

Appl *GJ Coles v Retail Trade Industrial Tribunal* 12 ALD 143
Refd to *About Holdings Ltd v Bellbird Enterprises Pty Ltd* (1996) 17 WAR 309
Foll *Vanmela Pty Ltd v Fairfield CC* (1999) 101 LGERA 297
Appl *Tanner v Shergold* (2000) 171 ALR 672
Appl *Tanner v Shergold* (2000) 60 ALD 771
Not Foll *Shergold v Tanner* (2002) 68 ALD 1
Foll *A-G (NSW) v World Best Holdings* (2005) 223 ALR 346

[HIGH COURT OF AUSTRALIA.]

MAGRATH AND ANOTHER . . . APPELLANTS ;
RESPONDENTS,

AND

GOLDSBROUGH, MORT AND COMPANY }
LIMITED } RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Industrial Arbitration (N.S.W.)—Prohibition—Industrial Commission—Constitution H. C. OF A.
—Three members necessary to jurisdiction—Reference to Deputy Commissioner— 1932.
Resignation of member of Industrial Commission—Less than three continuing
members of Commission—Suspension of powers of Deputy Commissioner—
MELBOURNE,
Industrial Arbitration (Amendment) Act 1926-1930 (N.S.W.) (No. 14 of 1926 March 1.
—No. 22 of 1930), secs. 3, 6*—Industrial Arbitration Act 1912-1930 (N.S.W.)* SYDNEY,
(No. 17 of 1912—No. 22 of 1930), sec. 58.* April 26.

Held, by Rich, Dixon and McTiernan JJ. (Starke and Evatt JJ. dissenting),
that when the number of members of the Industrial Commission of New South
Wales fell below the number of three prescribed by sec. 6 of the *Industrial*
Arbitration (Amendment) Act 1926-1930 (N.S.W.) the powers of the Deputy
Commissioner were suspended even in matters which had been referred to
him while there were three members of the Commission.

* The *Industrial Arbitration (Amendment) Act 1926-1930* (N.S.W.) provides :
—By sec. 3 (1) : “From and after the commencement of this Act the jurisdiction and powers of the Court of Industrial Arbitration shall be vested in and exercised by the Industrial Commission established by this Act.”
By sec. 6 : “(1) There shall be an Industrial Commission of New South Wales constituted by the appointment by the Governor of three members, one of whom shall be by his commission appointed President. The Commission shall be a superior Court of Record, and its seal shall be judicially noted. . . . (4) The Governor may appoint a person to be a Deputy Commissioner for such time as the Governor may fix, and such Deputy Commissioner shall have and exercise the jurisdiction and powers of the Commission in all matters referred to him by the Commission, provided that at the request of any party he shall, or, of his own motion, he may remit any question arising in

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Held, also, by *Rich, Dixon and McTiernan JJ.*, that, notwithstanding the provisions of sec. 3 (1) of the *Industrial Arbitration (Amendment) Act 1926-1930* (N.S.W.) and sec. 58 of the *Industrial Arbitration Act 1912-1930* (N.S.W.), a writ of prohibition would lie to restrain the Deputy Commissioner from proceeding in a reference while the Commission was not fully constituted.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Goldsbrough, Mort & Co. Ltd.*; *Re Magrath*, (1931) 32 S.R. (N.S.W.) 338, affirmed.

APPEAL from the Supreme Court of New South Wales.

This was an appeal from a decision of the Supreme Court of New South Wales granting a writ of prohibition directed to Edward Crawford Magrath, William Brotherson and the Sydney Harbour Trust Commissioners, restraining them from proceeding with an application made by the Federated Storemen and Packers' Union of Australia, New South Wales Branch, industrial union of employees, to the Industrial Commission of New South Wales for a variation of the Storemen and Packers, Wool, &c., Stores (State) Award. Edward Crawford Magrath was Deputy Commissioner of the Industrial Commission of New South Wales, and William Brotherson was secretary of the New South Wales branch of the above-named Union. The applicant for the writ of prohibition was Goldsbrough, Mort & Co. Ltd., which applied for the writ of prohibition on the ground that prior to the

any such matter to the Commission for its opinion and direction. Upon the hearing of any matter so referred the members, other than the Chairman of the Conciliation Committee for the industry or calling shall, if the Commission or the Deputy Commissioner so direct, sit with the Deputy Commissioner but as assessors only and without vote. The Commission may grant leave to appeal to the Commission against any order or award made by the Deputy Commissioner, and on such appeal may vary any such order or award in such manner as it thinks just. The Deputy Commissioner may from time to time, if he thinks fit, or when the Commission so directs, assume and exercise the powers, functions, and jurisdiction of the Chairman of the Committee whether or not the Chairman is absent.

. . . (7) At sittings of the Commission all members shall be present, and any question shall be decided according to the decision of the majority: Provided, however, that the Commission may in any particular

matter delegate any of its powers or functions to any one member. From any order or award made by such member an appeal shall lie to the Commission and on the appeal the Commission may vary any such order or award in such manner as it thinks just."

The *Industrial Arbitration Act 1912-1930* (N.S.W.) provides by sec. 58: "(1) Any decision of the Court" of Industrial Arbitration "shall be final; and no award, and no order, or proceeding of the Court, shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature on any account whatsoever. (2) No writ of prohibition or certiorari shall lie in respect of any award, order, proceeding, or direction of the Court relating to any industrial matter or any other matter which on the face of the proceedings appears to be or to relate to an industrial matter."

hearing of the application for variation of the award by the Deputy Commissioner, to whom the matter had been referred for determination by the Industrial Commission, there were two members only of the Industrial Commission, one having resigned, whereas the *Industrial Arbitration (Amendment) Act* (N.S.W.) required that there should be three members of the Commission in existence at the time when any award was made. It appeared that on 30th September 1931 Street J. had resigned his office and the Governor had appointed no one in his place. Before the vacancy occurred the Commission had referred this application for variation to the Deputy Commissioner pursuant to sec. 6 (4) of the *Industrial Arbitration (Amendment) Act* 1926-1930, and, notwithstanding the occurrence of the vacancy, he assumed to exercise jurisdiction over the matter. The Full Court of New South Wales held that as the Industrial Commission had, by reason of there being less than three members of it, ceased to be able to exercise any powers under the *Industrial Arbitration Acts*, the Deputy Commissioner was also placed in the same position, and that accordingly a writ of prohibition should issue: *Ex parte Goldsbrough, Mort & Co. Ltd. ; Re Magrath* (1).

From that decision Edward Crawford Magrath and the Sydney Harbour Trust Commissioners now, by special leave, appealed to the High Court.

O'Mara, for the appellants. The question for decision is whether the Deputy Commissioner has power to deal with any matter when the number of the members of the Industrial Commission has been reduced to less than three. The *Industrial Arbitration (Amendment) Act* 1926 brought into existence new tribunals and conferred powers on those tribunals. Sec. 13 of the *Industrial Arbitration Act* 1912 constituted the Court of Industrial Arbitration. Sec. 28 is the only power conferring on the Court power to determine a matter on its own initiative. This matter was referred while there were three Industrial Commissioners, and once the Court made a reference it entirely divested itself of jurisdiction and could not recall the matter. In 1926 a new system of industrial arbitration was introduced and new tribunals were created. In the present case no Conciliation

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Committee had been appointed under the Act and the application was referred to the Industrial Commission. If it is assumed that three members of the Commission are necessary to the performance of any function under the Act and there are not three members in existence, the whole system has broken down (*In re Government Railways and Tramways (Officers) Conciliation Committee ; Re Armstrong* (1)). In the present case there was a delegation of all its functions to the Deputy Commissioner. The Industrial Commission is a juristic entity which must be in existence before an appeal to it from the Deputy Commissioner can be instituted, but the powers of the Deputy Commissioner are not dependent on the existence of the Industrial Commission. Until a party wishes to appeal, or until the matter is decided, the Deputy Commissioner has jurisdiction. If it is necessary to have three members of the Commission in existence, then the whole system under the Act is defeated. Once the Commission has referred a matter to the Deputy Commissioner it cannot recall that matter or interfere with the Deputy Commissioner. The Deputy Commissioner acts to the exclusion of the Commission up to a certain stage. The Commission and the Deputy Commissioner are never functioning in the same matter at the same time. It is only after the Deputy Commissioner has fulfilled his functions that any question of appeal can arise. There is only one way in which the Deputy Commissioner can deal with this matter, and that is by hearing it alone. Any directions to the Deputy Commissioner must be given at the time of the reference or at the time of the hearing. The Supreme Court was in error in saying that the Commission had a right to exercise jurisdiction while the matter was under reference to the Deputy Commissioner. Sec. 58 of the 1912 Act gives the Court of Industrial Arbitration jurisdiction to determine whether it can deal with the matter (*Baxter v. New South Wales Clickers' Association* (2)). Sec. 3 of the *Industrial Arbitration (Amendment) Act 1926-1930* puts the Industrial Commission in the position of being free from any methods of attack referred to in sec. 58 of the 1912 Act, and prohibition will not lie to it or to the Deputy Commissioner (*Morgan and Australian Workers' Union v. Rylands Bros. (Australia) Ltd.* (3) ; *Minister for Labor and Industry*

(1) (1931) 30 A.R. (N.S.W.) 391.

(2) (1909) 10 C.L.R. 114, at p. 129.

(3) (1927) 39 C.L.R. 517, at p. 526.

(*N.S.W.*) v. *Mutual Life and Citizens' Assurance Co.* (1); *R. v. Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (2)).

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Robert Menzies K.C. (with him *Cooke*), for the respondent. If the Industrial Commission had no jurisdiction owing to there being less than three members, there were no powers which could be exercised by the Deputy Commissioner, and all his powers ceased until the vacancy was filled. Sec. 58 of the 1912 Act gives protection to "the Court," which is defined by sec. 5 of that Act. By sec. 6 of the 1926-1930 Act the Commission is given the powers of a Court of Record, but other powers are also conferred by secs. 7 and 8. In the 1926 Act the distinction between the Court and the Commission is recognized. They are recognized as independent entities and the provisions relating to the one cannot be automatically applied to the other. In fact the distinction between the Court and the Commission is preserved in the very Act by which the Commission is set up. The existence of the power of appeal is a condition of the exercise of the power by the Deputy Commissioner. The powers of the Deputy Commissioner are conditional on the continued existence of the Industrial Commission. It would be an extraordinary result if the Deputy Commissioner were capable of making an award which was not subject to appeal because the rest of the industrial machinery could not function. There was a suspension of the powers of the Deputy Commissioner while the Industrial Commissioner could not function, and that suspension would be removed when the Commission again became capable of exercising its powers.

O'Mara, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

April 26.

RICH J. This is an appeal by special leave from the unanimous judgment of the Supreme Court of New South Wales, which directed that a writ of prohibition should issue to the Deputy Commissioner restraining him from proceeding in a reference to him made pursuant

(1) (1922) 30 C.L.R. 488.

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to sec. 6 (4) of the *Industrial Arbitration (Amendment) Act 1926-1930*. The prohibition was granted upon the ground that the Deputy Commissioner's jurisdiction over the matter referred, no longer existed because the powers of the Industrial Commission had altogether ceased. Sec. 6 (1) of the Act in question erects the Industrial Commission and gives it the status of a superior Court of Record but requires that it shall be constituted by the appointment by the Governor of three members. Sub-sec. 7 of the same section provides that at sittings of the Commission all members shall be present and all questions shall be decided according to the decision of the majority. The only exception, if it be an exception, arises under a proviso which allows the Commission to delegate, subject to appeal, any of its powers or functions to any one member. One of the members of the Commission has resigned his office, and no attempt has been made by the Governor to fill the vacancy. The reference to the Deputy Commissioner was made shortly before the resignation. In making the reference the Commission acted under sub-sec. 4. That sub-section is as follows:—"The Governor may appoint a person to be a Deputy Commissioner for such time as the Governor may fix, and such Deputy Commissioner shall have and exercise the jurisdiction and powers of the Commission in all matters referred to him by the Commission, provided that at the request of any party he shall, or, of his own motion, he may remit any question arising in any such matter to the Commission for its opinion and direction. Upon the hearing of any matter so referred the members, other than the Chairman of the Conciliation Committee for the industry or calling shall, if the Commission or the Deputy Commissioner so direct, sit with the Deputy Commissioner, but as assessors only and without vote. The Commission may grant leave to appeal to the Commission against any order or award made by the Deputy Commissioner, and on such appeal may vary any such order or award in such manner as it thinks just. The Deputy Commissioner may from time to time, if he thinks fit, or when the Commission so directs, assume and exercise the powers, functions, and jurisdiction of the Chairman of the Committee, whether or not the Chairman is absent."

The material considerations which appear from these provisions must be briefly mentioned :—(1) The jurisdiction and powers which the Deputy Commissioner exercises are those of the Commission ; (2) although the Deputy Commissioner is appointed by the Governor the description of his office suggests that he is to act as an agency of the Commission ; (3) his powers and jurisdiction do not arise until a matter is referred to him by the Commission ; (4) he is authorized to obtain the opinion and direction of the Commission whenever he thinks fit in the course of exercising his authority ; (5) the mere request of the party deprives him of the power to decide a question and he must remit it for the opinion and direction of the Commission ; (6) when he has completely dealt with the matter referred, the Commission have full authority over his award or order and may revise the exercise of his authority by permitting an appeal to them ; (7) the Commission can direct him to use the services of assessors. Thus the Deputy Commissioner has a subordinate authority derived from a superior exercisable subject to the control of the Commission which can be invoked by a party before award by requesting a remission and after award by appeal.

The parties before us agree that the powers of the Commission are now in abeyance. They do not agree upon the metaphysical question whether the Commission continues in contemplation of law to possess an existence, but the difference between a condition of nonentity and impotent continuity does not seem to me to have any practical significance. The important legal consequence is that if the powers of the Deputy Commissioner continue unabated the impotence of the Commission converts his subordinate capacity into independence, his conditional authority into an absolute jurisdiction, his controllable discretion into a final, if not an arbitrary, authority. The question is whether the legislation intends that this result should be possible. The central hypothesis of the statute is that a properly constituted commission shall exist. It proceeds entirely upon this subsumption. But where it fails, in my opinion it must follow that all matters provided in the statute which are founded upon it fail with it. To my mind it is to pervert the true meaning and intention of the provision providing a Deputy Commissioner for the use of the Commission, and defining his powers, to treat his jurisdiction as

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erected upon an independent foundation and the conditions which control it as depending upon the continuance of the powers of the Commission and severable. The limitations and conditions attached to his authority cannot be severed from it: sub-sec. 6 is an integral whole and is inseparably connected with the powers of the Commission. When those powers are suspended the powers of the Deputy Commissioner must also be suspended. This was the view taken by the Supreme Court, and I find myself in substantial agreement with the reasons which they gave in support of it. This disposes of the important question in the case which provided the ground upon which this Court gave special leave to appeal.

The appellant, however, relied upon the further contention that, jurisdiction or no jurisdiction, the Deputy Commissioner had been placed outside the control of the Supreme Court and his proceedings could not be impeached. If this means that among the powers of the Commission bestowed upon him is the power of deciding the existence and extent of his own jurisdiction, it is enough to say that in my opinion this power went into abeyance as well as his more modest claims for authority. If, on the other hand, it means that, although he has no jurisdiction to decide anything, the superior Courts of law have no authority to question his decisions, it is only necessary to remember the rule of law against giving to a statute a construction depriving Courts of law of authority by the use of prerogative writs to prevent the assumption of a non-existent authority unless an intention to do so is expressed with a clearness which admits of no doubt. In this case the intention to do so is not expressed at all. The appellant finds it by a process of deduction in the fragmentary bestowal of the Commission's powers upon the Deputy Commissioner. He contends that the grant to the Commission by sec. 3 of the 1926-1930 Act of the jurisdiction and powers of the Court of Industrial Arbitration carried with it the protection given to proceedings and awards of that Court by sec. 58 of the *Industrial Arbitration Act* 1912-1930. I am unable to find from these uncertain inferences a manifest intention to allow the Deputy Commissioner to proceed to affect by his determinations the rights of the subject when he is wholly without power to do so.

The appeal must be dismissed with costs.

STARKE J. This is a case in which I confess my opinion has fluctuated a good deal. The Industrial Commission of New South Wales is constituted by the appointment by the Governor of three members (Act No. 14 of 1926, sec. 6). Its powers and functions are very extensive and, *inter alia*, it has power to inquire into and determine any industrial dispute, and to declare what is called in the Act a living wage for employees. "All members shall be present and any question shall be decided according to the decision of the majority" (Act No. 45 of 1927).

The learned counsel who appeared for the appellants admitted, and rightly as it seems to me, that the Commission could not function if the office or position of any member became vacant by death, resignation, retirement or otherwise. The provision made by the Act No. 45 of 1927 is in line with this view: "If a member of the Commission is prevented by any cause from attending to his duties as such, the Governor may appoint some person qualified to be appointed a member to act temporarily as a member of the Commission, and such person shall, while so acting, have all the powers of a member of the Commission." On 30th September 1931 one of the members of the Commission resigned his office or position, and no one has been appointed to fill the vacant office. Under the Act No. 45 of 1927 the Governor may appoint a person to be a Deputy Commissioner for such time as the Governor may fix, and such Deputy Commissioner shall have and exercise the jurisdiction and powers of the Commission in all matters referred to him by the Commission. But he shall at the request of any party, and may of his own motion, remit any question arising in any such matter to the Commission for its opinion and direction. Further, the Commission may grant leave to appeal to the Commission against any order or award made by the Deputy Commissioner, and on such appeal may vary any such order or award in such manner as it thinks just. The Deputy Commissioner has other powers but they are immaterial for the purpose of this case.

In 1931 the appellant Magrath was appointed to the office of Deputy Commissioner in the terms of the Act. The Federated Storemen and Packers Union made an application to the Industrial Commission for a variation of the Storemen and Packers Award

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and this application the Industrial Commission, on 25th September 1931, referred to the Deputy Commissioner. It will be noted that this reference was made a few days before the member of the Commission resigned his office. The matter so referred to the Deputy Commissioner came on for hearing before him in October 1931, and objection was then taken, which he rejected, that his jurisdiction failed or was suspended so long as the functions of the Industrial Commission are suspended or cannot be exercised by reason of the office or position of one of the members of the Commission being vacant. The Act does not explicitly so provide, and the contention can only be supported if it be a necessary implication from the Act. The Industrial Commission is a legal entity; but it is composed of its members, and can only function when they are present. The Deputy Commissioner is not a member of the Commission though he is to exercise the jurisdiction and powers of the Commission in matters referred to him, but subject to the control of the Commission, by the methods already mentioned. A vacancy in the office of a member of the Commission does not destroy the Commission as a legal entity. It is not extinguished or suspended because the office of one or more of its members is vacant. Rather, the powers and functions of the Commission are dormant and cannot be exercised so long as there be a vacancy in the office of any of its members. But if this be so, the implication that the powers and functions of the Deputy Commissioner are also dormant is far from necessary. Cases may easily arise in which neither the Deputy Commissioner nor the parties desire to remit any matter to the Commission or to appeal. An implication that the Deputy Commissioner's powers are dormant or suspended in such cases is so unreasonable and so unnecessary that it ought not to be made. It seems, I think, equally unnecessary in cases in which the Deputy Commissioner or the parties desire to remit any matter to the Commission. The matter can be remitted and so soon as the Commission resumes activity by the filling of its vacant offices, the matter can be determined. Delay in hearing on the part of the Commission cannot affect the powers and functions of the Deputy Commissioner; but the parties cannot apply for leave to appeal to the Commission whilst its powers and functions are

dormant. Even so, why should the powers and functions of the Deputy Commissioner also become dormant? The Act provides that an award or order of a Conciliation Committee shall not be suspended during appeal (No. 14 of 1926, sec. 9 (5)); but it does not even give a right of appeal from the Deputy Commissioner without the leave of the Commission. A vacancy in the office of a member of the Commission does not deprive a party of his right to apply for leave ; he may exercise this right so soon as the Commission resumes activity. Consequently, in all cases, the implication is, I think, unreasonable and unnecessary and ought not to be made. I might have said that I agree with the opinion of my brother *Evatt*, and with the decision of the President of the Industrial Commission (1) to which my learned brother has referred me ; but as the matter seems of some general importance I have thought it right to express my opinion in my own words.

A further contention was made, namely, that the provisions of sec. 58 of the *Industrial Arbitration Act* 1912, No. 17, coupled with the *Industrial Arbitration (Amendment) Act* 1926, made the awards and decisions of the Deputy Commissioner final. The section provides that any decision of the Court of Industrial Arbitration shall be final and not liable to challenge, appeal or review, or be quashed or called in question by any Court of judicature on any account whatsoever, or be the subject of prohibition or certiorari. The jurisdiction and powers of the Court of Industrial Arbitration are vested in the Industrial Commission (No. 14 of 1926, sec. 3). I have some doubt whether the provisions of sec. 58 are, by those words, applicable to the Industrial Commission and the Deputy Commissioner. Be that as it may, the provision could not, I should think, operate if the powers and functions of the Deputy Commissioner were suspended or could not be exercised by reason of the Commission's powers being suspended. An award or decision within sec. 58 must be that of a tribunal organized in the manner required by the Act. If my view on the main question is right, the interpretation of sec. 58 becomes unnecessary.

The appeal ought, in my opinion, to be allowed.

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DIXON J. Sec. 6 (1) of the *Industrial Arbitration (Amendment) Act 1926-1930* provides that there shall be an Industrial Commission of New South Wales constituted by the appointment by the Governor of three members, and that the Commission shall be a superior Court of Record. Sec. 6 (7) provides that at the sittings of the Commission all members shall be present and any question shall be decided according to the decision of the majority. A proviso enables the Commission to delegate to one of its members its powers in a particular matter but always subject to appeal to the Commission. On 30th September 1931 a member of the Commission resigned his office and the Governor has appointed no one in his place. Before the vacancy occurred the Commission had referred a matter to the Deputy Commissioner pursuant to sec. 6 (4), and, notwithstanding the occurrence of the vacancy, he assumed to exercise jurisdiction over the matter. The question is whether the authority of the Deputy Commissioner in the reference is suspended or continues in full force although only two members of the Commission remain. The Deputy Commissioner is appointed by the Governor but his authority, so far as it is material, is not original but depends upon a reference by the Commission. Sec. 6 (4) provides that the Deputy Commissioner shall have and exercise the jurisdiction and powers of the Commission in all matters referred to him by the Commission. Three conditions are attached to the exercise of his jurisdiction in such a reference. In the first place, he may of his own motion and, upon the request of a party, he must remit any question arising in the matter to the Commission for its opinion and direction. In the second place, the Commission may grant leave to appeal to the Commission against any order or award he makes and may vary it in such manner as the Commission thinks just. In the third place, the Commission may direct members of a conciliation committee to sit with him as assessors but without vote. The first two of these conditions go to the measure and quality of his authority. If the control which they give over the exercise of the Deputy Commissioner's jurisdiction has been removed or suspended by the continued failure of the Governor to appoint a third Commissioner, a conditional and subordinate power has become absolute. Although the Commission as a statutory tribunal

may be considered in contemplation of law to possess an existence which is independent of the members who compose it and continues in spite of their going out of office, yet it must be "constituted" by the appointment of three members, and at its sittings all three must be present. Thus its powers are exercisable by the Commissioners who constitute the Commission and, except in the case of a delegated power, not otherwise than by the three Commissioners jointly. The law may ascribe a continuity to the Commission, but it appears to me that, nevertheless, its powers fall into abeyance when the Commission is no longer constituted of the full number of Commissioners required for the exercise of its jurisdiction. None of the parties to this appeal desired to contend that the remaining members of the Commission could, except perhaps under a delegation already made, exercise any of its jurisdiction, but, in any case, I do not think such a contention could be maintained. It follows that either the powers of the Deputy Commissioner in the reference have fallen into abeyance with those of the Commission or, the control of the Commission over the exercise of his jurisdiction being suspended, the Deputy Commissioner's authority has become absolute and will so continue unless and until a third Commissioner is appointed.

The Full Court of New South Wales, consisting of *Harvey C.J.* in Eq., *Davidson* and *Milner Stephen JJ.* were of opinion that the powers of the Deputy Commissioner in the reference were suspended, and in this opinion I agree. It is, I think, undeniable that the material provisions of the statute proceed upon the assumption that any exercise by the Deputy Commissioner of his jurisdiction in a reference will be subject to the effective control of the Commission by way of appeal and by the remission of questions at the instance of a party for the direction of the Commission. The critical question appears to me to be whether this assumption, which is itself clearly enough exhibited, involves a legislative intention that if the control went into abeyance so should the Deputy's jurisdiction. It may be said that the assumption is sufficiently explained by attributing to the Legislature a belief that the Executive Government would not allow the powers of the Commission to be suspended for any considerable time, and that thus the assumption involves no intention

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whatever upon the subject. Unfortunately we are required to discover in the provisions of the statute either an intention that the jurisdiction of the Deputy Commissioner should continue notwithstanding the suspension of the Commission's control or an intention that it should not so continue. The form and expression of the provision relating to the Deputy Commissioner as well as the reason of the matter, appear to me altogether in favour of the latter intention. The very title by which his office is described implies that the Deputy Commissioner's functions are to act for the Commission. The powers and jurisdiction which he is given are those of the Commission. He obtains them only by a reference of the matter to him by the Commission. His decision must follow the direction of the Commission upon any question which a party requests him to remit. The grant of a limited and qualified power in derogation of private right necessarily implies an intention that the power shall not be exercisable free of the qualifications and limitations imposed. This must be especially true of a coercive jurisdiction given to a subordinate office subject to the control and revision of a superior tribunal. The existence of the Deputy Commissioner's powers depends upon the coexistence of the powers of the Commission. I, therefore, think the jurisdiction of the Deputy Commissioner is suspended.

The appellant contends that a writ of prohibition will not lie to the Deputy Commissioner. This contention is founded upon the view that the proceedings and awards of the Deputy Commissioner must have the same immunity from prohibition as those of the Commission because, in a reference, he exercises the jurisdiction and powers of the Commission. I do not find it necessary to consider how far the proceedings and awards of the Commission are protected. I am ready to assume that sec. 58 of the *Industrial Arbitration Act* 1912 to 1930 applies and gives the fullest immunity to the Commission. The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably. The authority of the Deputy Commissioner is confined to particular matters referred to him. His orders and awards are not final, but are subject to appeal. He

is not a Court of Record. In these respects he occupies a situation entirely different from that of the Commission. A grant to a subordinate tribunal of portion of a jurisdiction vested in a superior tribunal or Court may conceivably carry with it all the protection which the proceedings of that Court enjoy from objections which assume that, having jurisdiction over the subject matter, the tribunal properly entered upon the inquiry, but assert that it miscarried in the course of it. But such a grant ought not, in my opinion, to be construed as conferring upon the subordinate Court the same immunity from objections based upon the complete absence in the tribunal, or the person by whom it is constituted, of jurisdiction over the subject matter. (See *Colonial Bank of Australasia v. Willan* (1).)

For these reasons I think the appeal should be dismissed.

EVATT J. This is an appeal by special leave from a judgment of the Supreme Court of New South Wales which on December 16th, 1931, made absolute a rule nisi for a writ of prohibition directed to the Honourable E. C. Magrath. It restrained him from proceeding with the hearing of a certain application made on September 24th, 1931, to the Industrial Commission of New South Wales in its original jurisdiction, and referred by the Industrial Commission to Mr. Magrath as Deputy Commissioner. At the time when this reference was made, the Commission consisted of three members, *Piddington J.* (President), *Street J.* and *Cantor J.* The order of reference was signed by the three members. Subsequently, on September 30th, 1931, *Street J.* resigned. The vacancy not having been filled in the meantime, objection was taken by the respondent on October 26th, 1931, to the Deputy Commissioner's proceeding with the hearing of the matter referred to him. After hearing argument the Deputy Commissioner decided that he had jurisdiction to hear the matter and he overruled the objection. The Supreme Court thereupon issued the writ of prohibition.

The Supreme Court held that, although the reference to the Deputy Commissioner was valid when made, he was rendered incapable of acting further upon the reference at the very moment

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when *Street J.* resigned. It was pointed out that sec. 6 (7) of the *Industrial Arbitration (Amendment) Act 1926* provides that at “sittings” of the Commission all members shall be present, and that sec. 6 (4) provides that if any party requests him to do so the Deputy Commissioner shall remit to the Commission itself any question arising “in” any matter referred to him by the Commission. From these two enactments the conclusion has been drawn that the powers exercisable by the Deputy Commissioner are “subject to control at any time by the Full Bench” and cannot lawfully be exercised “when there is no Full Bench of the Commission to exercise that control” (per *Harvey C.J.* in Eq. (1)). And the same result is stated differently by *Davidson J.*: “When the Commission ceased to be able to function under the Act the Deputy lost all jurisdiction to do so” (2).

Whether these conclusions are correct depends upon the words used by the Legislature.

The Commission is a superior Court of Record, the seal of which must be judicially noticed (sec. 6 (1)). Each member “holds office” during good behaviour. The Commission is empowered to grant leave to appeal to the Commission against any order or award made by the Deputy Commissioner; but it cannot, after referring a matter to the Deputy of its own motion, recall the reference or control the Deputy in the exercise of his jurisdiction except so far as the Deputy (1) is required by a party to remit questions for the “opinion and direction” of the Commission, or (2) himself chooses to remit such questions to the Commission. The Deputy Commissioner is not appointed by the Commission but by the Governor, and upon appointment he takes the same oaths as the members of the Commission. The Commission has jurisdiction to hear and determine appeals not only from the Deputy Commissioner but from the orders and awards of numerous Conciliation Committees, and it also inherits a large and important jurisdiction from the old Court of Industrial Arbitration.

The Industrial Commission did not cease to exist when *Street J.* resigned. The other members still “held office.” *Piddington J.* still remained President. Sittings could not be held because there

(1) (1931) 32 S.R. (N.S.W.), at p. 344. (2) (1931) 32 S.R. (N.S.W.), at p. 352.

were no longer three members. But the Commission as a Court of Record still continued to exist.

Why should the conclusion be drawn that the Deputy Commissioner, who may have completed the hearing of a long and complicated industrial matter, is deprived of all power to give his decision merely because one of the three members of the Industrial Commission has resigned, or died, or been removed from office, or attained the age of 70 years without being granted retiring leave? The statute contains no express direction to this effect. It is true that usually there will exist, side by side, a Commission with three members and a Deputy Commissioner, so that the Deputy may, as a general rule, assume that the three members actually in office will in due course pronounce their opinion and direction upon questions remitted under sec. 6 (4). But the Deputy may remit to the Commission on May 1st, a member of the Commission may resign on June 1st, a successor may be appointed on July 1st, and the remitted question may be determined by the Commission, differently constituted, on August 1st. No one could suggest that the full Commission would not have power to adjudicate on August 1st. But if so, that is because the question was properly remitted to the Commission by the Deputy and the Commission was empowered by law to determine the question on August 1st, although between June 1st and July 1st there arose a vacancy in the office of one of the members. In truth, the Deputy remits to "the Commission" questions for "its" opinion and direction and does not remit to "A, B and C" questions for "their" opinion and direction.

The "Commission" as such existed as much after the resignation of *Street J.* as at the time when he was a member and signed the order of reference. The matter referred was referred by "the Commission," not by A, B and C, although A, B and C were, as members and in obedience to sec. 6 (7), present at the sitting of the Commission when it was decided to refer. It is competent to the Deputy Commissioner to remit to the Commission any question arising in the matter referred although B has, in the meantime, resigned office, and the office has not been filled. The fact that the "opinion and direction" cannot be given by A and C alone does not invalidate the remission by the Deputy. The remission is valid,

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although the question cannot be disposed of by "the Commission" until the vacancy caused by B's resignation is filled.

In the analogous case of *In re Government Railways and Tramways (Officers) Conciliation Committee* (1), Piddington J. held that one of the three members of the Industrial Commission had jurisdiction to hear and determine a matter duly delegated to him pursuant to sec. 6 (7) of the Act although, at the time of the commencement of the hearing of the delegated matter, a vacancy on the Commission had arisen. On this aspect of the case he said :—

"Now with regard to the second point, that for the hearing to go on all the conditions must be capable of being fulfilled in any exercise of the Commission's power—that is an assertion only. There is nothing in the Act to say that all the conditions of every section must be capable of being fulfilled at any moment in order that an existing power of the Commission may be exercised. Convenience is not the same thing as power. At the moment it is not possible to exercise the power of delegation under sub-sec. 7, because there cannot be a meeting of three members owing to the resignation of one. But the delegation in question was made at a sitting of the three members of the Commission, and that being so what has taken place is this: The delegated Judge has had conferred upon him by the Legislature jurisdiction to hear this cause. That jurisdiction has been conferred in two steps—by the constitution in 1927 of a Commission of three members, and by a delegation of power to hear this cause by the Commission at a sitting when all three members were present. This cause is therefore within the jurisdiction of the Judge to whom the delegation has been made. The cases that have been cited by Mr. Bradley are decisions on statutes which are vitally different and turn on different considerations. They turn on the consideration of there being a deputy for a Judge who does not exist or who has died. This is not the case. Every question of jurisdiction in a tribunal must depend upon the way in which, under the relevant statute, the tribunal is constituted" (2).

With this opinion I agree. In principle it covers the present case. The interruption of the hearing before the Deputy which is authorized by sec. 6 (4) of the Act, cannot take place in the case of a delegation by the Commission to one of its own members. But in the latter case there is an appeal as of right from the decision, whereas in the case of the Deputy leave to appeal must be obtained. The reference to the Deputy, like the delegation to the member, must take place at a time when there are three members. After that point of time, the reference or delegation may lawfully proceed notwithstanding the occurrence of a vacancy on the Commission. In the one case appeals "to the Commission" lie and may be instituted; in the other, applications "to the Commission" for leave to appeal may

(1) (1931) 30 A.R. (N.S.W.) 391.

(2) (1931) 30 A.R. (N.S.W.), at p. 394.

be made and questions may be remitted "to the Commission" for opinion and direction, although, at the moment of the institution of the appeal, the application for leave to appeal, and the remission, there are only two persons in actual office as members of the Industrial Commission.

The practical importance of the present appeal is negligible, because the respondent may effectually prevent the Deputy from proceeding further with the reference by requesting him to remit some question "to the Commission." But I am of opinion that it is erroneous to treat a vacancy in the office of one of the three members of the Commission as something which automatically strips the Deputy of all his powers.

The appeal should be allowed.

McTIERNAN J. In my opinion the judgment of the Supreme Court was right and the appeal should be dismissed. The jurisdiction of the Deputy Commissioner to proceed in the matter in question in this case, which was referred to him by the Industrial Commission, pursuant to sec. 6 (4) of the *Industrial Arbitration (Amendment) Act 1926-1930* was not conferred upon him by his appointment as Deputy Commissioner, but was derived from the reference. The effect of the reference was to vest in him the jurisdiction and powers of the Industrial Commission in that matter, subject to the conditions contained in sec. 6 (4). This section, *inter alia*, set up machinery to enable him on his own motion, and to require him at the request of any party, to obtain the opinion and direction of the Commission on any question arising in the matter referred to him.

It may be noted that if the Deputy Commissioner proceeded to exercise the jurisdiction of the Industrial Commission in a matter referred to him in circumstances that did not give rise to any doubt as to the strict conformity of the proceeding with sec. 6, it would, I think, be a correct description of his position in such a proceeding, to say that he was proceeding on behalf of the Industrial Commission, as its deputy exercising a conditional and delegated authority, and not as a tribunal of co-ordinate jurisdiction. In the above-mentioned circumstances his authority in the matter referred to him would not be complete and irrevocable, and any question arising

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in the proceedings would, at the request of any party, by force of the statute, be remitted to the Industrial Commission for its opinion and direction. Moreover, the Deputy Commissioner could at any time exercise his right to remit any question to the Commission, thereby fulfilling the intention of Parliament that he should have recourse to the Commission to obtain its opinion and direction when he thought fit to do so. The possibility of the Deputy Commissioner proceeding conformably with the particular scheme which the Legislature devised, and in pursuance of which the reference of the "matter" to him was made, depends upon the existence of a duly constituted Industrial Commission, which is capable of exercising the jurisdiction and operating the powers conferred upon it by the Act. It is conceded that, in the events which have happened, the Commission has become disabled from carrying out the functions which the Legislature entrusted to it. In constituting an Industrial Commission and providing for the appointment of persons to the Commission and vesting it with important jurisdiction and powers, I think that the Legislature contemplated that the body which it created would become, and continue to exist as, an active authority capable of exercising its jurisdiction and powers. If that be so, it follows that the Legislature in enacting the provisions of sec. 6 (4) did not envisage the Deputy Commissioner other than as a tribunal which might at any time need to consult the Industrial Commission, and from which any party might wish at any time to have the "matter," which was referred to him wholly or in part, removed to the Commission, and as a tribunal with which the Industrial Commission might direct that the members, other than the Chairman of the Conciliation Committee for the industry or calling, might sit. Now that the Industrial Commission is unable to exercise its jurisdiction, the conditions under which the Legislature intended that the Deputy Commissioner should have and exercise the jurisdiction and powers of the Industrial Commission cannot be fulfilled. There is, in my opinion, no lawful authority for the Deputy Commissioner to proceed under any other conditions. If, in the events which have happened, he were allowed to proceed, the intention of the Legislature with respect to the nature of his jurisdiction and the manner in which it should be exercised, would

be defeated. The special and peculiar relationship created by the Act between the Industrial Commission and the Deputy Commissioner would not be maintained. The existence of that relationship is the very basis of the exercise of his authority in the "matter" now in question which the Deputy Commissioner was proceeding to hear. The effect of the fortuitous events, as a result of which the Commission has become disabled and inactive, has not been to strike out of the reference the conditions contained in sec. 6 (4) and virtually to vest in the Deputy Commissioner a measure of freedom and independence in the exercise of the jurisdiction of the Commission which the statute does not give him, to cause his knowledge to be enlarged so that he can dispense with the advice of the Commission upon which Parliament contemplated he would rely, and to give him an absolute right to sit alone, without any possibility of the members of the Conciliation Committee, by direction of the Commission, sitting with him.

I think that the true effect of the suspension of the activity of the Commission in the exercise of its jurisdiction, is that the power of the Deputy Commissioner to exercise that jurisdiction in any matter referred to him by the Commission pursuant to sec. 6 (4) is also suspended. As his power in that "matter" became entirely suspended he had no power to decide, as he assumed to do, that he could proceed in the matter notwithstanding that the Industrial Commission was incapable of acting. I agree that, although sec. 3 of the 1926-1930 Act purports to grant to the Commission the powers and jurisdiction of the Court, the result is not that the immunity enjoyed by decisions of the Court of Industrial Arbitration under sec. 58 of the *Industrial Arbitration Act* 1912-1930 extends to the decisions of the Deputy Commissioner, in a reference, in which, as a matter of law, his power was wholly suspended.

Appeal dismissed with costs.

Solicitor for the appellants, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Minter, Simpson & Co.*

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