penalty, were *ultra vires*. The Magistrate decided against the respondent, and adjudged it guilty of a breach, and ordered it to pay a fine of 10s. Thereupon on 25th August the respondent applied to the Supreme Court for a common law writ of prohibition against the appellant, the Chief Industrial Magistrate and another, to restrain the further proceeding on the order.

Before the Supreme Court, two questions were argued: first, whether the defences raised before the Magistrate were well founded; and, next, whether, even if they were, prohibition would lie. The Supreme Court determined both questions adversely to the present appellant, who has appealed to this Court. Having regard to the opinion we have formed with respect to the second question, it is not necessary, nor would it be proper, to express any opinion as to the first; which, moreover, has not been argued before us.

The second point involves two possible propositions, both of which have been argued. One is that, apart altogether from sec. 55 (4), the function of the Magistrate on the application before him was (*inter alia*) to determine the validity of the regulation, subject to appeal to the Industrial Court under the earlier part of sec. 55. The other is that, assuming the Magistrate exceeded his jurisdiction, the effect of sec. 55 (4) is to exclude any interference with the decision, other than the appeal to the Industrial Court given by sub-sec. 1 or by way of case stated to that Court by sub-sec. 2. Having arrived at the opinion that the second proposition is sound, it is unnecessary to consider the first.

Reading the Act as a whole in order to ascertain the true meaning of sec. 55 (4), it appears clear to us that it is enacted as a self-contained industrial enactment, providing for rights and remedies.

By "self-contained" is meant that express provision is made either by original enactment or by incorporating other enactments. As to rights we need say nothing. As to remedies the following provisions are material:—Sec. 13 constitutes a Court of Industrial Arbitration, and enacts that "it shall be a superior Court and a Court of record." The qualification for a Judge of the Court is—in addition to the then present Judge of the Court of Industrial Arbitration—that he shall be a Supreme Court Judge, a District Court Judge, or a barrister of five years' standing. Additional Judges may be appointed. The tenure is as in the Supreme Court. Boards (sec. 16) are constituted—on the recommendation of the Court—for industries; and chairmen are to be appointed, on the like recommendation. The boards may make awards. The registrar or industrial magistrate (sec. 50) may inflict a penalty, not exceeding £50, for breach of an award or industrial agreement, and may in certain cases grant a writ of injunction. Disobedience of injunction is criminal; and the offender may be committed for trial, either by the Court or by justices acting under the *Justices Act* 1902. Sec. 55 of the Act of 1912 provides:—"(1) From any order of the registrar, or any industrial or other magistrate or justices under this Act, imposing a penalty or ordering the payment of any sum of money or any penalty, an appeal shall lie to the Court. On any such appeal the Court may either affirm the order appealed from or reverse the said order or reduce the amount so ordered to be paid or the amount of the penalty; and, in any case, the Court may make such order as to the costs of the appeal, and of the proceedings before the registrar, magistrate, or justices, as it thinks just. (2) The registrar, or any industrial or other magistrate or justices, may on the application made by any party to any proceedings for the payment of money or a penalty under this Act state a case for the opinion of the Court, setting forth the facts and the grounds for any order or conviction made by him or them. (3) The provisions of the *Justices Act* 1902, and any Act amending the same, which relate to appeals to a Court of Quarter Sessions and to the stating of cases by justices for the opinion of the Supreme Court, and the decision of any such Court thereon, and the carrying out

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of such decision shall, *mutatis mutandis*, and subject to any regulations made by the Court under this Act, apply to and in relation to appeals to and cases stated for the opinion of the Court under this sub-section. (4) No other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed." Before construing this section, reference should be made to other sections. Sec. 58 declares any decision of the Court final, and forbids its being challenged or called in question by any Court of judicature on any account whatsoever. It also specifically excludes writs of prohibition and certiorari as to any award, order, proceeding or direction of the Court relating to any industrial matter or any other matter which, on the face of the proceedings, appears to be or to relate to an industrial matter. Sub-sec. 3 adds: "The validity of any proceeding or decision of the board or a chairman of a board shall not be challenged except as provided by this Act." Sec. 61 says: "Any penalty imposed by or under this Act *or the regulations* may, except where otherwise provided, be recovered upon summary conviction before a stipendiary, police, or industrial magistrate, or any two justices in petty sessions." Sec. 73 enacts:— "(1) Regulations made under this Act, on being approved by the Governor and published in the *Gazette*, shall, if not disallowed as hereinafter provided, and if not repugnant to this Act, have the force of law. (2) All such regulations on being gazetted shall be laid before both Houses of Parliament within fourteen days if Parliament is then sitting, and, if not sitting, then within fourteen days after the next meeting of Parliament. But if either House of Parliament passes a resolution of which notice has been given at any time within fifteen sittings days after such regulations have been laid before such House disallowing any regulation, such regulation shall thereupon cease to have effect."

It is apparent that the Legislature has with great solicitude provided a complete scheme of judicial action for the determination of questions arising under this Act, and that the scheme so adopted shuts out (*inter alia*) the prohibition known to the common law in respect to all orders, &c., made "under this Act." The Legislature has on the whole thought it advisable in the interests of industrial peace to place entire confidence in the final judgment and opinion

of the Court expressly constituted for the purposes of the Act. Reverting now to sec. 55, the first sub-section in respect of an order of the industrial magistrate "under this Act" provides an appeal to the Court of Industrial Arbitration, which has full power to affirm or reverse the order; and no limitation is placed on the ground of reversal. The reversal may therefore be on the ground of want or excess of jurisdiction. Another method allowed is by stating a case for the opinion of the Court of Industrial Arbitration. Sub-sec. 3 adopts, by way of machinery for the appeal and the case stated, the provisions *mutatis mutandis* of the *Justices Act* 1902, but only with reference to the appeal and case stated to the Industrial Court. Then comes the crucial provision in sub-sec. 4, namely, "No other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed." Arranging that important provision so as the better to understand its meaning, it reads thus :— No other proceedings (*a*) in the nature of an appeal from such order or (*b*) by way of prohibition shall be allowed. The words "no other proceedings" refer to the "appeal" and the "case stated," and mean no proceedings other than those. Then (*a*) includes everything in the "nature of an appeal," which includes statutory prohibition (under the incorporated provisions taken from the *Justices Act* and adapted), and that is itself a recognized method of "appeal." Consequently (*b*), which specifically mentions "prohibition," without qualification, not only includes common law prohibition, but must on sound principles of construction be confined to it, leaving statutory prohibition within (*a*). This construction is in agreement with that of the Supreme Court as to the meaning of "prohibition" in sub-sec. 4.

It is plain, then, that if the order of the Industrial Magistrate was "under this Act" (sec. 55 (1)), the only way of impeaching it was by the statutory methods provided by that section. The complaint was in fact made under the Act; it complained of a breach of a regulation which the Governor in Council had made, as, under the Act, Parliament had not disallowed it, and unless "repugnant to this Act" (sec. 73) it had the force of law. The subject matter of the regulation was wages for employees; the alleged relation of the respondent to the person named in the complaint as entitled

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to the wages was that of employer and employee. It is impossible to say that the Magistrate did not *bonâ fide* act as under the authority of the Act; and, therefore, his order was an order "under the Act" subject to the appeal and case stated as provided by the Act, but not open to prohibition by the Supreme Court. The provision negativing prohibition connotes that an "order made under the Act" may be an order exceeding the jurisdiction conferred by the Act. Reference was made during the argument to *Ex parte Brennan* (1). We cannot regard that as a correct exposition of the Act so far as it determines that a prohibition may be granted.

The appeal should be allowed, and the order *nisi* for prohibition discharged.

HIGGINS J. I concur in the opinion that the appeal should be allowed—that this is not a case for prohibition.

We have not entered into the question as to the effect or the validity of the regulations gazetted 1st April and 6th May 1921; but, for the purpose of discussing the right to grant prohibition, one must assume that the regulations do not apply to this employer or that they are invalid. If the regulations do not apply or are invalid as to employers who are not under any award or industrial agreement, the order of the Industrial Magistrate imposing a penalty of 10s. on the respondent Company for not obeying the regulations, for not paying to the employee Arms at least £4 5s. per week, was wrong. But an order may be wrong, and yet be within the jurisdiction of the tribunal; and, in my opinion, the order was within the jurisdiction, and prohibition will not lie.

I desire to confine my judgment to a point taken by counsel for the Minister before the Supreme Court. Counsel there urged, and urges now, that at the most there has been a misconstruction by the tribunal arising incidentally in the course of the proceedings, and that jurisdiction to enter upon the inquiry and convict is granted to the tribunal by sec. 61 of the *Industrial Arbitration Act* 1912. I must not be understood, however, as differing from my learned brothers as to the effect of sec. 55 (4); I leave the question open. The effect of that sub-section need not be decided if we are satisfied

(1) (1915) 15 S.R. (N.S.W.), 173.

that the Industrial Magistrate in making the order acted within his jurisdiction and that prohibition would not lie even if sec. 55 (4) had not been enacted.

Now, under sec. 61 of the Act any penalty imposed by or under the Act or the regulations may be recovered on summary conviction before an industrial magistrate. The Magistrate had to decide whether the accused was guilty of the offence charged; and to find a man guilty the Magistrate had to decide both law and fact. He had to determine that the act or default charged would be a breach of the law, and that the accused had done the act or made the default. If the regulations do not apply or are invalid, the Magistrate in convicting made a mistake in his decision; but he made the mistake while acting within his duty and jurisdiction. A remedy is provided by the Act for such a mistake; for under sec. 55 (1) an appeal lies to the Industrial Court from any order of the Magistrate under the Act imposing a penalty, and the order was made under sec. 61 of the Act; but in my view there can be no prohibition whether an appeal lies or not. The Magistrate treated the regulations as applicable and as valid, and imposed a penalty; if he had come to an opposite conclusion and refused to impose a penalty it would have been equally within his jurisdiction, for he has to administer justice "according to law," and must determine for himself, to the best of his power, what the law is. In other words, the determination of the applicability and validity of the regulation is part of the duty, and within the jurisdiction, of the Magistrate. There is no "absence or excess of jurisdiction" if he made a mistake as to the law.

It is urged that the Magistrate "gave himself jurisdiction by an erroneous interpretation of the law." This is an inversion of the true position; for, being seised of a case within his jurisdiction by sec. 61, he merely made (what must be at present assumed to be) a mistake as to the law. On this assumption, there may have been an excess of power on the part of the Governor in Council; but there was no excess of jurisdiction on the part of the Magistrate. He had, logically, to make up his mind whether the regulations applied, and (if necessary) whether the Governor had exceeded his power; and, if he came to a wrong decision on the subject, that would be ground

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for appeal (if there is right to appeal, as here), not for prohibition (*Enraght* v. *Lord Penzance* (1); *Hooper* v. *Hill* (2)).

Appeal allowed. Order of Supreme Court set aside. Rule nisi for prohibition set aside. Appellant to pay costs of this appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *A. J. McLachlan & Co.*

B. L.

(1) (1882) 7 App. Cas., 240, at pp. 254-257. (2) (1894) 1 Q.B., 659.

[HIGH COURT OF AUSTRALIA.]

CONNOLLY AND ANOTHER . . . . APPELLANTS; PLAINTIFFS,

AND

RYAN . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *May* 17; *June* 2.

KNOX C.J., HIGGINS AND GAVAN DUFFY JJ.

Mortgage—Action by mortgagor for possession against trespasser—Consent of mortgagee—Onus of proof—Transfer of Land Act 1893 (*W.A.*) (56 *Vict. No.* 14), *secs.* 116, 117.

Sec. 116 of the *Transfer of Land Act* 1893 (W.A.) provides that "In addition to and concurrently with the rights and powers conferred on a mortgagee and on a transferee of a mortgage by this Act every present and future mortgagee for the time being of land under this Act and every transferee of a mortgage for the time being upon any such land shall until a discharge from the whole