[HIGH COURT OF AUSTRALIA]

JACKA AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

LEWIS . . . . . RESPONDENT.
APPLICANT,

H. C. OF A. 1944.

MELBOURNE, *Mar.* 9, 23.

Latham C.J., Rich, Starke, and McTiernan JJ.

High Court—Appeal—Jurisdiction—Commonwealth Court of Conciliation and Arbitration—Judicial order—The Constitution (63 & 64 *Vict. c.* 12), *s.* 73 (*ii.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *s.* 31 (1).

The jurisdiction of the High Court under s. 73 (ii.) of the Constitution to hear and determine an appeal from the Commonwealth Court of Conciliation and Arbitration made in the exercise of its judicial power is not excluded by s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

So *held* by *Latham* C.J., *Rich* and *Starke* JJ. (*McTiernan* J. dissenting).

MOTION.

Arthur Lewis, who at all material times was a member of the Victorian branch of the Arms, Explosives and Munition Workers' Federation of Australia (which was an organization registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1934), made an application by summons under s. 58E of that Act to the Commonwealth Court of Conciliation and Arbitration, the respondents being the Victorian branch above mentioned, its president, secretary, executive committee and the members of the executive committee. Judge *Kelly* made an order on the application directing the respondents to observe the rules of the organization by recognizing, accepting and submitting to a ballot for the office of president of the Victorian branch and to a ballot for the office of sub-branch delegate to the Federal Council of the organization the nomination of the applicant.

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The respondents gave notice of appeal to the High Court.

The applicant moved the High Court for an order that the notice of appeal be set aside on the ground that the High Court had no jurisdiction to entertain the appeal.

Fraser, for the applicant. If the High Court has jurisdiction in this matter, it must be on the basis that s. 73 (ii.) of the Constitution has not been excluded by legislation. However, it is submitted that s. 73 (ii.) is excluded by s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. This submission as to the effect of s. 31 (1) is supported by the history of that sub-section. In its original form, in the Act of 1904, s. 31 (1) provided: "No award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatever." By Act No. 6 of 1911, s. 14, the sub-section was amended by the insertion of (1) the phrase "or order" after "award" and (2) a provision that the award or order should not be subject to prohibition or mandamus. By Act No. 18 of 1914, s. 11, the provision relating to prohibition and mandamus was extended to include injunction; and s. 21AA was inserted, making provision for the determination of questions of law by the High Court. Act No. 43 of 1930, s. 24, inserted the words "Except as in this Act provided" at the beginning of the sub-section and the words "other than the High Court" after "in any other Court"; the nature of these amendments suggests that the language of the section was being revised so that it would be more apt. It is important in this connection to observe that in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1) it had been decided that the legislature could not take away or restrict the original jurisdiction of the High Court under s. 75 (v.) of the Constitution in matters "In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." That being so, the language of s. 31 (1), as it stood before the 1930 Act, was inappropriate inasmuch as its purport was inconsistent with s. 75 (v.) of the Constitution and the insertion of the words "other than the High Court" was necessary to cure the inconsistency. On the proper construction of s. 31 (1) those words attach to the reference to prohibition, &c., and not to the earlier words of the section, so that the sub-section has two branches (each subject to other provisions of the Act): (1) no award or order of the Court shall be challenged, &c., the implication being that neither the High Court nor any other court shall review the award or order; (2) no such award or order shall

(1) (1910) 11 C.L.R. 1.

be subject to prohibition, &c., "in any other Court other than the High Court."

Fullagar K.C. (with him *P. D. Phillips*), for the appellants. Section 31 (1) cannot be grammatically interpreted as submitted on behalf of the respondent. That interpretation is not supported by the history of the sub-section. In the original provision the words "in any other Court" attached to the expression "challenged . . . or called in question," and the words "in any other Court other than the High Court" must now so attach. The Commonwealth Court of Conciliation and Arbitration is a Federal court within the meaning of s. 73 (ii.) of the Constitution, and the right of appeal under that provision is not affected by s. 31 (1) properly construed. An appeal lies to the High Court from any order made by the Arbitration Court when it acts judicially (See *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1)), though the position is different where the Court exercises its arbitral power. It is true that s. 31 (1) is expressed as applying to an award as well as to an order. It may be that an appeal would lie from an award on the ground of want of jurisdiction, but, whatever may be the position of an award, it is clear that the order under s. 58E of the *Commonwealth Conciliation and Arbitration Act* is a judicial order and, therefore, within s. 73 (ii.) of the Constitution.

Fraser, in reply.

Cur. adv. vult.

Mar. 23.

The following written judgments were delivered :—

LATHAM C.J. This is a motion by Arthur Lewis, the respondent to an appeal from an order made by his Honour Judge *Kelly*, a judge of the Arbitration Court, seeking to have the notice of appeal set aside on the ground that the High Court has no jurisdiction to entertain the appeal.

The order of the Arbitration Court which is the subject matter of appeal was made under s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The order directed that the rules of the Victorian branch of the Arms, Explosives and Munition Workers' Federation of Australia should be observed by accepting and submitting to a ballot the nomination of Lewis to certain offices.

The Commonwealth Constitution, s. 73, provides that the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine

(1) (1918) 25 C.L.R. 434.

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appeals from all judgments, decrees, orders and sentences of any Justice exercising the original jurisdiction of the High Court, and of "any other federal court." In *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) it was held that the Arbitration Court was not validly constituted as a court because its members did not hold office upon a life tenure, which was held to be required by s. 72 of the Constitution in the case of all Federal courts. After this decision the *Commonwealth Conciliation and Arbitration Act* 1926 was passed, and by s. 6 certain sections of the principal Act were repealed and new sections substituted which had the effect of creating the Arbitration Court as a Federal court. Accordingly, unless the Parliament has provided for relevant "exceptions or regulations" which prevent an appeal to the High Court, the High Court has, under s. 73 of the Constitution, jurisdiction to hear an appeal from any judgment, decree, order or sentence of the Arbitration Court. The order made by Judge *Kelly* in the present case is plainly an order of the Court to which s. 73 applies. It is not an industrial award. If it were an industrial award, it would be necessary to consider whether the words of s. 73, "judgments, decrees, orders, and sentences," applied to it, even though it was made by a court.

Section 31 (2) of the *Commonwealth Conciliation and Arbitration Act* provides that the Arbitration Court may state a case for the opinion of the High Court upon a question of law. Section 21AA of the Act provides that parties to industrial disputes or proceedings in the Arbitration Court or the Registrar may apply to the High Court for a decision on the question whether an industrial dispute within the meaning of the Act exists, or on questions of law. These two provisions make it possible to call in question in the High Court matters which may be dealt with or may have been dealt with in the Arbitration Court. It is contended that, except in the two cases mentioned, no review by any means of any order of the Arbitration Court is possible in the High Court or in any other court.

The argument depends entirely upon the terms of s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act*. The provision is as follows:—

"31.—(1) Except as in this Act provided, no award or order of the Court or a Conciliation Commissioner shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court other than the High Court on any account whatever."

The significance of the words "Except as in this Act provided" has already been explained by reference to ss. 31 (2) and 21AA.

(1) (1918) 25 C.L.R. 434.

Subject to those exceptions, the section provides (so far as orders and appeals are concerned) that no order of the Court shall be appealed against in any other court other than the High Court on any account whatever. This is a clear prohibition of appeals to courts other than the High Court, but equally clearly, in my opinion, it is not a prohibition of appeals to the High Court.

It has been argued for the respondent that the section should be read as if the words " in any other Court other than the High Court " were attached only to the words " be subject to prohibition mandamus or injunction," and not also to the prior words " challenged, appealed against, reviewed, quashed, or called in question." When the words " other than the High Court " were inserted by the amending Act No. 43 of 1930, s. 24, it was probably the intention of Parliament merely to include in the section a recognition of the fact that s. 75 (v.) of the Constitution gave a constitutional right in certain cases to a party to institute proceedings for prohibition, mandamus or an injunction in the High Court. This constitutional right had been affirmed in *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Whybrow & Co.* (1), and in the *Tramways Case* [*No.* 1] (2). Such a right cannot be destroyed by any Commonwealth statute. The history of the section supports the suggestion that the intention of Parliament was probably as stated. The section was enacted in 1904 and was amended in 1911, 1914 and 1930. Originally the section applied only to awards and was in the following terms : " No award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatever." Thus the words " challenged, &c.," and the words " in any other Court " appeared in the section before it contained any reference to prohibition, mandamus or injunction. The amendment of 1911 (Act No. 6, s. 14) applied the section to orders of the Court and introduced an exclusion of proceedings for prohibition or mandamus. Act No. 18 of 1914, s. 11, excluded proceedings for an injunction. The words " other than the High Court " were introduced by Act No. 43 of 1930, s. 24. The words " in any other Court other than the High Court " cannot be read as applying only to proceedings by way of prohibition, mandamus or injunction and not to the other proceedings mentioned in the section.

It would be difficult to suggest that the proceedings of the Arbitration Court, a Federal court, could be appealed against, reviewed, quashed, called in question, or be subject to prohibition, mandamus or injunction in any other court other than the High Court. Thus

(1) (1910) 11 C.L.R. 1. (2) (1914) 18 C.L.R. 54.

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the introduction of the words "other than the High Court," whatever may have been the intention when the amendment was made, has the actual, though doubtless unintended, effect of making the section largely, if not entirely, nugatory, Probably these words were intended only to relate to prohibition, mandamus or injunction, but it is not possible so to construe them in the section as it stands.

Accordingly it should, in my opinion, be held that this Court has jurisdiction to entertain this appeal, and the motion must be refused.

RICH J. In this matter a summons under the provisions of s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was issued by the respondent Arthur Lewis against the appellants which asked for an order compelling them to accept the nominations of Arthur Lewis for the position of President of the Victorian Branch of the Arms, Explosives and Munition Workers' Federation of Australia, an organization registered under the Act, and for the position of sub-branch delegate to the Federal Council of such Federation pursuant to rule 4 of the branch rules of the said Federation registered under the Act. Upon the return of the summons Judge *Kelly*, one of the judges of the Arbitration Court, made the following order :—"I do order that" (the respondents) "William Jacka Colin Edwards Helen Miller John McGee Alec White Ephraim Taylor Robert Brown George Hayden and Ruth Foster are and each of them is hereby directed to observe the rules of the organization by recognizing accepting and submitting to a ballot for the Office of President of the Victorian Branch of the said organization and to a ballot for the office of sub-branch delegate to the Federal Council of the said organization the nomination of Arthur Lewis the applicant herein for such offices."

This order is in the nature of a mandatory injunction and the question for our determination is whether an appeal lies to this Court from such an order.

By s. 51 (xxxv.) of the Constitution, the Parliament is empowered to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The character of an arbitrator depends upon the nature of the duties which he is appointed to perform. If he is appointed to determine as between contesting parties a dispute or question as to the nature or extent of their already existing legal rights or duties *inter se*, not only is he subject to a legal duty to act judicially, but he is to perform what is essentially the function of a court of justice. If he is appointed to determine as between contesting parties not

a dispute as to their existing legal rights but a difference as to the conditions which are to prevail between them if they enter into legal relations with one another, then, although he is still subject to a legal duty to act judicially, he is to perform or implement an act which is arbitral in the sense of legislative, and is not one of the functions of a court in the proper sense of the term. In the case of placitum xxxv., it is evident from the nature of the subject matter that the arbitration provided for is of the latter type, and that the functions which the arbitrator is required to perform as such are not those of a court of justice.

It was held by this Court in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1), that since, under the Act as it then stood, the President of the Commonwealth Court of Conciliation and Arbitration was appointed for seven years only, he did not and could not constitute a Federal court. This did not, however, preclude him from exercising arbitral functions of the kind contemplated by the placitum, but it put it beyond his power to proceed to enforce any award which he might make, because this is essentially a function which can be performed only by a court *stricto sensu* : Cf. *Toronto Corporation* v. *York Corporation* (2). After the decision in the *Waterside Workers' Case* (1) the Act was amended ; and it is now provided, by ss. 11 and 12, that there shall be a Commonwealth Court of Conciliation and Arbitration, the tenure of office of whose judges complies with the conditions prescribed by s. 72 of the Constitution for justices of courts created by the Parliament. Section 31 provides that, except as in the Act provided, no award or order of the Court or a Conciliation Commissioner shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction in any other court other than the High Court on any account whatever. The section goes on to enable the Court to state a case for the opinion of this Court upon any question arising in a proceeding which in its opinion is a question of law.

If the question were whether an appeal would lie to this Court from an arbitral determination of the Commonwealth Court of Conciliation and Arbitration, it would be necessary to point out that no provision for any such appeal is made by the Act. If an appeal lay at all it would be on the footing that the Court is a " federal court " within the meaning of clause 73 (ii.) of the Constitution. In my opinion, however, the phrase " federal court " here means not a body constituted by persons whose tenure of office is that

(1) (1918) 25 C.L.R. 434.

(2) (1938) A.C. 415.

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required for members of a Federal court, but such a body when it has exercised a court function in giving the decision sought to be appealed against. Questions of some difficulty may at times arise as to whether matters referred for the determination of what is undoubtedly a court are to be dealt with by it in the exercise of its ordinary jurisdiction, so as to be subject to any ordinary rights of appeal, or in the exercise of a special jurisdiction for which no appeal is provided: Cf. *Holmes* v. *Angwin* (1); *Medical Board of Victoria* v. *Meyer* (2); *Webb* v. *Hanlon* (3). But it is clear that no appeal lies from a court which has exercised a non-judicial function, unless, of course, an appeal is especially provided for, notwithstanding that judicial decisions of the court are in general subject to appeal (*Moses* v. *Parker*; *Ex parte Moses* (4); *Bradford Third Equitable Benefit Building Society* v. *Borders* [*No.* 2] (5)).

In the present case, however, the order made is one which determines the rights of parties under the rules of a registered organization. The order is curial in character and was made in the exercise of judicial power.

In my opinion, therefore, the motion should be dismissed.

STARKE J. Motion on the part of the respondent to set aside a notice of appeal from an order of the Commonwealth Court of Conciliation and Arbitration made pursuant to s. 58E of the *Commonwealth Conciliation and Arbitration Act*.

That Court has both arbitral and judicial powers (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (6)). The order made pursuant to s. 58E is an exercise of the judicial power, for it determines the rights of parties under the rules of the organization known as the Arms, Explosive and Munition Workers' Federation of Australia and s. 58E itself subjects the parties named in it to a penalty for failure to comply with the order.

The Constitution, by s. 73, provides that this Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from judgments, decrees, orders, and sentences (1) of any Justice or Justices exercising the original jurisdiction of the High Court: (2) of any other Federal court or court exercising Federal jurisdiction.

The Commonwealth Court of Conciliation and Arbitration is a Federal court, for it is constituted under Federal law and exercises

(1) (1906) 4 C.L.R. 297.
(2) (1937) 58 C.L.R. 62.
(3) (1939) 61 C.L.R. 313.
(4) (1896) A.C. 245.
(5) (1939) 3 All E.R. 29.
(6) (1918) 25 C.L.R. 434.

part of the judicial power of the Commonwealth: See *Commonwealth Conciliation and Arbitration Act*, Parts III. and IV.

But s. 31 of that Act provides that "Except as in this Act provided, no award or order of the Court . . . shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court other than the High Court on any account whatever." The words "other than the High Court" are apt to preserve the appeal to this Court from judgments and orders of the Arbitration Court made in the exercise of its judicial power. The history of the section suggests, it is said, that the words were inserted in it to make clear that the constitutional power of this Court under s. 75 of the Constitution—which cannot be taken away by the Parliament (*Tramways Case* [*No.* 1] (1))—remains unaffected. That section provides:—"In all matters . . . (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction."

It is well settled in this Court that the Arbitration Court and its judges are officers of the Commonwealth within the meaning of this provision (*Tramways Case* [*No.* 1] (1)).

It is, I think, possible that this was the intention of the introduction of the words "other than the High Court" into the section. But, if so, that intention has miscarried, for the section clearly and explicitly excludes the High Court from the prohibitive words contained therein and consequently leaves appeals and other applications to the High Court untouched. The omission of the words "other than the High Court" from the section would exclude this Court from the jurisdiction contended for in the present case and yet leave unimpaired the constitutional power contained in s. 75 (v.) and any powers expressly conferred by the *Commonwealth Conciliation and Arbitration Act*, such as ss. 21AA and 31 (2) and (3).

The motion should be dismissed.

McTIERNAN J. The question to be decided is whether the Parliament has by s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 prescribed as an exception from the appellate power, which is granted to the High Court by s. 73 of the Commonwealth of Australia Constitution, an appeal against an order of the Commonwealth Court of Conciliation and Arbitration. It is clear that under the power granted to it by s. 73 Parliament could completely except, by appropriate words, the decisions of the Arbitration Court from the appellate power granted by this section to the High

(1) (1914) 18 C.L.R. 54.

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Court (*Whybrow's Case* (1); *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (2)).

Section 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 embodies the provisions of the original *Commonwealth Conciliation and Arbitration Act* 1904 with additions made by subsequent Acts. The original provisions were that no award of the Arbitration Court should be challenged, appealed against, reviewed, quashed or called in question in any other Court on any account whatever. After *Whybrow's Case* (3) the word "order" was inserted in s. 31 (1) after the word "award," and the words "or be subject to prohibition or mandamus" after the words "called in question." This was in accordance with the view of *Isaacs* C.J., then *Isaacs* J., who, however, on this point disagreed with the majority, that prohibition was within the appellate jurisdiction granted by s. 73 to the High Court, and Parliament could except prohibition from that jurisdiction by appropriate words, but the words of s. 31 did not create that exception. In the *Tramways Case* [*No.* 1] (4), it was held that the additions made to s. 31 were invalid in so far as they purported to take away from the High Court the power to issue prohibition in respect of an award or order of the Arbitration Court; the High Court having original jurisdiction under s. 75 (v.) of the Constitution to issue prohibition to the President of the Arbitration Court. However, when by s. 11 of the *Commonwealth Conciliation and Arbitration Act* (*No.* 2) 1914 Parliament amended s. 31, it retained the provisions regarding prohibition and mandamus and added injunction to them, although injunction, like prohibition or mandamus, is a remedy provided by s. 75 (v.) of the Constitution.

Section 24 of the *Commonwealth Conciliation and Arbitration Act* 1930 gave s. 31 (1) its present form by inserting in the then existing provisions the words "Except as in this Act provided," "or a Conciliation Commissioner" and "other than the High Court." The result is that s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, upon which the present question turns, is in these terms: "Except as in this Act provided, no award or order of the Court or a Conciliation Commissioner shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court other than the High Court on any account whatever."

(1) (1910) 11 C.L.R., at p. 47.
(2) (1916) 22 C.L.R. 103, at p. 120.
(3) (1910) 11 C.L.R. 1.
(4) (1914) 18 C.L.R. 54.

It is apparent from the cases which have been cited that the view which this Court took of the provisions of s. 31 (1), as it stood at the time of these decisions respectively, was that the governing intention was to take away the power of the High Court to control the Arbitration Court. The High Court had taken that view of s. 31 (1) even before the judges of the Arbitration Court were appointed under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1928. This Act cured the defects disclosed by *Alexander's Case* (1) in the constitution of the Arbitration Court. There *Griffith* C.J. said: "Moreover, s. 31 provides that no award or order of the Court shall be appealed against. Every appeal is the creature of Statute. Under s. 73 of the Constitution an appeal lies to the High Court from every Federal court with such exceptions as the Parliament prescribes. If the Arbitration Court is, as it is called by the Parliament, a court, it is a Federal court, and the provision of s. 31 is necessary to deny the right of appeal which would otherwise exist. If it is not, the provision is superfluous" (2).

Parliament may be presumed to have been aware, when it amended s. 31 from time to time, of the Court's view of the governing intention of its provisions. It is apparent then that the abolition of an exception, which had been consistently maintained by the Act from the beginning, of an appeal to this Court from an award or order of the Arbitration Court, would be regarded by Parliament as a fundamental alteration in the *Commonwealth Conciliation and Arbitration Act*. Section 31 (1) places an award and an order on the same footing. It makes no distinction between the Arbitration Court and a conciliation commissioner in seeking to exclude proceedings by way of appeal or otherwise. If the proper conclusion to be reached from the words of s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is that Parliament intended to bring into play the jurisdiction of this Court to hear an appeal from an order of the Arbitration Court, the same must be said of an award. But the question would then arise whether an award is appealable. Section 73 grants to the High Court appellate jurisdiction in respect of judgments, decrees, orders and sentences of the courts therein mentioned. There were references, which it is important to notice, made in the *Tramways Case* [*No.* 1] (3) to the nature of the functions discharged by the President of the Arbitration Court in making an award: these functions are similar to those which the Arbitration Court or a conciliation commissioner exercises in making an award. *Griffith* C.J. said in that case: "In the discharge of his arbitral functions the President is not bound by the rules of evidence, but

(1) (1918) 25 C.L.R. 434.
(2) (1918) 25 C.L.R., at p. 445.
(3) (1914) 18 C.L.R. 54.

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may inform his mind in any manner he thinks fit. A court of appeal would have no means of reviewing a decision so arrived at (*Moses* v. *Parker* (1))" (2). These remarks bear on the effect of s. 25 of the *Commonwealth Conciliation and Arbitration Act*. *Isaacs* J. took the view that this "should be read as a procedure section, and it does not except 'rules of law', as was the case in *Moses* v. *Parker* (1), a circumstance that seems to me to have been the real point of the judgment of the Privy Council" (3). In *Alexander's Case* (4) the view of *Griffith* C.J. was adopted by *Powers* J.—But see *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No.* 4 *Ltd.* (5). It would seem probable that if the words which were inserted in s. 31 (1) by the *Commonwealth Conciliation and Arbitration Act* 1930 removed the exception which had formerly been made of appeals from awards or orders of the Arbitration Court to the High Court, the exception was removed *per incuriam*. The question, however, is whether or not, according to the true construction of s. 31 (1) as amended by the insertion of those words, the exception was abolished from the Act.

It is sought to read the language of s. 31 (1), beginning with the words "no award" down to the end of the sub-section, as if the language consisted of two separate parts, the first ending with "called in question," and a second part consisting of the remainder of the sub-section. According to this reading, the words "in any other Court other than the High Court" would be attached to the words excluding prohibition, mandamus or injunction, but not to the words excluding an appeal, and the words "other than the High Court" could be regarded as a recognition by Parliament of its inability to exclude the constitutional remedies of prohibition, mandamus or injunction from the original jurisdiction of the High Court to which it belongs according to the decisions which have been mentioned. The intention of the prohibitory language of s. 31 (1) is, as it seems to me, to prohibit an order or award being challenged, appealed against, reviewed, quashed or called in question in courts, but not generally, that is, not outside courts. In my opinion it would accord both with the strict grammatical construction of the provisions to attach the words "in any other Court other than the High Court on any account whatever" to the whole of the preceding words. I do not agree that the words "in any other Court other than the High Court on any account whatever" should be read as if they were detached from the antecedent words directed to appellate proceedings.

(1) (1896) A.C. 245.
(2) (1914) 18 C.L.R., at p. 63.
(3) (1914) 18 C.L.R., at p. 72.
(4) (1918) 25 C.L.R., at p. 482.
(5) (1943) 67 C.L.R. 25, at p. 36.

Section 31 (1) begins by excepting from its operation any proceedings which are authorized by the provisions of the Act. The proceedings which are thereby excepted from the prohibitory words do not include an appeal to the High Court from an award or order of the Arbitration Court. That appeal, as has been observed, would lie independently of the Act by force of s. 73 of the Constitution unless s. 31 (1) has taken it away. The prohibitory words of the sub-section are expressed to extend to proceedings, which include an appeal from an award or order of the Arbitration Court, being taken " in any other Court other than the High Court." The words " Except as in this Act provided " are capable of referring to the provisions of the Act relating to proceedings both in the Arbitration Court and in the High Court. As these words are capable of this meaning, the words " in any other Court " are capable of meaning in any court other than the Arbitration Court or the High Court. The words " other than the High Court " are an exception upon the words " in any other Court." If these words " in any other Court " mean any court other than the Arbitration Court or the High Court, the effect of inserting the exception " other than the High Court " is to make the prohibition contained in the words beginning with " no award " down to the end of the sub-section, apply to every court other than the Arbitration Court. I think that the words " Except as in this Act provided," which, as I have said, are capable of applying to the provisions in the Act regarding proceedings in the Arbitration Court and in the High Court should be read as so applying. The words " other than the High Court " are in my opinion consequential upon the words " Except as in this Act provided." That reading brings the whole of the provisions of s. 31 (1) into harmony with the provisions of the Act regarding proceedings in the Arbitration Court and the High Court in respect of awards or orders of the Arbitration Court or a conciliation commissioner. That reading also avoids the suggestion that the Parliament did *per incuriam* alter the rule, which it had consistently adopted previously to the passing of the *Commonwealth Conciliation and Arbitration Act* of 1930, of excepting appeals to the High Court from the appellate power granted to the High Court by s. 73 of the Constitution.

The two sets of words " Except as in this Act provided " and " other than the High Court " were inserted at the same time. As the former words are capable of applying to provisions regarding proceedings in the Arbitration Court and the High Court, and in my opinion do apply to all such proceedings, the effect of the insertion of the words " other than the High Court " is to remove

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the doubt which would in their absence exist, as to whether Parliament retained the exception of appeals from awards or orders of the Arbitration Court to this Court. In my opinion it can consistently with the true grammatical construction of s. 31 (1) be said that Parliament has not abolished the exception.

It is in accordance with this view of s. 31 (1) to say that the Parliament did not apply itself to the task of removing the constitutional blemish on the face of s. 31 (1) which was made manifest by *Whybrow's Case* (1), or at any rate the *Tramways Case* [*No.* 1] (2). Since those cases, and before the passing of the *Commonwealth Conciliation and Arbitration Act* 1930, Parliament frequently amended the Act without taking any steps to remove that blemish. Indeed, since this Court decided that the provisions were ultra vires to the extent to which they purported to prescribe prohibition and mandamus as exceptions to the jurisdiction of the Court, the Parliament added "injunction" which, like the other remedies, is given by s. 75 (v.) of the Constitution. It is not surprising that, when Parliament last amended s. 31 (1), it allowed the unconstitutional provisions to remain unaltered.

It seems to me that the governing intention of the whole of the language of s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is to retain the exception of an appeal to the High Court from an award or order of the Arbitration Court, rather than to make an amendment abolishing the exception. The exception of an appeal was clearly made by the Act as it stood before s. 31 (1) was amended by the *Commonwealth Conciliation and Arbitration Act* 1930: the amendment did not in my opinion abolish the exception.

In my opinion the appeal is incompetent and the motion to strike it out should be allowed.

Motion dismissed with costs.

Solicitor for the appellants, *J. M. Lazarus.*

Solicitor for the respondent, *M. S. Minogue.*

E. F. H.

(1) (1910) 11 C.L.R. 1.

(2) (1914) 18 C.L.R. 54.