[HIGH COURT OF AUSTRALIA.]

THE GRAZIERS' ASSOCIATION OF NEW SOUTH WALES . . . . . } APPLICANT;

AND

DURKIN . . . . . RESPONDENT.

H. C. OF A. 1930.

SYDNEY, *July* 29; *Aug.* 14.

Gavan Duffy, Rich, Starke and Dixon JJ.

Industrial Arbitration—Injunction—Disobedience—Remedies provided by section under which injunction granted—Fine or imprisonment—Exclusion of other remedies—Motion for writ of attachment for contempt—Amendment of notice of motion—Commonwealth Conciliation and Arbitration Act 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *secs.* 48*, 87, 88—*Acts Interpretation Act* 1904-1916 (*No.* 1 *of* 1904—*No.* 4 *of* 1916), *secs.* 3, 5—*High Court Rules* 1928 (*S.R.* 1928, *No.* 118), *Orders XXVII., XLI., XLIX., LVII., r.* 6.

On an application for a writ of attachment for breach of an injunction granted under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928,

Held, that the remedies for breach of such an injunction are limited to those prescribed by the section itself, and, therefore, that the motion should be dismissed.

The notice of motion, which did not specify the nature of the breach as required by Order XLIX. of the *High Court Rules* 1928, was allowed to be amended.

* Sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 provides that "the High Court . . . may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach or to enjoin any organization or person from committing or continuing any contravention of this Act or of the award under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the Act or the award by act or omission. In this section the term 'award' includes order. Penalty: one hundred pounds or three months' imprisonment."

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MOTION for Attachment.

The Graziers' Association of New South Wales, an organization of employers registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, applied, upon notice of motion given under Order XLI. of the *High Court Rules* 1928, for an order for the issue of a writ of attachment against the respondent Durkin for disobedience of an order in the nature of an injunction made, under sec. 48 of the Act, by the High Court on 23rd June 1922 (see *Waddell* v. *Australian Workers' Union* (1)) and directed to, amongst others, Durkin. The notice of motion was entitled "In the matter of the Graziers' Association of New South Wales, applicant, and J. Durkin, respondent. And in the matter of the *Commonwealth Conciliation and Arbitration Act* 1904-1928." The notice was (so far as material) as follows :—"Take notice that this Honourable Court will be moved . . . for an order that the Graziers' Association of New South Wales be at liberty to issue a writ of attachment against you the above-named respondent J. Durkin for your contempt in that you have disobeyed the order absolute of this Honourable Court made on 23rd June 1922 . . . And also take notice that upon the hearing of the said application the Graziers' Association of New South Wales intends to use the following affidavits . . . filed herein"—particulars of seven affidavits, duly served upon the respondent, being set out. The affidavit of John William Allen, the general secretary of the Association, showed that an award of the Commonwealth Court of Conciliation and Arbitration made in respect of the pastoral industry on 14th September 1927 was varied on 14th July 1930, by the order of the Chief Judge of that Court by (*inter alia*) making the amount payable for shearing sheep 32s. 6d. per hundred instead of 41s. per hundred as provided in the earlier award. It also showed that at many sheep stations in the Moree and Walgett districts of New South Wales shearers had refused and were continuing to refuse to shear sheep under the new conditions. One deponent stated that at Moree on 15th July 1930 he heard Durkin address a meeting of about 100 men in the morning and a meeting of about 200 or 300 men in the afternoon. He heard Durkin say :—"I personally am

(1) (1922) 30 C.L.R. 570, at p. 578.

very much opposed to the new award, the cut is too drastic, and I recommend the men to fight against it . . . the working-man is being forced to make all the sacrifices and the bosses are being left almost untouched," and "If the union does not stand by you we will form a rank and file movement," and that he, Durkin, "would use force and" he expected "others would do the same." According to two deponents Durkin visited "Midkin," a sheep station near Moree, on 15th July 1930, and said to a meeting of shearers and shed-hands "I suppose, boys, you have heard of the variation of the award 32s. 6d. a hundred for shearing and 3 guineas for shed-hands. The A.W.U. is strongly opposed to it, and I ask you to come out and stand fast for the old rate." The men thus addressed refused to resume work that day and on succeeding days. The affidavit of another deponent showed that on 16th July 1930 Durkin visited Kurrajong, another sheep station in the same district, and said to the shearers employed there: "Will you come out if Holloway (an organizer of the Australian Workers' Union) comes out in the morning and tells you the rate is 32s. 6d. and there is no appeal?" On 18th July the shearers on the station refused to continue to work. No affidavits were filed by or on behalf of Durkin.

Other material facts appear in the judgment hereunder.

Evatt K.C. (with him *McKell*), for the respondent, raised a preliminary objection. The notice of motion does not satisfy the requirements of Orders XLI. and XLIX. of the Rules of this Court: it does not specify what the respondent is deemed to be guilty of, nor is it entitled in the particular cause or matter, and the document generally does not conform to the Rules. The particular breach or breaches alleged must be specified (*Brammall* v. *Mutual Industrial Corporation* (1)). Where a criminal charge is involved the Court should exercise its discretion in favour of the person charged. The Court should insist upon strict compliance with the Rules.

Maughan K.C. (with him *J. A. Ferguson*), for the applicant. The notice of motion complies with the Rules as to specifying the nature of the contempt inasmuch as it refers to and includes the

(1) (1915) 84 L.J. Ch. 474.

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affidavits which are proposed to be used at the hearing. The proceedings are not void unless the Court so directs (Order LVII., rule 6). As to defects in the title of process, see *In re Markham Cremer Law* (1). Leave should be granted under Order XXVII., rule 1, to amend the title and other matters if the Court thinks such amendments are necessary.

GAVAN DUFFY J. The Court thinks that the actual breach or breaches charged should be stated and that the matter should proceed, subject to this amendment, unless the respondent would be prejudiced.

Maughan K.C. The applicant complains that the respondent has committed and is committing breaches of that part of this Court's order of 23rd June 1922 whereby the respondent was "restrained . . . from counselling taking part in or encouraging anything in the nature of a strike on account of any industrial dispute in the pastoral industry and from attempting to commit any such offence" &c. The facts alleged by the applicant are uncontradicted: no affidavits have been filed on behalf of the respondent. When the injunction was granted the Court drew attention to the serious nature of the acts now complained of (*Waddell* v. *Australian Workers' Union* (2)). The injunction is a perpetual one, and must be obeyed. The evidence shows that the respondent is doing the very things the Court restrained him from doing: it is clearly shown that he intended to foment a strike and as a matter of fact a strike resulted. The injunction is not limited to the currency of the then award: it covers any dispute in the pastoral industry whenever occurring. The fact that the old award has been replaced by a new award is quite irrelevant. What should be done by the Court is entirely a matter for the Court. The disputes were (1) the disputes which resulted in the last award of the learned Chief Judge of the Commonwealth Conciliation and Arbitration Court and (2) the disputes arising after the promulgation of that award. All the applicant has to show is that there is a strike on account of an industrial award. The making or variation of an award is proof

(1) (1914) W.N. 258.

(2) (1922) 30 C.L.R., at pp. 575 *et seqq.*

of the existence of a dispute. There was a strike on account of an industrial dispute. "Industrial dispute" includes any threatened or impending or probable industrial dispute (*Commonwealth Conciliation and Arbitration Act* 1904-1928, sec. 4). A strike resulting from disagreement with an award is a strike on account of an industrial dispute.

[DIXON J. referred to *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (1).]

Durkin is bound by an award of the Court and is not entitled to do anything in the nature of a strike (sec. 6A of the Act).

[STARKE J. Having regard to the provisions of sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, can the Court issue a writ of attachment in this matter ?]

That section gives the Court power to grant injunctions, and the Court has inherent power to punish any disobedience of such injunctions.

Evatt K.C. The order having been made under sec. 48 of the Act, the only sanction that can be invoked is that set out in the section itself (*Acts Interpretation Act* 1904-1916, sec. 3). Parliament has no power to grant an injunction in perpetuity against individuals. The power of inferior Courts to punish for contempt is limited to contempts committed in those Courts (*R.* v. *Lefroy* (2)). The order was not intended to be a perpetual injunction directed to the individual respondents (*Waddell* v. *Australian Workers' Union* (3)).

[DIXON J. referred to *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4).]

When parties are charged with being guilty of disobeying an order of Court, the judgment on the making of such order can be looked at as being either part of the surrounding circumstances or part of the record. The industrial dispute was settled by the award, and the only dispute shown by the evidence was a sporadic dispute in a portion of one State only, which is not a dispute within the meaning of the Act. It is only an offence against the Act if the

(1) (1925) 35 C.L.R. 449.
(2) (1873) L.R. 8 Q.B. 134.
(3) (1922) 30 C.L.R. 570.
(4) (1925) 35 C.L.R. 462, at p. 480.

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provisions of secs. 6 or 6A can be brought into operation against the individual. The dispute referred to in the injunction is the dispute which existed at the time of the granting of the injunction; it was not intended to refer to disputes which have arisen in the pastoral industry since that time (1922). The order is completely exhausted in its operation. The present applicant was not a party to the injunction, and therefore has no *locus standi* in the matter. An application for punishment for contempt can only be made by a party to the original application for an injunction. The Graziers' Association in 1922 was different from the present applicant.

Maughan K.C., in reply. The Court's hands are not tied by any words in sec. 48 as to what the Court should do in the matter of awarding punishment for contempt. If it were otherwise, it would be a very serious curtailment of the inherent power of the Court. There is nothing in the section depriving the Court of such power. A power given to make an order in the nature of an injunction is *in pari materia* with a power to make an injunction. Power to make an injunction confers also a power to punish for a breach of an injunction. The mere fact that the non-observance of the order is by sec. 48 visited with punishment of a fine or imprisonment does not exclude the ordinary remedies of the Court, which include attachment. The records show that the applicant here was one of the original applicants for the order to be made and was also a party bound by the award. If necessary, I ask leave to join as co-applicants here the five individuals who were the applicants for the injunction in their capacity as members of the executive of the applicant Association. The nature of the order indicates that the Court had regard to a then existing dispute and also to future disputes.

Cur. adv. vult.

Aug. 14. THE COURT delivered the following written judgment:—

The Graziers' Association of New South Wales, an organization of employers registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, has applied upon notice of motion

given under Order XLI. of the Rules of this Court, for an order for the issue of a writ of attachment against the respondent for contempt consisting in disobedience of an order in the nature of an injunction made on 23rd June 1922 by this Court under sec. 48 of the *Commonwealth Conciliation and Arbitration Act*. The application therefore proceeds upon the assumption that obedience to an order made under sec. 48 may be enforced in the same way as obedience to orders made in the Court's ordinary jurisdiction directing a party to do or abstain from doing an act. The question at once arises whether this assumption is correct, or whether disobedience to orders made under sec. 48 exposes the party to the sanctions only which are specifically provided by the section.

Sec. 48 enacts that the Commonwealth Court of Conciliation and Arbitration, the High Court or a Justice thereof or a County, District or Local Court may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach, or to enjoin any organization or person from committing or continuing any contravention of the Act or of the award under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the Act or the award by act or omission. The section ends: "Penalty: one hundred pounds or three months' imprisonment." It is evident that the words "under pain of fine or imprisonment" express the consequence which is to ensue from disobedience to the order. The effect of the statement of the penalty at the foot of sec. 48, together with the provisions of sec. 3 and sec. 5 of the *Acts Interpretation Act* 1904-1916 is to make any contravention of sec. 48 an offence punishable on summary conviction by a fine not exceeding one hundred pounds, or imprisonment not exceeding three months. It is difficult to suppose that the words "under pain of fine or imprisonment" refer to any but these penal consequences. They are incurred by every person who actually violates the order in the nature of mandamus or injunction, because in doing so he must contravene either the Act or the award. It is true that the language of sec. 48 in its present amended form imposes the penalty in respect of the contravention of the Act or the award, and, literally interpreted,

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this covers every such contravention whether it is or is not a disobedience of the order. But it would, indeed, be strange if the words " under pain of fine or imprisonment " were meant to refer to fine or imprisonment for contempt of Court inflicted under the general powers of the Court to enforce its orders. For it is by no means clear that such a contempt would be " special " and would expose the party in default to fine as distinct from attachment or committal. See *In re Freston* (1) and *Scott* v. *Scott* (2), and the memorandum in *In re Evans* (3). Further, the various tribunals upon which sec. 48 confers power to make orders in the nature of mandamus or injunction differ in their authority to commit or attach for disobedience of their orders. Some of them have no power at all to do so. Again, if this were the meaning of the provision, it would expose the party to two liabilities, both of which, at least to him, would appear to be punishments, and they would be cumulative. It therefore seems certain that the fine and imprisonment to which sec. 48 refers are the fine and imprisonment expressly provided by the penal clause of that section itself.

Upon this interpretation sec. 48 creates new rights and duties and gives a specific remedy or penalty for the violation of such rights or of such duties. " It is an old and well-known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist " (per *Brett* M.R., *Bailey* v. *Bailey* (4); see, too, *R.* v. *County Court Judge of Essex* (5) and *Barraclough* v. *Brown* (6)). It follows that disobedience of an order made under sec. 48 may be visited by the punishment described by that section, but does not expose the delinquent to attachment for contempt.

This conclusion is strengthened by a consideration of the history of sec. 48. When it was passed in 1904, sec. 48 conferred power to make the order upon the Commonwealth Court of Conciliation and Arbitration alone, and the only order which it enabled that Court to make was an order compelling compliance with, or restraining

(1) (1883) 11 Q.B.D. 545, at pp. 552-554, 556-557.
(2) (1913) A.C. 417, at pp. 459-460.
(3) (1893) 1 Ch. 252, at pp. 259-264.
(4) (1884) 13 Q.B.D. 855, at p. 859.
(5) (1887) 18 Q.B.D. 704, at p. 708, per *Lopes* L.J.
(6) (1897) A.C. 615.

breach of, the award, and the only contravention which the section penalized was a contravention of the award. Such a provision clearly allowed no other remedy than that which it specified. Sec. 6 of Act No. 39 of 1918 omitted the Commonwealth Court of Conciliation and Arbitration from, and added County, District and Local Courts to, the tribunals to which the section gave authority. It omitted the Commonwealth Court of Conciliation and Arbitration because it repealed those provisions of the Act which were considered to give judicial power to that Court. Act No. 31 of 1920 added the High Court to the Courts to which authority is given to make orders in the nature of mandamus and of injunction, and the same statute included contraventions of the Act among the breaches of duty to be enjoined and to be punished. Then by Act No. 22 of 1926 the Commonwealth Court of Conciliation and Arbitration was restored to its place among the tribunals to which the power is confided. None of these amendments exhibits any intention that the penalty which the final words of sec. 48 provide should no longer be exclusive, but should become either cumulative upon, or alternative with, attachment or committal for contempt.

The result is that the application for a writ of attachment is misconceived and must be dismissed. In this view it is unnecessary to deal with any of the other contentions raised on behalf of the respondent.

Application dismissed with costs.

Solicitors for the applicant, *McLachlan, Westgarth & Co.*
Solicitor for the respondent, *A. C. Roberts.*

J. B.