[PRIVY COUNCIL.]

TRUE . . . . . APPELLANT;
PLAINTIFF,

AND

AMALGAMATED COLLIERIES OF W.A. LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.
1940.
April 5.

Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche.

Industrial Arbitration (W.A.)—Award—Recovery of wages—Limitation of time—Contract—Statutory right—Agreement to pay wages in accordance with award—Industrial Arbitration Act 1912-1935 (*W.A.*) (*No.* 57 *of* 1912—*No.* 6 *of* 1935), *sec.* 176.

The *Industrial Arbitration Act* 1912-1935 (W.A.) provided, by sec. 176 (2), that every worker should be entitled to be paid by his employer in accordance with any industrial agreement or award of the Court of Arbitration which was applicable, "notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

The plaintiff was employed by the defendant under a verbal contract to work as a miner at tonnage rates in accordance with the terms of an award of the Court of Arbitration. In an action which was not commenced within the time specified by sec. 176 (2) of the Act the plaintiff alleged that he had been underpaid and claimed payment of the amount of the deficiency on the basis that he was entitled to it by virtue of his contract.

Held that the time within which the plaintiff might sue to enforce the terms of his contract was not limited by sec. 176 (2): That sub-section presupposed the existence of a contract of employment which, as to its wages provision, was inconsistent with an industrial agreement or award; it dealt with such a case by giving the worker a statutory right to recover "as wages" the

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amount fixed by the industrial agreement or award, and it was that statutory right alone which was subject to the time-bar prescribed by the sub-section.

Decision of the High Court : *Amalgamated Collieries of W.A. Ltd.* v. *True*, (1938) 59 C.L.R. 417, on this point, reversed, and the decision of the Supreme Court of Western Australia (Full Court) restored.

APPEAL from the High Court to the Privy Council.

This was an appeal by the plaintiff from the decision of the High Court of Australia in *Amalgamated Collieries of W.A. Ltd.* v. *True* (1) varying a decision of the Supreme Court of Western Australia given on an appeal by the plaintiff from a judgment entered against him in an action brought by him in the Local Court at Collie (W.A.).

D. L. Jenkins K.C. and *J. H. Stamp*, for the appellant.

D. N. Pritt K.C. and *C. M. Colin*, for the respondent.

LORD RUSSELL OF KILLOWEN delivered the judgment of their Lordships, which was as follows :—

The question for decision on this appeal is whether the appellant's action is to any extent time-barred under sec. 176 (2) of the *Industrial Arbitration Act* 1912-1935 (of Western Australia), and the answer depends upon the true construction of that section.

The Act establishes a Court of Arbitration with jurisdiction to deal with and determine all industrial matters, including power to make awards, each of which while in force operates (See sec. 83) as "a common rule of any industry to which it applies." The court's authority may be delegated to an industrial board. At the dates relevant to this appeal there was in force, as regards the parties to this appeal, an award (No. 32 of 1934), being an award (No. 10 of 1931) made by the Industrial Board as amended in August 1934 by the Court of Arbitration.

The admitted facts show that the appellant was verbally engaged by the respondent to work for it as a miner at tonnage rates, and not at day wages, upon the terms and conditions of the award No. 32 of 1934. His contract of service therefore contained, as part thereof, all the relevant provisions of that award including the appropriate provisions as to wages. Pursuant to that engagement

(1) (1938) 59 C.L.R. 417.

the appellant worked for the respondent for one year ending on 26th September 1936, and was paid wages which are alleged, by him, to be insufficient under the terms of his contract of service by an amount of £8 1s. 9d. On 12th April 1937 he commenced proceedings by summons in the Local Court at Collie, Western Australia, claiming payment of that sum. The respondent raised two defences, one which, if successful, would defeat the whole claim, the other, that as to £4 12s. 11d., the claim was time-barred under sec. 176 (2) of the Act.

In the Local Court the magistrate acceded to the first defence, and entered judgment for the respondent. On appeal the Full Court of the Supreme Court of Western Australia (*Northmore* C.J. and *Dwyer* J.) set aside that judgment, and entered judgment for the appellant for the full amount of £8 1s. 9d. The respondent then appealed to the High Court of Australia, with the result that by order of that court dated 4th April 1938 the order of the Supreme Court was varied by substituting the sum of £3 8s. 10d. for the sum of £8 1s. 9d. All the judges in the High Court were in agreement in rejecting the first ground of defence ; but the Chief Justice and *Starke* and *Dixon* JJ. were of opinion that as to £4 12s. 11d. the action was time-barred under the section, while *Evatt* and *McTiernan* JJ. were of opinion that the section did not apply. The action is a test action, and by Order in Council leave was given to the appellant to appeal to His Majesty in Council. There is no appeal from the decision of the High Court in regard to the first ground of defence. The only question for their Lordships' consideration is whether the appellant's claim is, as to £4 12s. 11d., time-barred under the section.

The section runs thus :—" 176. (1) Subject to section thirty-nine no person shall be freed or discharged from any liability or penalty or from the obligation of any industrial award or agreement by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award or agreement, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled. (2) Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer

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and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

In the judgments in the High Court, and in the course of the argument before the board, decisions were cited upon other and different enactments by other legislatures; but having considered those authorities with care, their Lordships have found that they afford no real assistance or guide in answering the question which arises on this appeal. The section they think must be construed upon a consideration of the language used, and of the Act in which it finds a place.

The Supreme Court appear to have thought the position reasonably plain. They held that the sub-section only applied where the workman could not under the provisions of his contract obtain the full amount of wage fixed by the award, but was forced to have recourse to the sub-section in order to obtain the difference between his contract wage and the amount fixed by the award; and that since the appellant sued on his contract alone, he had no need to pray the sub-section in aid, and was therefore not subject to the sub-section's time bar.

The majority in the High Court thought that in every case in which a worker was seeking to recover wages of an amount which was fixed by an award he was (whether entitled to it by the provisions of his contract or not) seeking to recover an amount to which sec. 176 declared him to be entitled, and that accordingly the twelve-months' limitation applied. On the other hand *Evatt* and *McTiernan* JJ. took the same view of the section as that adopted by the Supreme Court. They were of opinion that as the appellant was entitled to his wages under his contract, he had no need to assert the right given by the section, and was therefore not bound by the limitation therein contained.

In view of this conflict of eminent judicial opinion, the question obviously cannot be said to be plain or easy of solution; but on

consideration their Lordships find themselves in agreement with the views of *Evatt* and *McTiernan* JJ. and the Supreme Court.

The section is, in their opinion, a section dealing with a particular subject matter, viz., contracting out, i.e., with contracts of service which are inconsistent with industrial agreements or awards. The first sub-section annuls any provision in a contract of service inconsistent with an industrial award or agreement. If one of the offending provisions should be the provision as to wages, a difficult situation for the servant might arise. There might be a difficulty in suing on a *quantum meruit*, or on an implied promise to pay the amount fixed by the industrial award or agreement, in view of the fact that the parties had *de facto* purported to stipulate for a specified and a different sum. The second sub-section meets and overcomes this difficulty, by declaring that, notwithstanding the contract or pretended contract to the contrary, the worker shall be entitled to be paid in accordance with the industrial agreement or award, and may recover the amount to which he is by the sub-section declared, entitled "as wages," but subject to the short period of limitation. In other words the second sub-section presupposes the existence of a contract of employment which, as to its wages provision, is inconsistent with an industrial agreement or award, and deals with such a case by giving the workman a statutory right to recover "as wages" the amount fixed by the industrial agreement or award, as the case may be. It is that statutory right alone which is subject to the time-bar of twelve months. If he claims against the terms of his contract he is given the shortened time limit, but the time within which he may sue to enforce the terms of his contract is not affected.

Their Lordships think that this construction is the only one which gives due effect to all the words of the section. The effect of the rival view would be to reduce the normal period of limitation from six years to twelve months in the case of every worker to whom an industrial agreement or award applies—an enormous industrial field even if one were to except, as *Dixon* J. does, the cases in which the contract wage exceeds the amount fixed by the industrial agreement or award. It would be strange to find so drastic and sweeping a change in the laws of limitation in a contracting-out provision,

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or enacted otherwise than in the clearest possible terms. The sub-section, if that had been intended, need only have provided that every worker to whom an industrial agreement or award applied might recover wages in accordance therewith, but that every action for the recovery of wages the amount of which was in fact fixed by an industrial agreement or award must be commenced within twelve months from the time when the cause of action arose.

On the other hand the construction which their Lordships prefer to adopt assigns an operation and effect to every word in the sub-section. It attributes to the words "such worker" a qualifying meaning which narrows the general expression "every worker," by limiting it to a worker whose contract or pretended contract is "to the contrary." It attributes to the words "as wages" the meaning that the workman may recover, as if payable under a contract of service, money due as a statutory right. It attributes to the words "is hereby declared entitled" the meaning that a new right is being conferred by the sub-section. It attributes to the words "such amount" the meaning of the amount which the worker is so given the right to recover as wages.

For the reasons indicated their Lordships are of opinion that the appeal should be allowed, the order of the High Court discharged except as to costs, and the order of the Supreme Court restored. They will humbly advise His Majesty accordingly. The respondent will pay the costs of this appeal.

Solicitors for the appellant, *Blyth, Dutton, Hartley & Blyth.*
Solicitors for the respondent, *M. L. Moss & Son.*