[HIGH COURT OF AUSTRALIA.]

THE RAILWAY COMMISSIONERS FOR NEW SOUTH WALES . . . Defendants, } Appellants;

AND

ORTON . . . . . Plaintiff, Respondent.

THE RAILWAY COMMISSIONERS FOR NEW SOUTH WALES . . . Defendants, } Appellants;

AND

KNIGHT . . . . . Plaintiff, Respondent.

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

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Sydney, *April* 26; *May* 4.

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

Industrial Arbitration—Award—Persons bound—Railway Commissioners for New South Wales—Award made binding on State—Claim for wages at rate fixed by award—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 29—*Government Railways Act* 1912 (*N.S.W.*) (*No.* 30 *of* 1912), *secs.* 1, 4, 10, 11, 13, 14, 69, 70—*Government Railways (Amendment) Act* 1916 (*N.S.W.*) (*No.* 69 *of* 1916), *sec.* 4.

In certain proceedings before the Commonwealth Court of Conciliation and Arbitration in respect of an industrial dispute, the Railway Commissioners for New South Wales were neither named as parties nor served with process, nor did they appear before the Court; nor in the award made therein fixing certain

minimum rates of wages payable to employees were the Railway Commissioners named as parties bound by the award, but the State of New South Wales and His Majesty the King in the right of that State were parties to the proceedings and were named as parties bound by the award.

Held, that an employee to whom the award applied was not entitled under the award to recover from the Railway Commissioners, in whose service he was, the difference between the wages paid to him and the wages to which he would have been entitled under the award.

Quære, whether the State of New South Wales would be liable under the award in respect of the wages of an employee of the Railway Commissioners.

APPEAL from a District Court of New South Wales.

An action was brought in the District Court at Sydney by Henrie Orton against the Railway Commissioners to recover the sum of £26 6s. 2d. The plaintiff was a member of the Amalgamated Society of Engineers, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act*, and was employed by the Railway Commissioners as a fitter. On 23rd August 1920 an industrial dispute between the organization and the Adelaide Steamship Co. Ltd. and a number of other employers, was referred into the Commonwealth Court of Conciliation and Arbitration, and on 14th June 1921 an award was made by that Court fixing certain minimum rates of wages and payments for overtime and for lost time to be paid by the respondents named in the award as being bound by it to members of the organization employed by them. Among the respondents named in the award as being bound by it were the State of New South Wales and His Majesty the King in right of the State of New South Wales. The sum sued for by the plaintiff was the difference between the amount of the wages actually paid to him and the amount to which he would have been entitled if the defendants had been bound to comply with the award.

A similar action was brought by Edwin John Knight, a machinist in the employment of the Railway Commissioners, to recover the sum of £39 8s. 9d. under similar circumstances.

Both actions were heard together, and judgment was given in each case for the plaintiff for the amount claimed.

From these decisions the Railway Commissioners now appealed to the High Court.

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Leverrier K.C. (with him *J. A. Ferguson*), for the appellants. Assuming that the State of New South Wales is bound by the award, the Railway Commissioners are not. Under the *Government Railways Act* 1912 and the Acts amending it, the railways and the control and management of them, including the control of employees, are vested in the Commissioners and all control is taken away from the Executive (see *Government Railways Act* 1912, secs. 4, 5, 7, 11, 13-23, 38-40, 61, 62, 70, 72, 78, 103, 143; *Government Railways (Amendment) Act* 1916, sec. 4). The Commissioners are therefore not included in the award merely by the naming of the State of New South Wales as a party bound by the award, and they are not included in those parties, &c., who are specified in sec. 29 of the *Commonwealth Conciliation and Arbitration Act* as being bound by an award. So far as an intention to bind them is concerned, on reading the award one would say that the intention is not to bind them. They are not in the same position as the Minister for Trading Concerns was in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1). If the award is to be taken as binding upon the State of New South Wales in respect of employees of the Railway Commissioners, the State is the proper party to be sued.

Brissenden K.C. (with him *Collins*), for the respondents. The Railway Commissioners are in the position of statutory agents of the State of New South Wales. They have, under the *Government Railways Act*, general powers of employing and dismissing employees, and they have the liability of paying to employees such sums as are appropriated by Parliament. Under the *Commonwealth Conciliation and Arbitration Act* the State and every agency is bound by the award to pay the minimum rate of wages to employees. The award is an order that the State shall pay the minimum rate of wages fixed by the award, and shall pay them through the agency which the State has created for paying wages. The proper method of enforcing that duty is to proceed against the agency of the State which is legally liable to pay wages; and in this case that is the Railway Commissioners. The Commissioners are no more than agents for the State (*R.* v. *McCann* (2)). There is no distinction between a

(1) (1920) 28 C.L.R., 129.

(2) (1868) L.R. 3 Q.B., 677, at pp. 678, 681.

Department of the Government and the Railway Commissioners (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1); *Roper* v. *Commissioners of Works and Public Buildings* (2); *Sydney Harbour Trust Commissioners* v. *Wailes* (3); *Commissioners of Works and Buildings* v. *Pontypridd Masonic Hall Co.* (4)).

[ISAACS J. referred to *Perry* v. *Eames* (5).]

Cur. adv. vult.

May 4.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The respondents, Orton and Knight, brought actions in the District Court at Sydney, New South Wales, for balances of wages alleged to be due to them pursuant to an award of the Commonwealth Court of Conciliation and Arbitration dated 14th June 1921 (No. 113 of 1920). In the proceedings before the Arbitration Court the Commissioners were neither named as parties nor served with process, nor did they appear before the Court; and the award upon which they were sued, although naming the parties bound by it, did not contain the name of the Commissioners. The State of New South Wales and His Majesty the King in the right of that State were parties and summoned to appear as parties to the proceedings in the Arbitration Court. The Commissioners have not in this case disputed that the State and His Majesty in the right of the State are bound by the award, and the respondents urged that the Railway Commissioners are agencies or instrumentalities of the State for the purpose of the management of the railways, and that, if the State or His Majesty in right of the State is bound by the award, then all the agencies and instrumentalities of the State must also be bound and liable upon the award. The argument found favour with the learned Judge of the District Court, who entered judgment for the respondents. In our opinion it is not tenable. Even if the State and the Commissioners of Railways do stand in some such relation as that

(1) (1919) 26 C.L.R., 508.
(2) (1915) 1 K.B., 45.
(3) (1908) 5 C.L.R., 879, at p. 887.
(4) (1920) 2 K.B., 233.
(5) (1891) 1 Ch., 658, at p. 669.

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of principal and agent, an agent cannot be made liable on an obligation incurred by or cast upon the principal in his own name and not in the name of the agent. It is not true that if a principal is bound to discharge a particular obligation his agent is therefore necessarily bound to discharge the same obligation.

Nothing that we have said should encourage the respondents in the belief that an action against the State of New South Wales or His Majesty in right of the State would meet with success. The Commissioners, largely removed from political control, have been created an independent corporation with power to employ such persons as they require for the purpose of their undertaking, and it may well be that for the purpose of the *Commonwealth Conciliation and Arbitration Act* they are the employers of the respondents. But we leave the question of the liability of the State upon the award open for discussion should it again arise.

Both appeals ought to be allowed.

ISAACS J. The respondent Knight is an employee of the appellants. He is a machinist, and is a member of the Amalgamated Society of Engineers. He sued in the District Court of Sydney for £39 8s. 9d., that being the amount which, over and above the wages actually paid to him by the Commissioners, would be due to him if the terms of a Federal award applied to him.

At the trial, before *Scholes* D.C.J., the award was admitted. It was between the Society of Engineers, and (*inter alia*) the "State of New South Wales," and "His Majesty the King in the right of the State of New South Wales." The Railway Commissioners were not named as a party, nor were they served; and it may be taken that, unless their liability attaches by reason of the fact that the "State of New South Wales" is a party to the award, there is no liability of the Commissioners to pay or to be sued. All the necessary facts were admitted except that the amount due, if any were due, was £38 13s. 5d., not £39 8s. 9d. It was also admitted that the Federal Arbitration Court had power to bind the State of New South Wales. That admission necessarily flowed from the decision of this Court in the *Amalgamated Society of Engineers' Case* (1).

(1) (1920) 28 C.L.R., 129.

Two substantial grounds of defence, however, were raised: (1) that the Railway Commissioners' operations did not come within the award; and, if they did, then (2) that the Commissioners were not the proper defendants in the action. The learned District Court Judge decided both grounds in favour of the present respondent, and gave him a judgment for the sum of £38 13s. 5d. The Commissioners appealed to this Court on both grounds, and some others not necessary to refer to.

Mr. *Leverrier*, for the Commissioners, very tersely put the issue thus: "Are the Railway Commissioners bound by reason of the award against the State of New South Wales?" That issue divides into the two grounds above mentioned. Mr. *Leverrier* argued that the *Government Railways Act* 1912 was a sufficient answer on both. Dr. *Brissenden*, for the respondent, argued very forcibly that on a true construction of the Act the railways were still State railways, and that the Commissioners, for the purposes of wages to railway employees, represented the State. The first ground he supported by reference to the title of the Act—*Government Railways Act* 1912 (sec. 1)—and some of its operative provisions.

Sec. 4 says "the authority to carry out this Act shall be the Chief Commissioner" (altered now by sec. 4 of No. 69 of 1916). The words "the authority" naturally lead to the inquiry: "Authority" on behalf of whom? The Commissioners are made a body corporate, and capable of suing and being sued. It is evident by sec. 4 and sec. 10 (3) that what is entrusted to the Commissioners is "the general management of the Government railways and tramways." By sec. 11 the property in all railways and tramways and all pieces of land, &c., either "Crown land or land acquired" in the past or in the future "for or on behalf of His Majesty" are, for the purposes of the Act, vested absolutely in the Commissioners. By sec. 13, as amended, "all moneys appropriated by Parliament for the maintenance or management of the railways by this Act vested in the Commissioners, and for all purposes in connection therewith, shall be *expended under the control and management of the Commissioners.*" By sec. 14, as amended, "all moneys payable to the Commissioners, under this or any other Act, shall be *collected*

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and received by them on account of, and shall be paid into, the Consolidated Revenue," &c. As to employees, Part VIII. applies. By sec. 69 the Governor appoints examiners of candidates for employment. By sec. 70, as amended, "(1) The Commissioners shall appoint or employ such officers to assist in the execution of this Act as they think necessary, and every officer so appointed shall hold office during pleasure only. (2) *The Commissioners shall pay such salaries, wages, and allowances to officers as Parliament appropriates for that purpose.*" I refrain from quoting further sections, as the first point is not to be decided in this case. But enough has been said to show that the *Government Railways Act* 1912 still leaves the railways a State undertaking. The railways, under a well recognized policy of freeing their management from political influence, are entrusted for management only to Commissioners. The Commissioners, for convenience, in exercising the "authority" given to them are incorporated; but that makes no difference. If the vesting of property and authority were in them as natural persons, their office would be still the same.

No one can doubt, and no one has suggested a doubt, that the railways are the property of the State of New South Wales, notwithstanding the Act. In the *State Railways Servants' Case* (1) *Griffith* C.J. stated facts which cannot be denied, though the constitutional effect of them has since been corrected. I refer, without quoting his words, to the passage beginning "With regard to State railways" and ending with a reference to the case of *R.* v. *McCann* (2). That case was cited by Dr. *Brissenden* with others to support his first position that in reality the railway service was only a Department of the New South Wales Government, managed by officers appointed in a special way, armed with special powers, subject to special duties and free from certain Executive interference and control—that is, free from the control of political officers of the Crown, but nevertheless, as incorporated, nothing more than a special agent of the Crown or, in other words, of the State of New South Wales. If the question had to be pursued to the end, it would, in my opinion, be a heavy task—I do not say an impossible task, because the case has not been fully argued—for the State to maintain

(1) (1906) 4 C.L.R., 488, at pp. 534-535. (2) (1868) L.R. 3 Q.B., 677.

its property in the railways, its real position as employer and paymaster (through the Commissioners) of the employees, and its immunity from Commonwealth taxation under sec. 114 of the Constitution, with any such separation from the railways as made it impossible to be considered the real employer within the meaning of the *Commonwealth Conciliation and Arbitration Act*. If that were possible, I am not prepared to say how far private individuals, by a clever system of arrangement, might not evade the Act altogether. In the case of a State, a mere alteration of the "authority" as here to a board of three incorporated under a slightly different name would effectually nullify any award otherwise binding. It would seem that the only permanent award that could be made in such a case would be in relation to the true employer, the State. However, it is not necessary to decide the point, because the second ground, arising under the same Act, appears to me to be fatal to the present proceedings.

Dr. *Brissenden* went on to contend that the Commissioners were not simply agents, but agents sufficiently authorized and empowered by the Act to represent the State in the action. And the second ground seems to me to resolve itself into a question whether, on its true construction, the Commissioners are clothed with authority to be sued in this action as representing the State of New South Wales. In my opinion that question must be answered in the negative. The State of New South Wales—not being able to do so by executive direction, but being competent to do so by legislative direction—did constitute the Commissioners its representatives in relation to the railways, but with limited authority. That authority, as we have seen, requires every penny of money received to be accounted for, to the Consolidated Revenue, and requires the Commissioners to pay to the employees only such moneys as are appropriated by Parliament for the purpose. Assuming, therefore, the corporation is the agent to employ and to dismiss and to act as paymaster, all on behalf of the State, it is clear it cannot pay one penny more under *the authority of the State* than the State has, in fact, authorized it to pay. It may be that, as against the State, the employee may under Federal law be entitled to more, and, if so, the State would doubtless provide it in its own way in obedience to the law (see *Eastern Trust*

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Co. v. *McKenzie, Mann & Co.* (1)). It may be also that the Federal Arbitration Court could seize the fact of the present relation of employer and employee, as in the Western Australian cases referred to in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2), and bind the Commissioners. But the present case rests on the position that the State has itself put the Commissioners in the position of its full representative for the purpose of paying, and being sued for, the wages fixed by the Federal award. As I cannot agree with that contention I am of opinion the second ground of defence is well founded, and the appeal in this and Orton's case, which is similar, must be allowed.

HIGGINS J. Two actions were brought by two members of the Amalgamated Society of Engineers against the Railway Commissioners of New South Wales for alleged deficiencies in payment of wages payable from 1st January up to 16th September 1921. An award was made on 14th June 1921 by the Commonwealth Court of Conciliation; and it was operative as to one clause as from 1st January 1921, and as to other clauses as from 29th May. The alleged deficiencies are due to the fact that the Railway Commissioners have not obeyed the award, saying that it is not binding on them. It is admitted that, if the Commissioners are bound to comply with the terms and conditions awarded, the plaintiff in each case is entitled to recover the deficiency—in the case of Knight, £38 13s. 5d.; in the case of Orton, £26 6s. 2d. There is no question of jurisdiction.

Sec. 29 of the Conciliation Act states that an award is binding on (*a*) all parties to the industrial dispute who appear or are represented before the Court (of Conciliation), (*b*) all parties who have been summoned or notified to appear as parties to the dispute, or required to answer the claim, whether they have appeared or answered or not. Now, the Railway Commissioners—a corporation created by the *Government Railways Act* 1912 to manage the New South Wales railways—did not appear and were not represented before the Court, and were not summoned or notified to appear as parties to the dispute, or required to answer the claims. At first sight, therefore, the

(1) (1915) A.C., 750, at p. 759. (2) (1920) 28 C.L.R., 129.

answer to the question raised by the case is obvious—the Commissioners are not bound by the award. But the learned Judge of the District Court has held, after much hesitation, that the Commissioners are bound. Certain expressions were used in the judgments in *Sydney Harbour Trust Commissioners* v. *Ryan* (1), to the effect that Harbour Trust Commissioners and Railway Commissioners are each a branch of the Government performing functions committed to it by statute; and, the Railway Commissioners being a statutory corporation instituted for the purpose of carrying on a State function on behalf of the State, the Judge came to the conclusion that the Commissioners are included in the expression the "State of New South Wales" used in the award. I am unable to concur with this view. Even if the award, or any order of any Court, binds a principal as to all his activities, it does not follow that an agent carrying out one of the activities can be sued for a breach. A contract as to wages made with company X cannot be enforced by action against the company's department manager; nor can an award be so enforced. Of course, the Railway Commissioners constitute a corporation in themselves, and are the employers of all the railway servants (*Government Railways Act* 1912, sec. 4, sec. 70); but if this corporation is to be treated as the principal liable to an action for the wages, the difficulty is that it is not a party bound by the award under sec. 29 of the Conciliation Act; and if this corporation is to be treated as an agent of the State of New South Wales, the State, as principal, must be sued—not the agent. The question does not arise as to the liability of the State to pay these wages; but I must not be understood as saying that an action would lie against the State. The State, it is conceded for the purposes of this case, is liable to pay these wages to its own employees; but it is open to argument—to say the least—that the railway employees are not employees of the State, but employees of the Commissioners.

The fiasco in this case is evidently due to the neglect of the officials of the union, or of the persons who drew up the log of demands and served it on the employers, to include the Railway Commissioners as employers. It must be an omission; for the log was served on

(1) (1911) 13 C.L.R., 358, at pp. 362, 369.

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other State agencies (so called). It was served on the Board of Fire Commissioners of New South Wales, on the Minister for Education, on the Geelong Harbour Trust (of Victoria), on the Hawthorn Tramway Trust, on the Fremantle Harbour Trust (W.A.), on the Minister for Trading Concerns (W.A.). There was no plaint in this case although the case assumes that there was; the dispute was referred into Court, under sec. 19 of the Conciliation Act; and the President could not include in the reference any employers who had not been served with the log of demands. Employers not served could not be treated as parties to the dispute.

In my opinion, the appeal must be allowed in both cases.

Appeals allowed. In each case judgment of District Court Judge set aside and judgment entered for the defendants. Plaintiff in each case to pay costs of action and of appeal to High Court.

Solicitor for the appellants, *John S. Cargill.*

Solicitors for the respondents, *Sullivan Bros.*

B. L.