[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR HOME AND TERRITORIES . . . . . } APPLICANT;

AND

TEESDALE SMITH AND OTHERS. . . RESPONDENTS.

H. C. OF A. 1924.

ADELAIDE. *Sept.* 19, 20.

MELBOURNE, *Oct.* 14.

ISAACS A.C.J., GAVAN DUFFY and STARKE JJ.

Arbitration—Award—Rule of Court—Jurisdiction of High Court—Ultra vires—Retrospective operation—Costs of arbitration and award—Discretion—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 75, 76—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 33A.

Sec. 33A of the *Judiciary Act* 1903-1920, which provides that "the High Court may by order direct that an award in an arbitration in respect of any matter over which the High Court has original jurisdiction, or in respect of which original jurisdiction may be conferred upon the High Court, shall be a rule of the High Court," is within the legislative power of the Commonwealth Parliament; and the section applies to awards in existence at the time the section was enacted as well as to those coming into existence afterwards.

The refusal of an application to the High Court made before sec. 33A of the *Judiciary Act* was enacted to make an award a rule of that Court, the ground of the refusal being that the High Court had then no jurisdiction to entertain the application, is not a bar to a similar application being made after that section was enacted.

A disputed claim for compensation in respect of land compulsorily acquired by the Commonwealth having arisen, by agreement the complaint was referred to the arbitration of a Justice of the High Court. The agreement provided that "the costs of the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may . . . direct the taxation thereof by the proper taxing officer of the said High Court." By his award the arbitrator ordered (*inter alia*) that the general costs of and incidental to the arbitration and award as between party and party in an action in the High Court (with a certain exception) should he paid by the claimants to the Commonwealth on demand after taxation, such costs to be taxed by the proper taxing officer of the High Court, and he directed that upon the taxation of such costs certain rules of the *Rules of the Supreme Court* of South Australia

1913 should not be applied. On an application by the Commonwealth to the High Court under sec. 33A of the *Judiciary Act* to make the award a rule of Court,

Held, that the order to pay the costs "of and incidental to" the arbitration and award was within the terms of the agreement; that the arbitrator might properly exclude the application of the specified rules of the Supreme Court of South Australia to the taxation; that the existence of a doubt whether the taxing officer of the High Court had any authority to move in the matter of the taxation of the costs was not a ground upon which the High Court should refuse to exercise its discretion by granting the application; and therefore that the application should be granted.

MOTION.

Certain land in South Australia belonging to Henry Teesdale Smith and Simon Matheson having been acquired by the Commonwealth by compulsory process under the *Lands Acquisition Act* 1906, Smith and Matheson made claims for compensation, which became a disputed claim for compensation under the Act. The Minister for Home and Territories by originating summons applied to the High Court to determine the claim, but at the request of the claimants the application was stayed and an agreement was entered into between the parties to refer the claim to the award and determination of a Justice of the High Court to be nominated for that purpose by the Chief Justice. The arbitration was accordingly held before *Powers* J., who, on 18th February 1920, made his award (*Arbitration between Teesdale Smith and Minister for Home and Territories* (1)). On 9th July 1920 the Minister applied to the High Court by motion to have the award made a rule of Court, but the motion, which was heard by *Starke* J., was, on 17th August 1920, dismissed with costs (*Minister for Home and Territories* v. *Smith* (2)).

The Minister for Home and Territories now applied to the Full Court of the High Court, by motion, to make the award a rule of the High Court, pursuant to sec. 33A of the *Judiciary Act* (which was enacted on 30th October 1920), the respondents to the motion being Lydia Kate Smith, George Basil Smith and Kenneth James Patterson, executors and trustees of Henry Teesdale Smith, and Margaret Watson Matheson and Griffith Mostyn Evan, executors and trustees of Simon Matheson.

(1) (1920) 28 C.L.R. 513. (2) (1920) 28 C.L.R. 584.

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The other material facts are stated in the judgment of *Isaacs* A.C.J. and *Starke* J. hereunder.

Cleland K.C. (with him *Ward*), in support of the motion.

Sir Josiah Symon K.C. (with him *Mayo*), to oppose. Sec. 33A of the *Judiciary Act* is invalid. The Commonwealth Parliament has not, under the Constitution, any general power to legislate as to arbitration, the only legislative power as to arbitration being in respect of industrial disputes, and, therefore, there was no power to legislate as to arbitration in respect of the particular matters referred to in sec. 33A. No authority for sec. 33A is given by sec. 75 or sec. 76 of the Constitution, which give jurisdiction to the High Court in respect of the "matters" referred to in sec. 33A, for those "matters" are ended upon an agreement to arbitrate as to them. The judgment of *Starke* J. on the previous application (*Minister for Home and Territories* v. *Smith* (1)) operates by way of *res judicata*. Sec. 33A does not apply to this award, for the section is not retrospective. That section is not a mere procedural section, but confers a new and additional right which did not exist before (see *Colonial Sugar Refining Co.* v. *Irving* (2); *Dwarris on Statutes*, 2nd ed., p. 540; *Hitchcock* v. *Way* (3); *Gardner* v. *Lucas* (4); *Young* v. *Adams* (5); *In re Joseph Suche & Co.* (6); *In re Williams and Stepney* (7); *In re Athlumney*; *Ex parte Wilson* (8); *Lemm* v. *Mitchell* (9)). In the exercise of its discretion the Court should refuse the application and leave the Commonwealth to its remedy by action. One reason for doing so is that the parties intended, by clause 9 of the agreement, that the award should not be made a rule of Court, and they must be assumed to have known that it could not be made a rule either of the High Court or of the Supreme Court of South Australia (see *Swayne* v. *White* (10)). Another reason is that there is a doubt whether the arbitrator has exceeded his power in awarding the costs "of and incidental to" the

(1) (1920) 28 C.L.R. 584.
(2) (1905) A.C. 369, at p. 372.
(3) (1837) 6 A. & E. 943, at p. 951.
(4) (1878) 3 App. Cas. 582.
(5) (1898) A.C. 469, at p. 600.
(6) (1875) 1 Ch. D. 48.
(7) (1891) 2 Q.B. 257.
(8) (1898) 2 Q.B. 547, at p. 551.
(9) (1912) A.C. 400.
(10) (1862) 31 L.J. Q.B. 260.

arbitration and award, his power under the agreement being to award the costs "of" the award. There is also a doubt whether the arbitrator had power to direct taxation of the costs by an officer of the High Court (see *Simpson* v. *Inland Revenue Commissioners* (1)).

[STARKE J. referred to *Matthews* v. *Inland Revenue Commissioners* (2); *In re Grundy, Kershaw & Co.* (3).]

Cleland K.C. and *Ward*. Sec. 33A of the *Judiciary Act* is within the power conferred by sec. 51 (XXXIX.) of the Constitution. The provision is incidental to the power conferred by secs. 75 and 76 of the Constitution upon the Federal Judicature. Sec. 33A is divisible, and that portion of it which relates to any matter over which the High Court has original jurisdiction is within sec. 75 of the Constitution. It is also incidental to one or other of the powers conferred by sec. 51 (XXXI.) and sec. 51 (XXXIV.) of the Constitution. Sec. 33A is retrospective to the extent that it applies to all awards in existence when the section was enacted (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (4); *Gardner* v. *Lucas* (5)). It does not give an award any new validity but merely provides how the award may be enforced.

Cur. adv. vult.

Oct. 14.

The following written judgments were delivered :—

ISAACS A.C.J. AND STARKE J. This is a motion in original jurisdiction on behalf of the Minister for Home and Territories to make an award between the Minister and Henry Teesdale Smith and Simon Matheson (both now deceased) a rule of Court. The respondents are the respective executors and trustees of the deceased. The motion is made under sec. 33A of the *Judiciary Act*, and is contested on several grounds. Before stating the objections it will be convenient to mention the circumstances under which the award was made, and its operative provisions, as well as certain steps taken with reference to its enforcement.

(1) (1914) 2 K.B. 842.
(2) (1914) 3 K.B. 192.
(3) (1881) 17 Ch. D. 108.
(4) (1922-23) 32 C.L.R. 413.
(5) (1878) 3 App. Cas., at p. 602.

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Smith and Matheson were Crown lessees of land in South Australia on the line of the transcontinental railway between Kalgoorlie and Port Augusta. The Commonwealth, for the purposes of the railway, compulsorily acquired some of the land and made bores and wells and used water on the land. Compensation was claimed, the amount disputed, and there arose a disputed claim for compensation within the meaning of the Commonwealth *Lands Acquisition Act*. Six months having elapsed after the claim became a disputed claim and none of the conditions (*a*), (*b*) and (*c*) in sub-sec. 1 of sec. 38 of the Act having been fulfilled, the Minister applied to the High Court in May 1918 to determine the claim. The claimants then requested the Minister to agree to arbitration and to stay the proceedings on condition that a Justice of the High Court nominated by the Chief Justice should be the sole arbitrator, and that certain terms should be agreed to. This was ultimately assented to, and *Powers* J. was nominated arbitrator. Among the terms agreed to were the following:—" (8) The *Arbitration Act* 1891 of the State of South Australia shall not apply. (9) Subject to clause 3 hereof this submission shall be irrevocable except by leave of the High Court of Australia or a Justice thereof, and shall have the same effect in all respects as if it had been made a rule of the High Court." " (19) The award to be made by the arbitrator shall be final and binding on the parties and the persons claiming under them respectively. (20) The costs of the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner those costs or any part hereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof or direct the taxation thereof by the proper taxing officer of the said High Court." Clause 3 has, in the events which have happened, become immaterial.

On 16th February 1920 the arbitrator made and published his award. The award determined: (1) the amount of compensation payable by the Commonwealth to the claimants, and (2) costs, as to which it was ordered that " the general costs of and incidental to the arbitration and award as between party and party in an action in the High Court of Australia except the costs hereinafter mentioned shall be paid by the claimants to the Minister . . . on demand

after taxation such costs to be taxed by the proper taxing officer of the High Court of Australia." The costs referred to as "the costs hereinafter mentioned" are costs in respect of a certain claim, and those are ordered to be paid by the Commonwealth to the claimants on demand after taxation—"such costs to be taxed by the proper taxing officer of the said High Court." Then the award added: "I further award and direct that on the taxation of any of the costs hereinbefore referred to, Rules of Court numbers 11, 12 and 13 of Order LXII. of the *Rules of the Supreme Court of South Australia* 1913 shall not be applied, and such costs shall be taxed as if the said Rules were not in force in South Australia."

The direction as to costs has given rise to some difficulty. It needs further action on the part of what is termed "the proper taxing officer" before a definite sum can demanded by either party. It has been considered doubtful whether upon the mere direction of the arbitrator any person who in fact occupies the position of "the proper taxing officer" of this Court could or should proceed with the taxation under the award. That is to say, it is regarded as doubtful whether the direction is that he could or should act independently of curial authority and simply because he personally answers the designation. An action to recover the costs would have been futile, unless they could be definitely ascertained; and the doubt referred to led to an impasse. On 9th July 1920, that is, nearly five months after the award was published, an application was made by the Minister to *Starke* J. to make the award an order of this Court, so that it might be enforced by the Court and the taxing officer could act officially upon the direction. That application was refused with costs upon the sole ground that this Court had no statutory jurisdiction to entertain such an application (*Minister for Home and Territories* v. *Smith* (1)). Subsequently, on 30th October 1920, by Act No. 38 of that year, a new section was added to the *Judiciary Act* 1903-1920, and called sec. 33A. It is in the following terms: "The High Court may by order direct that an award in an arbitration in respect of any matter over which the High Court has original jurisdiction, or in respect of which original jurisdiction may be conferred upon the High Court, shall be

(1) (1920) 28 C.L.R. 584.

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a rule of the High Court." On 5th September 1924 notice of this motion was given, and the application now stands for decision.

The objections advanced on behalf of the respondents may be conveniently stated and dealt with in the following order: (1) Sec. 33A is invalid; (2) sec. 33A is not retrospective so as to apply to awards already made; (3) The decision of *Starke* J. in July 1920 made this question a *res judicata*; (4) the awarding of costs "incidental" was unauthorized; (5) the direction to disregard rules 11, 12 and 13 of Order LXII. of the *Rules of the Supreme Court of South Australia* was unauthorized; (6) the discretion of this Court should be exercised by refusing the application and leaving the Crown to its remedy by action.

1. *Invalidity.*—The argument is that, whereas in respect of "matters" within sec. 75 of the Constitution this Court is by the Constitution itself invested with original jurisdiction and in respect of "matters" within sec. 76 of the Constitution this Court may be, and now in some cases has been, invested by Parliament with original jurisdiction, yet sec. 33A of the *Judiciary Act* goes beyond those "matters" and purports to include in the original jurisdiction of this Court awards—that is, arbitral determinations—some of which, at any rate, are the outcome of voluntary arrangements and are not included in the "matters" themselves prescribed by the Constitution. It is contended, and properly so, that, there being no general legislative authority conferred on the Commonwealth in respect of "awards," but only in respect of "awards" within sec. 51 (XXXV.), sec. 33A cannot be supported on the mere ground of the statutory expression "award in an arbitration." The true answer to the argument is that an "award in an arbitration" in respect of a "matter" is not itself a new matter, but is either from the beginning an essential element of the matter or the later advancement of the "matter" itself to a stage or condition which mutually affects or controls the parties with respect to their respective rights or obligations in addition to the matter. A "matter" within the meaning of sec. 75 and sec. 76 of the Constitution means a justiciable controversy (see *South Australia* v. *Victoria* (1)). Wherever an award is a necessary factor of the definite legal relation

(1) (1911) 12 C.L.R. 667.

of the parties, the "matter" is not really complete without it. But, as sec. 33A is broad enough to include an "award in an arbitration" in respect of matters complete without awards, we have to go further in order to meet the objection. But even there, an award is not something independent of the "matter." An "award in an arbitration" connotes a "difference," and that means a dispute as to the rights, duties or obligations of the parties with reference to the subject in controversy (see *In re Carus-Wilson and Greene* (1)). If, in the course of that dispute, the parties, after mutual reasoning, arrived at a complete understanding and embodied that understanding in a formal deed which bound both and estopped each from again raising the dispute, no one could doubt that the formal deed, although a new and binding contract, was, in effect, a mere adjunct of the "matter," a mere accessorial relation for the better ascertaining and acknowledging the rights, duties and obligations of the parties springing from their original relations. But if, mutual reasoning being unable to effect this, the parties agree to accept the opinion of a third person in the form of an award, is there any difference in legal result? Clearly not. In *Wood* v. *Griffith* (2) Lord *Eldon* L.C. said: "That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person." (And see *Nickels* v. *Hancock* (3).) And it is equally clear estoppel arises (see *Commings* v. *Heard* (4) and *Gueret* v. *Audouy* (5)). The rights, duties and obligations declared are still those existing under and by reason of the original relations; they are not any new creations. If those relations ascertained by a Court in the ordinary way would bring the case within the ambit of sec. 75 or sec. 76 of the Constitution, then any failure to observe or perform those rights, duties or obligations as evidenced and ascertained by an award equally gives rise, when a complaint is made to this Court, to a controversy constituting a "matter" within those sections. The objection of statutory invalidity therefore is not sustained.

2. *Retrospectivity of Section* 33A.—The question of whether an Act

(1) (1886) 18 Q.B.D. 7.
(2) (1818) 1 Swans. 43, at p. 54.
(3) (1855) 7 DeG. M. & G. 300, at pp. 318, 319.
(4) (1869) L.R. 4 Q.B. 669, at p. 673.
(5) (1893) 62 L.J. Q.B. 633, at p. 637.

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operates retrospectively or not is one of intention of the Legislature. If the intention either way is unequivocally expressed, there is no room for construction, for the language of the enactment cannot be altered. But where the language is not explicit, then the guiding principle is as stated in *Maxwell on Statutes*, 6th ed., p. 381, namely, "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation." For this purpose each Act must be examined on its own basis. Decisions on other Acts are helpful only so far as they illustrate the principle by indicating what considerations influence a Court in determining on which side a given enactment falls. Two judgments of outstanding authority may be referred to: one is that of Lord *Blackburn* in *Gardner* v. *Lucas* (1), and the other that of Lord *Macnaghten* in *Colonial Sugar Refining Co.* v. *Irving* (2). Lord *Blackburn* says that prima facie any new law that is made affects future transactions, not past ones. But if the subject matter of the Act is new procedure then the Act applies to bygone transactions and is retrospective unless there is some good reason why it should not be so. Lord *Macnaghten*, speaking for the Judicial Committee, is quite in accord with that; and, when the two judgments are read together, the clear content of both can be perceived. Lord *Macnaghten* says:—"If the matter in question be a matter of *procedure only*, the petition is well founded. On the other hand, if it be *more* than a matter of procedure, if it touches a *right in existence* at the passing of the Act," the appellants would succeed. He asks: "Was the appeal to His Majesty in Council *a right vested in the appellants* at the date of the passing of the Act, or was it a *mere matter of procedure*?" Seeing that the appellants were *suitors in a pending action*, he holds they had a *right*. The decision established that the *Judiciary Act* did not operate upon pending actions so as to deprive the suitors in those actions of rights including rights of appeal which were in existence at the time of the passing of the Act. It supplies an instance of "a good reason," referred to by Lord *Blackburn*, why an Act altering procedure should not operate retrospectively. References having some relevance are *George Hudson Ltd.* v. *Australian Timber Workers'*

(1) (1878) 3 App. Cas., at p. 603. (2) (1905) A.C., at p. 372.

Union (1), *Page* v. *Bennett* (2) and *R.* v. *Birwistle* (3). Applying the principles stated to sec. 33A, it appears that the enactment is one relating to procedure, that is, to the method of enforcing existing rights. It does not assume to alter any rights; it merely invests the High Court with a measure of original jurisdiction to ascertain and compel the observance of rights. Awards are not altered, the contracts of the parties to the submission under which the awards are made are not varied—nothing is done but to provide for a judicial recognition of whatever rights exist. Lord *Blackburn's* distinction as to procedure applies at least prima facie to this case. Whether Lord *Macnaghten's* qualification applies arises on the next objection.

3. *Res Judicata.*—If this objection could be sustained, then there would be, as in *Irving's Case* (4), "a good reason" for not bringing this matter even within a procedure section. In that event the respondents would have had, as in *Lemm* v. *Mitchell* (5), a vested right absolving them from all liability to have the award made a rule of Court. But that cannot be maintained. The decision of *Starke* J. was not founded on the rights of the parties as between themselves, or on the circumstances of the award, or on the general law of liability to make awards rules of Court. It rested solely on the incapacity of the Court to entertain such an application. Now that the Court is invested with the power to entertain, and in proper circumstances to grant, such an application, the applicant has for the first time a legal right to ask, and cannot be met with the objection that he has already lawfully asked once and been refused by a final judgment. This objection also fails (see *R.* v. *Goff* (6)).

4. "*Incidental Costs.*"—The 20th clause of the agreement of reference leaves to the arbitrator's discretion "the costs of the arbitration and award." The award as to costs is as to the "costs of and incidental to the arbitration and award." It is said the inclusion of the words "and incidental to" amounts to an excess of authority and vitiates the direction as to costs. In connection with some proceedings the point might be substantial, but not so here. There is now a well established understanding that in relation

(1) (1922-23) 32 C.L.R. 413.
(2) (1860) 29 L.J. Ch. 398.
(3) (1889) 58 L.J. M.C. 158.
(4) (1905) A.C. 369.
(5) (1912) A.C. 400.
(6) (1905) 2 I.R. 121.

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to arbitrations the costs of the reference include the costs incidental to the proceeding. In *In re Walker and Brown* (1) *Field* and *Cave* JJ. held, making an authority with the help of common sense, that the power over the costs of a reference includes the power to give costs of the award. In *In re Autothreptic Steam Boiler Co. and Townsend, Hook & Co.* (2) the submission referred to "the costs of the reference and award." Yet it was held that incidental costs were included and the earlier case as to common sense was quoted, and so the costs of the submission were allowed. Those two cases, which were prior to the *Arbitration Act* 1889, established that the costs of an arbitration included the costs of every step necessary from the essential preliminaries to the final determination. Then *In re Knight and Tabernacle &c. Building Society* (3) was decided upon the Act of 1889. That Act, in the Schedule, par. (*i.*), left "the costs of the reference and award" to the discretion of the arbitrators or umpire, &c. As to those words *Bowen* L.J. said (4): —"There is a provision in the *Arbitration Act* 1889 that the costs of the reference and award shall be in the discretion of the arbitrators or umpire. I think the Legislature in framing this clause of the *Arbitration Act* 1889 must have meant to include all the costs which would have been included by the well-known phrase applicable to such matters, 'costs of and incidental to the reference and award.'" It thus appears that the two phrases "costs of" and "costs of and incidental to," when used with respect to an arbitration of this nature, cover the same ground; and this objection also fails.

5. *Exclusion of Rules of Taxation.*—The real point made was that, if pursuant to the discretion conferred by the 20th clause the arbitrator delegated taxation of costs to the taxing officer, the delegation should not be fettered. That, however, cannot be sustained. The arbitrator was given full discretion as to costs, as to who should pay them, and the manner of payment and apportionment. He was also empowered to tax or settle them himself—which, of course, would be a ministerial act following the lines laid down by the exercise of his discretionary powers. Or he could direct that this ministerial duty (see *R.* v. *Goff* (5) and *Simpson*

(1) (1882) 9 Q.B.D. 434.
(2) (1888) 21 Q.B.D. 182.
(3) (1892) 2 Q.B. 613.
(4) (1892) 2 Q.B., at p. 620.
(5) (1905) 2 I.R. 121.

v. *Inland Revenue Commissioners* (1)) should be performed by the proper taxing officer; and, in that case, the duty would necessarily be subject to the declared discretion of the arbitrator. It was within his discretion to exclude the rules referred to and to leave the taxing officer to act on general principles of fairness as if those rules were non-existent.

6. *Discretion of Court.*—The suggestion of the respondents is that the Court should not interfere, but leave the matter in the doubtful state that has hitherto existed as to the authority or duty of "the proper taxing officer" to move in the matter of taxation. The Crown contends that there is at present no authority for the taxing officer to move. The Crown's view is not at all clearly right. Our brother *Powers* is referred to in the submission as a Justice of this Court. Nevertheless he unofficially acted as arbitrator. The reference to the proper taxing officer of the Court in an unofficial award might just as well have been exercised by a person answering that description, though not as an officer of the Court (see per *Gibson* J. in *Goff's Case* (2)). But in a state of doubt, if it be a doubt, what is the proper duty of this Court exercising its discretion judicially? Is it to allow that doubt to continue, with a practical certainty of litigation or frustration of an admitted agreement, or is it to put into force the powers entrusted to it by the Legislature? The latter seems the proper, because the just, the effective and the merciful, course (*Simpson's Case* (3) and *Matthews* v. *Inland Revenue Commissioners* (4)).

The application to make the award a rule of Court should, therefore, be granted.

GAVAN DUFFY J. I agree that the application should be granted.

Application to make the award a rule of Court granted with costs.

Solicitors for the applicant, *Fisher, Ward, Powers & Jeffries* for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Symon, Mayo, Murray & Cudmore.*

B. L.

(1) (1914) 2 K.B., at p. 845.
(2) (1905) 2 I.R., at p. 129.
(3) (1914) 2 K.B. 842.
(4) (1914) 3 K.B. 192.