or otherwise ascertained at the rate, not exceeding 7 per cent, which at the time of fixing and determining it, whether initially or on revision, is the rate that the State under its then existing obligation is bound by law to pay in respect of the moneys it has borrowed and actually lent to the public body.

In each case order as stated in the judgment of Knox C.J. and Gavan Duffy J.

Solicitors for the appellants, *Ritchie & Parker Alfred Green & Co.*, Launceston, by *Simmons, Wolfhagen, Simmons & Walch*; *Crisp & Edwards*, Burnie, by *Griffiths, Crisp & Baker.*

Solicitor for the respondent, *A. Banks Smith*, Crown Solicitor for Tasmania.

B. L.

[HIGH COURT OF AUSTRALIA.]

MONARD . . . . . APPELLANT;
COMPLAINANT,

AND

H. M. LEGGO & COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

Industrial Arbitration—Agreement between parties to industrial dispute—Binding effect of agreement—Extended period of operation—Rights of members of organization under agreement made with organization — One award — One dispute — Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 24, 28.

Held, that it follows as a consequence of the provision of sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, which gives to an agreement between parties to an industrial dispute the effect of an award,

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(1) that the provision in sec. 28 (2) that after the expiration of the period specified in an award for its operation the award shall continue in force until a new award is made applies to an agreement made and filed pursuant to sec. 24 (1); and (2) that, where such an agreement is made between an organization of employees and a number of employers specifying the rates of wages payable by those employers to their employees who are members of the organization, one of those employees has a right of action against his employer for wages payable under the agreement in respect of the period during which the agreement continues to operate.

Mallinson v. *Scottish Australian Investment Co.*, (1920) 28 C.L.R., 66, followed and applied.

Carter v. *E. W. Roach & J. B. Milton Pty. Ltd.*, (1921) 29 C.L.R., 515, explained and distinguished.

Per Isaacs J.: There is only one award, in the relevant sense, to end one dispute.

APPEAL from a Court of Petty Sessions of Victoria.

On 16th November 1922, at the Court of Petty Sessions at Bendigo, a complaint was heard whereby Lilian Monard alleged that H. M. Leggo & Co. Ltd. on 29th September 1922 "was indebted to the said complainant in the sum of six shillings and eleven pence for work and labour done the particulars whereof are hereunto annexed." The particulars annexed were as follows:—"1921, December.—To amount of wages short paid to the complainant by the defendant during December 1921, the defendant having failed and refused to pay to the complainant wages for the 26th day of December 1921.—Amount short paid and which the complainant claims 6s. 1d." The complainant was a member of the Amalgamated Food Preserving Employees' Union of Australia, an organization registered under the *Commonwealth Conciliation and Arbitration Act*; and by clause 148 of an agreement made on 25th September 1919 between the Union and a number of employers including the defendant, which was certified and filed pursuant to sec. 24 (1) of the Act, it was provided that certain days, including Christmas Day, should be holidays, and that "time not worked on those days need not be paid for except that ordinary rates shall be paid for Christmas Day . . . although not worked." By the agreement it was also provided that it should continue in force until 31st December 1920. Christmas Day of 1921 fell upon a Sunday, and the complainant did not work

on that day or on 26th December. The Police Magistrate dismissed the complaint, having stated that in his opinion Christmas Day in the agreement meant Christmas Day and not some other day in lieu thereof, that he was not satisfied that sec. 28 (2) of the Act applied to the agreement, and that in his opinion, the agreement having terminated on 31st December 1920, sec. 28 (2) did not operate to continue it.

From that decision the complainant, by way of order to review, appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Foster, for the appellant. The words " Christmas Day " in clause 148 of the agreement mean the day which is observed as a holiday for Christmas Day, and in Victoria when Christmas Day falls upon a Sunday the following Monday is observed as a holiday (*Public Service Act* 1915 (Vict.), sec. 187 ; *Banks and Currency Act* 1915, sec. 13). The only employers who were parties to the agreement were Victorian, and the parties must have had in mind the provisions of the Victorian law. One of the effects of sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 is that the provision in sec. 28 (2), which extends the period during which an award has operation until a new award is made, applies to agreements. That view is not opposed to the decision in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (1). That decision was that sec. 29 (*ba*) did not, by force of sec. 24 (1), apply to agreements; and the reason was that the application of sec. 24 (1) was limited by the words " as between the parties to the agreement," and that sec. 29 (*ba*), if applied to an agreement, would have the effect of binding a person who was not a party to the agreement. But sec. 28 (2) operates between the parties to the award, and may therefore be applied to agreements. Another effect of sec. 24 (1) is that a member of an organization which is a party to an agreement fixing the rates of wages payable to its members has a right of action against his employer in respect of the wages payable under the agreement (*Mallinson* v. *Scottish Australian Investment Co.* (2)). [Counsel also referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte*

(1) (1921) 29 C.L.R., 515.

(2) (1920) 28 C.L.R., 66.

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North Melbourne Electric Tramways and Lighting Co. (1); *Federated Gas Employees' Union* v. *Metropolitan Gas Co.* (2).]

Stanley Lewis (with him *Robert Menzies*), for the respondent. On the principles stated in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (3) an agreement is binding only on the parties to it, and therefore where an organization is a party to an agreement a member of the organization cannot sue on it. Sec. 28 (2) does not apply to an agreement certified under sec. 24 (1), for sec. 24 (1) does not give efficacy to anything which is not contained in the agreement itself. Sec. 28 cannot be applied to anything but an award of the Court. Sub-sec. 1 obviously cannot be applied to an agreement, and sub-sec. 2 is so bound up with sub-sec. 1 that it also cannot be so applied. If on a proper construction of sec. 28 (2) it applies to agreements, it is unconstitutional; for it would be direct legislation imposing terms upon the parties without the interposition of an arbitrator (see *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (4)).

Foster, in reply.

Cur. adv. vult.

NOV. 8. The following written judgments were delivered :—

KNOX C.J. This was an application to make absolute an order nisi calling on the respondent to show cause why the order of the Court of Petty Sessions at Bendigo dismissing the complaint of the appellant should not be reviewed.

The appellant sued in the Court of Petty Sessions to recover 6s. 11d. for work and labour done, being wages short paid during December 1921. It appeared that the appellant was a member of the Amalgamated Food Preserving Union of Australia, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, and that an agreement regulating wages and working conditions had been made between the Union and a number of employers, including the respondent. This agreement, which was

(1) (1920) 29 C.L.R., 106.
(2) (1919) 27 C.L.R., 72.
(3) (1921) 29 C.L.R., 515.
(4) (1920) 28 C.L.R., 209, at pp. 218, 226.

duly certified under sec. 24 of the Act, was expressed to be for the period ending on 31st December 1920. In substance, the complaint of the appellant was that she had been paid, in respect of the week which included 25th and 26th December 1921, less than she was entitled to under the terms of the agreement, and the evidence established that, if the agreement was binding on the respondent, the appellant in fact received less by 10½d. than the amount prescribed by the agreement for the week in question.

For the appellant it was argued that the agreement continued in force by virtue of sec. 28 (2) of the Act, and that the appellant was entitled to enforce payment of wages at the rate prescribed by the agreement.

The first objection taken by Mr. *Lewis* for the respondent was that the appellant was not entitled to sue because she was not a party to the agreement. In support of this proposition he relied on the decision in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (1), but in my opinion that decision is not in point. In that case the question for decision was whether by force of sec. 24 and sec. 29 (*ba*) of the Act an agreement certified under sec. 24 was binding on a person not a party to the agreement, and the majority of the Court decided that such an agreement was not, by force of that section, made binding on persons who were not parties to it, but that the section did no more than provide that such an agreement should be binding on the parties to it to the same extent, *and enforceable against them in the same way*, as if those terms had been terms of an award instead of merely terms of an agreement. In that case no question arose as to the position of a person who was a party to the agreement or as to the right of a member of an organization to enforce provisions contained in an agreement made by that organization which enured for his benefit. We expressed the opinion that the words " as between the parties to the agreement " in sec. 24 were equivalent to the words " so far as the reciprocal rights and obligations of the parties under the agreement are concerned." In this case the agreement imposes on the respondent as between him and the organization an obligation to pay wages to his employees in accordance with its provisions. If the matter rested in agreement this obligation could only have

(1) (1921) 29 C.L.R., 515.

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been enforced at the instance of the other party to the agreement—the organization. But the provision that the agreement is to have the effect of an award imposes on the respondent, who is a party to the agreement, the same obligations as would be imposed by an award, including a statutory duty to observe its provisions. In *Mallinson* v. *Scottish Australian Investment Co.* (1) the Court said: "So far as the Act deals with the remuneration of employees it is clear that its effect is that, when persons standing in the relation of employer and employee respectively become bound by and entitled to the benefit of an award, the employer shall be liable to pay for the services of the employee, and the employee shall be entitled to be paid by the employer wages at a rate not less than the minimum rate of wages fixed by the award"; and the Court decided in that case that the employee had a right of action for wages under an award made between the organization of which he was a member and his employer. Under the agreement in this case the obligation on the respondent is (*inter alia*) to pay wages at the agreed rates, and the right of the organization is to insist on such payment. These are the reciprocal rights and obligations of the parties to the agreement, and, so far as these rights and obligations are concerned, the agreement is to have the effect of an award. Part of that effect is, following the decision in *Mallinson's Case*, that a member of the organization may sue to enforce payment to him of wages in accordance with the obligation imposed on his employer. The objection that the appellant is not the proper party to sue therefore fails.

The next objection taken for the respondent was that the provisions of sec. 28 (2) of the Act applied only to an award of the Court and not an agreement certified under sec. 24. The agreement in this case contained a provision that it should remain in force till 31st December 1920, and Mr. *Lewis* contended that it ceased to operate after that date. It was not disputed that, if the terms of the agreement had been embodied in an award between the same parties, that award would, by virtue of sec. 28 (2), have continued in force after 31st December 1920 until a new award should have been made; but it was said that the provisions of sub-sec. 1 of sec. 28 were clearly inapplicable to anything but an award of the Court,

(1) (1920) 28 C.L.R., at p. 72.

and that the provisions of sub-sec. 2 were so connected with those of sub-sec. 1 by the use of the expression "period so specified" that they also must be read as applying only to awards. If, however, the effect of sec. 24 is, as I think it is, to bind the parties to the agreement to the same extent with regard to their reciprocal rights and obligations as if the terms of the agreement had been contained in an award made between them and if, under an award in the terms of this agreement made between the parties to the agreement, their reciprocal rights and obligations would have continued after 31st December 1920, which is not disputed, it seems to me to follow that their reciprocal rights and obligations under the agreement must continue for the same period.

It was also contended for the respondent that, if the effect of sec. 28 (2) was to extend the duration of the certified agreement, the enactment was beyond the power of Parliament. It was said that Parliament had no power to alter by direct legislation an agreement between parties—that it could only do so, if at all, through an arbitrator. In my opinion this contention cannot be supported consistently with the decision of the majority of the Court on the validity of the sub-section in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1).

For these reasons I think the order of the Court of Petty Sessions should be discharged and the respondent should be ordered to pay to the appellant the sum of 10½d.

ISAACS J. This appeal is nominally concerned with a few pence claimed as wages by an adult female worker from her employer. In effect it involves, as we were told by learned counsel for the respondent, fully £100,000 for wages in connection with the agreement sued upon. Even this would probably be but a small part of the effect throughout Australia. If the defence succeeded, the decision would practically put an end to conciliation as a means of settling industrial disputes. The importance of the case is therefore manifest.

The facts are very simple. Lilian Monard sued H. M. Leggo & Co. Ltd. in the Court of Petty Sessions at Bendigo for 6s 11d., which she claimed to be due to her under an agreement made in part settlement

(1) (1920) 28 C.L.R., 209.

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of an industrial dispute and certified and filed under sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act*. The agreement was made in 1918, and by its terms was to expire on 31st December 1920. The complainant only became a member of the employees' union in 1920. The wages claimed were for 1921, and she claimed them on the basis that, notwithstanding that the agreement provided for its termination at the end of 1920, sec. 28 (2) of the Act extended the operation of the agreement as an award in the same way as it has been decided that a compulsory award is extended. On behalf of the employer an objection was raised that a decision of this Court, *Carter* v. *E. W. Roach & J. B. Milton Pty Ltd.* (1), had laid down an interpretation of the Act that stood in the complainant's way, and had made a distinction between awards by agreement and compulsory awards that was fatal to the claim. The contention was that upon that interpretation the Act did not extend the agreement. The Magistrate upheld that view, and dismissed the case. Hence this appeal.

On the argument the respondent relied upon the whole of the governing reasons in *Carter's Case* (1) to support the determination of the Magistrate. In view of the momentous consequences, I have very carefully scrutinized *Carter's Case* in order to see whether, consistently with that decision and the expressed reasons leading to it, I could act upon my own view of the legislation for the purposes of this case. I must frankly confess that, if the Act had not been amended since that decision was given, I should, inasmuch as we are not constituted as a Court to reconsider the case, have felt bound by force of the majority judgment in that case and, whatever the consequences, to hold the Magistrate's determination to be correct. Briefly stated, there are two reasons for this. The first is that I could not distinguish between "award" in sec. 28 and the same word in sec. 29, so that the operation of the agreement would not extend beyond 31st December 1920. But behind that is the second reason equally fatal. It is that, assuming sec. 29 (*d*) to be excluded from operating on an agreement award, the members themselves of organizations are not "bound," and therefore (not being themselves "parties") are not brought into

(1) (1921) 29 C.L.R., 515.

that mutuality and privity with those who are "bound" by the section which is essential to the reciprocity of rights and obligations on which *Mallinson's Case* (1) is founded. It would be profitless to state in detail why those reasons are the necessary outcome of the decisions, because as matters now stand I conclude on the whole that I am at liberty to construe the relevant legislation now in controversy for myself.

Since *Carter's Case* (2) was determined, Parliament has intervened, and by Act No. 29 of 1921 has amended the law so as to meet that decision and also to meet the prior decision in *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (3). These amendments are of a broadening and strengthening nature, and I have come to the conclusion that they may be regarded not merely as a simple addition of words to two cognate sections, but also as a general indication of policy. That policy is that the provisions as to conciliation are strengthened, and that conciliation agreements are not to be placed in a worse position than compulsive awards. This wider view has been inferentially so strongly evidenced that I accept it as an authoritative guide. Whatever, therefore, may have been the correct interpretation of sec. 24 (1) and sec. 29 before those amendments were made, the new legislation now leaves me free, with reference to the subject under present consideration, to read the Act as a whole as best I can, untrammelled by the interpretation given in *Carter's Case*. This I proceed to do.

By sec. 2 conciliation is placed in the forefront as the desirable method of ending industrial disputes, and compulsive award is only "in default of amicable agreement between the parties." By sec. 16 the President is specially charged with the primary duty of reconciliation of parties to industrial disputes. By sec. 23 the Court, even when it has cognizance of the dispute and is in the course of the hearing, is required to make proper suggestions to induce amicable agreement. Then comes sec. 24; which I read, not only in conjunction with the provisions of the Act as it stood before 1921, but also assisted by the recent amendments. The broad effect, sufficiently stated for this case, of secs. 24, 28 and 29 taken together,

(1) (1920) 28 C.L.R., at p. 72, ll. 5-14. (2) (1921) 29 C.L.R., 515.
(3) (1920) 27 C.L.R., 532.

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and construed with the aid I have mentioned, is, in my opinion, as follows:—Conciliation is the primary object sought, and at that stage by agreement as the foundation of an award. If no agreement whatever is arrived at, the Court proceeds to a compulsive award, which operates with statutory force and without any question binds mutually and reciprocally all the parties and persons as mentioned in sec. 29. *There is only one award, in the relevant sense, to end the one dispute*, even though every State in Australia is involved and even though variations due to necessities of situation are ordered for various localities. Suppose, however, separate agreements are made, one for each State, what is the result? Each settlement by agreement is, I apprehend, as between the parties to have the same effect as and be deemed to be an award. But I am unable to conceive that because, in conformity with the leading object of the Act and in obedience to its express mandate, the Court has suggested and all the contestants have adopted the course of amicable agreement, the Legislature has limited and weakened the effect and operation of the arrangement or placed the parties in a position less amply protected than if the fight had been forced on to the bitter end. And yet that is what the respondent's argument inevitably leads to. I should say that, at all events since the indirect but illuminating assistance of the Act of 1921, sec. 29 covers the case of the six States just supposed, and applies to the totality of settlement. If it does, of course there is an end of the matter. Carry the inquiry a step further. If an agreement is made, for instance, between some only of the parties and as to part only of the subjects of dispute, leaving other parties and other portions of the dispute unsettled; then, just as in the previous case as between the parties who have agreed —that is, as distinguished from the parties who have not agreed— and to the extent of their agreement, the written memorandum of the terms of their agreement when certified by the President is to be filed and then is "to have the same effect as, and be deemed to be, an award for all purposes." The words "an award" might mean, according to their context, a piece of paper or the settlement by arbitration of disputed terms. In the Act they have various contexts, and sometimes they mean one thing and sometimes the other.

The expression here means not the piece of paper—the material

memorandum of the terms—but that the terms themselves, once the parties have agreed to them and the President has by certifying sanctioned them, shall be regarded precisely as if the Court had independently sanctioned them by compulsorily awarding them. That is confirmed in more ways than one by the very words of the section. First, it is only a "memorandum" of the agreed terms that is to be drawn up. No formal agreement is required. Even the signature of the parties is not mentioned. All that is required is a memorandum of the terms for the President to see and for him to *certify*, and then this memorandum is to be filed and placed on record. Obviously the terms are the important thing, and the certificate is the official act which is deemed to award those terms.

The second verbal confirmation is found in the second sub-section. Where no complete agreement as to the whole dispute is arrived at, the Court shall by "an award"—that is, by its own compulsive award—determine the dispute. In each case the word "award" means the curial determination, not the paper it is ultimately written on. The award in this sense exists before the document is completed, though for evidentiary or enforcement purposes such a document may be required. A man's "will" in one context means the document; but properly it means his total dispositions of property, evidenced, it may be, by many documents executed and witnessed in the statutory way. Here, when the heart of the matter is reached, the meaning of the words is, I think—at all events since the 1921 Act—very plain. Suppose, for example, instead of an entirely compulsive or entirely conciliation award covering the six States, three had agreed and three went to compulsive award, there would not be four or six awards. There would still in the proper sense be but one award covering the one dispute, but part of that award would be arrived at by conciliation and part by arbitration. The parts arrived at by conciliation, though each for a limited purpose might be called an award, would ultimately form part of the complete "resultant award" covering the dispute as a whole, and thereby settling it just as much as would a purely compulsive determination. That is all preparatory to the declaration by the Legislature as to what the effect of any award shall be. Then, just as

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before, sec. 29 comes in and provides for the mutually and reciprocally binding force of the "award," however arrived at, in respect of the parties and persons mentioned in the various paragraphs. Of course, an award, whether wholly compulsive or wholly conciliatory, or partly one and partly the other, applies to the various parties and persons according to its terms and provisions only, and so far as it affects them severally.

But the point is, that conciliation, openly preferred by the Legislature as being the simpler, surer and happier method, and most conducive to better understanding and mutual goodwill—perhaps the greatest asset in industrial operations,—is not penalized, or placed in an inferior or more disadvantageous position than is the compulsive process, which may prove necessary when conciliation fails, and is the last resort.

This view is greatly strengthened if we imagine simply a two-State dispute—say, in New South Wales and Victoria. Suppose the parties in New South Wales agree, and the memorandum is certified and filed. Is that a separate independent award intended entirely to terminate and obliterate the dispute so far as relates to that State and leaving the dispute existing only in Victoria awaiting determination? If it is, then I doubt the constitutional validity of the provision, because, if the Court is authorized by the Act to settle a dispute in one State only, determining nothing good, bad or indifferent as to the other, that raises a very serious question of power. And if we are to regard the dispute in New South Wales as completely settled and out of hand, leaving a mere single State dispute in Victoria, the same difficulty arises, perhaps more acutely. As I interpret the Act no such constitutional difficulty arises. Let me, for the sake of clearness, suppose a case of inter-State dispute over the six States and the cause to have reached the Court. Suppose, too, that before the hearing all parties agree to and do put an end to the dispute, independently of sec. 24 (1), that is, by conciliation not requiring the memorandum mentioned therein, could the Court proceed to arbitrate? Certainly not, because the dispute would have ended. But suppose the dispute had ended in five States independently of the procedure required by sec. 24 (1), could the Court proceed in respect of the sixth? I think, with equal clearness,

certainly not—since again there would be no inter-State dispute to settle. Consequently, if in a two-State dispute an "award" under sec. 24 (1) or sec. 24 (2) settles the dispute in one State, it can only be as a step in its totality of determination; and whether the result is achieved wholly by compulsive award, or wholly by conciliation, or partly in one way and partly in the other, the Court's award is in the end one award with, may be, several constituent parts. All these considerations lead me to think that the statutory conciliation agreement when filed is an "award" only in the sense that so far the terms are settled as effectually as if the Court had awarded them. The Court still has to proceed and award as to the rest of the dispute, and in the end the totality of settlements constitute the final integer contemplated by Parliament and called in secs. 28 and 29 an "award," and which by those sections is to be in force and continue in force and to bind parties and persons as therein directed. My brother *Rich* in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1) has clearly pointed out the effect of the words "an award" in sec. 24 (2), which applies no matter how many stages are required to effect it. The observations of my brothers *Higgins* and *Powers* (2) are in the same direction.

This view and this alone, in my opinion, places the appellant here in the position predicated in *Mallinson's Case* (3); and, that being so, the appeal should be allowed.

As to the amount to be awarded, both parties treated it as practically immaterial. I agree to fixing it at 10½d.

HIGGINS J. The first argument used on behalf of the plaintiff seems to me to be absurd. Under the 148th clause of the agreement, members of the Union are to have eight holidays in the year, including Christmas Day and Boxing Day, and the member is to be paid for Christmas Day but not for Boxing Day. Christmas falls on a Sunday; and under Victorian Acts—one for public offices, the other for banks—it isprovided that when Christmas Day falls upon a Sunday the following Monday and Tuesday shall be holidays

(1) (1920) 28 C.L.R., 1, at p. 21. (2) (1920) 28 C.L.R., at pp. 13, 18.
(3) (1920) 28 C.L.R., 66.

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(*Public Service Act* 1915, sec. 187; *Banks and Currency Act* 1915, sec. 13). The argument is that because of these Victorian Acts the provision in the agreement for the payment for Christmas Day must be treated as a provision for payment for Monday, 26th December. But the proceedings in which the agreement was made were Australian proceedings, in a dispute which extended to two or more States; and the agreement cannot be interpreted or applied according to Victorian law. Christmas Day remains Christmas Day, for an Australian award or agreement. Counsel have not referred us to any Act which applied these sections as to holidays to factories in addition to public offices and banks; but even if there were such an Act, it amazes me to find the Union so reckless as to put before us an argument under which an award of the Commonwealth Court would be liable to be frustrated or altered or qualified by the legislation of any State.

But the complainant's argument may be bad and yet her case may be good; did she receive the amount to which she was entitled for the week in which Christmas Day and Boxing Day fell? Leaving aside complications as to overtime, the minimum amount that the plaintiff should receive for a full week was £1 11s. 3d. She did not work on Boxing Day; and, under the agreement, the employer was entitled to deduct for that day 5s. 2½d. Therefore she ought to have been paid £1 6s. 0½d. for the week; but she was paid for the week £1 5s. 2d. only (in accordance, as I understand, with the determination of some Victorian Wages Board). So she has been underpaid to the extent of 10½d. Assuming that the employer was bound by the agreement during the month in question, December 1921, the plaintiff is entitled, prima facie, to recover that sum; for, according to the decision of this Court in *Mallinson* v. *Scottish Australian Investment Co.* (1), an employee is entitled to sue as on an agreement for the deficiency in the wages.

I was inclined at first to think that, under the claim as shaped in the summons and particulars thereunder, the plaintiff was precluded from claiming for the deficiency. For the summons is for "six shillings and eleven pence" (*sic*) "for work and labour done the particulars whereof are hereunto annexed"; and the particulars are

(1) (1920) 28 C.L.R., 66.

stated thus :—" To amount of wages short paid to the complainant by the defendant during December 1921, the defendant having failed and refused to pay to the complainant wages for the 26th day of December 1921.—Amount short paid and which the complainant claims 6s. 1d." But having regard to the provisions of secs. 94 and 196 of the *Justices Act* 1915, I am of opinion that if complainant was in fact underpaid during December 1921, the Magistrate ought (if the agreement was then binding) to have given to the complainant relief as to the short payment, although she had put her complaint too high, and on a wrong ground. No doubt, if the respondent had been misled, or had not an opportunity of meeting this claim for short payment on the broader ground, apart from the ground of the Victorian Act as to holidays, there ought to be a retrial; but there was no misleading, no lack of opportunity; and the defendant at the trial actually stated as one of its objections, that there had been " payment in full."

Still, the question remains which is by far the most important question in this case—was the agreement binding during December 1921 ? This is a question of vital importance to the Union, and to all unions under the Commonwealth Act; as well as to employers and to the public. For if the provisions of sec. 28 (2) do not apply to agreements as well as awards, so that agreements as well as awards continue after the time specified in the agreement until a new award has been made, there is chaos until the new award, and all the evil methods of strikes and stoppages which the Act was meant to prevent will be as rampant as before the Act. In addition, if sec. 28 (2) does not apply to agreements, it would seem to follow that sec. 44 does not apply; and that unions, members and others cannot enforce agreements by a penalty. Under such circumstances, agreements cannot be enforced as awards can be enforced, under Part IV. of the Act; and few unions (if any) will consent to settle disputes by peaceful agreement without evidence or argument—they will insist on arbitration.

The specified period for the agreement was to end on 31st December 1920, and the alleged short payment took place in December 1921. Under sec. 24 (1): " If an agreement between all or any of the parties

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as to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes including the purposes of section thirty-eight."

Under sec. 28 (1) and (2):—"(1) The award shall be framed in such a manner as to best express the decision of the Court and to avoid unnecessary technicality, and shall subject to any variation ordered by the Court continue in force for a period to be specified in the award, not exceeding five years from the date of the award. (2) After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new has been made."

It was held, in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (1), that by virtue of these sections the power of the Court to vary its orders and awards and to reopen any question (sec. 38 (*o*)) applied to agreements, so that the Court could vary an agreement (even retrospectively); for an agreement when put in writing and certified and filed has, as between the parties to the agreement, the same effect as and is to be deemed an award for all purposes including the purposes of sec. 38 (sec. 24). This means, of course, it is to have the same effect as and to be deemed an award in the sense of a *complete* award, not an award *in fieri*, in course of making. Directions as to the mode of drawing up an award would not necessarily be applicable (see sec. 28 (1)—"The award shall be framed in such manner as to best express *the decision of the Court* and to avoid unnecessary technicality"). This decision, that the power to vary awards applied, by virtue of sec. 24, to agreements, was the unanimous decision of five Judges. But in another case, decided within twelve months afterwards, it was held by four Judges as against two, without overruling the previous case, that the provisions of sec. 29 (*ba*) did not apply to agreements. Sec. 29 (*ba*) provided that "The award of the Court

(1) (1920) 29 C.L.R. 106.

shall be binding on . . . (*ba*) in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party." An agreement bound Roach; but it was held that it did not bind E. W. Roach & J. B. Milton & Co., which had taken over Roach's business. This latter decision was pronounced on 17th November 1921; and by an Act passed on 16th December 1921 Parliament made certain alterations in sec. 24 and sec. 29 which were obviously meant to alter the law as interpreted in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (1) for the future even as to then existing agreements. But, apart from these alterations, it is our duty to try to reconcile these decisions. Under the earlier decision, an agreement is "as between the parties to the agreement," not as between the parties who have not made the agreement, to be "deemed to be an award for all purposes," and therefore the power of the Court under sec. 38 (*o*) to vary its award involves with it a power to vary agreements; but under the later decision, the provision in sec. 29 (*ba*) that "*the award of the Court*" is to be binding on successors or assignees of the business of a party bound by the award is not applicable to agreements, so as to make the agreement binding on successors or assignees of the business of a party bound by the agreement. I confess that I am unable to reconcile these decisions logically. But I have to remember that I was one of two dissentient Justices in *Carter's Case*. My brother *Starke* and I both pointed out in our judgments in that case that we thought the majority decision to be inconsistent with *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (2); but our view was not accepted. Unless and until *Carter's Case* be overruled, we must treat it as law; and, for my part, I should decline to be a party to overruling in a Bench of five Justices a decision given by a Bench of six. Every available member of this Court should have an opportunity of reconsidering the case, if it has to be reconsidered. Meantime, all that I can do is to accept and obey the decision, and to act on the theory that the provisions of sec. 29 (*ba*) are an exception to the

(1) (1921) 29 C.L.R., 515.

(2) (1920) 29 C.L.R., 106.

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rule laid down in sec. 24 (1) and applied in the *North Melbourne Case* (1), and that, although an agreement is to be deemed an award for all purposes, there is an implied exception as to sec. 29 (*ba*). The decision in *Carter's Case* (2) binds me, but not all the reasons for the decision; and I am free to say that in my opinion sec. 28 (2) is not another implied exception. Therefore, the provision of sec. 28 (2) that after the expiration of the period specified in the award the award shall continue in force until a new award has been made applies, in my opinion, to this agreement, and as the respondent Leggo & Co. was bound by the agreement throughout December 1921, the complainant ought to have succeeded on her summons. The Magistrate dismissed the summons on the sole ground that the agreement had expired. This decision was, in my opinion, wrong, and the appeal should be allowed.

Perhaps I should add that the alterations made by Parliament by the Act No. 29 of 1921 make it clear that as from 16th December 1921 the provisions, even of sec. 29 (*ba*), as to the binding of successors, are to apply to agreements, even existing agreements. By sec. 3 of that Act, sec. 24 (1) of the original Act was amended by inserting after the words "as between the parties to the agreement" the words "or any successor, or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party." And sec. 4 of the same Act, No. 29, inserted in sec. 29 (*ba*) after the words "of the business" the words "of *a party to the dispute* or". The result is that the provision for binding successors, &c., applies now, not only to a successor to the business of a "party bound by the award," but also to a successor to the business of "a party *to the dispute*"; and all parties to an agreement filed, &c., under sec. 24 (1) are necessarily "parties to the dispute."

RICH J. I also agree that the appellant is entitled to succeed.

STARKE J. The only argument in this case worthy of serious attention was that based upon the decision of this Court in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (2). It was said that the interpretation placed by that decision

(1) (1920) 29 C.L.R., 106. (2) (1921) 29 C.L.R., 515.

upon sec. 24 of the Arbitration Act limited the operation of an agreement filed pursuant to that section to the parties who made it and to the period specified by them in the agreement. The amendment made by the Act No. 29 of 1921, extends the operation of the agreement to successors, assignees and transmittees, but did not continue the agreement beyond its specified period or bring into operation the provisions of sec. 28 (2) of the Arbitration Act.

But for the exposition of the decision in *Carter's Case* (1) now given by the Chief Justice and the judgment of my brother *Rich*, who concurred in that decision, I should have felt some difficulty in meeting the argument, having regard to my view of the effect of the decision expressed in my dissenting opinion in that case. The opinions of the Chief Justice and my brother *Rich* in this case negative, however, my view of the effect of the decision in *Carter's Case* and affirm the extension of the provisions of sec. 28 (2) of the Arbitration Act to agreements filed pursuant to sec. 24.

Apart from the decision in *Carter's Case* I should have reached the same conclusion for reasons given by me in that case. I feel free, therefore, to accept the view of the Chief Justice and my brother *Rich* as to the effect of the decision in *Carter's Case*, and I agree to the order proposed by the Chief Justice.

Appeal allowed. Order of Court of Petty Sessions set aside. Respondent to pay to appellant the sum of 10½*d. and* £6 6*s. for costs in that Court. Respondent to pay costs of appeal.*

Solicitors for the appellant, *Loughrey & Douglas.*
Solicitors for the respondent, *Home & Wilkinson.*

B. L.

(1) (1921) 29 C.L.R., 515.