[HIGH COURT OF AUSTRALIA.]

PRENTICE . . . . . APPELLANT;
RESPONDENT,

AND

NUGAN PACKING COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1950.

SYDNEY, *Nov.* 10, 24.

Latham C.J., Dixon, McTiernan, Williams, Webb, Fullagar, and Kitto JJ.

Industrial Law—Wages—Recovery—Rate fixed by award—Termination of employment—Limitation of time—District Court—Jurisdiction—Industrial Arbitration Act 1940-1948 (*N.S.W.*) (*No.* 2 *of* 1940—*No.* 13 *of* 1948), *s.* 92 (2) (3).

A District Court is deprived by s. 92 (2) of the *Industrial Arbitration Act* 1940-1948 (N.S.W.) of jurisdiction to entertain an action under s. 92 (3) of that Act for the recovery of unpaid arrears of wages for which a price or rate has been fixed by an award where the action was commenced more than six months after the termination of the employment in respect of which the wages were earned.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Nugan Packing Co. Pty Ltd.*; *Re Prentice*, (1950) 50 S.R. (N.S.W.) 222; 67 W.N. 137, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 26th September 1949, Norman Bowen Prentice instituted an action in the District Court holden at Casino, New South Wales, against Nugan Packing Co. Pty Ltd. for the recovery of the sum of £184 18s. 4d., which was alleged to have become due to him as wages during the last twelve months of his employment with that company as a motor waggon driver under the Carters and Motor Waggon Drivers (State) Award.

The ground of defence material to this report notified by the defendant to the plaintiff was that the claim was for the amount

of an alleged balance due in respect of a price or rate fixed by an award or industrial agreement made under the *Industrial Arbitration Act* 1940-1946 (N.S.W.) and the employment of the plaintiff with the defendant terminated more than six months before the commencement of the action and the defendant relied upon s. 92 of that Act.

Section 92, so far as relevant to this report, provides:—"(1) Where an employer employs any person to do any work for which the price or rate has been fixed by an award, or by an industrial agreement, made under this Act, or by the conditions of a permit issued under 'section eighty-nine' of this Act, he shall be liable to pay in full in money to such person the price or rate so fixed without any deduction except such as may be authorized by any award or industrial agreement or permit as the case may be. (2) Such person may apply in the manner prescribed to an industrial magistrate for an order directing the employer to pay the full amount of any balance due in respect of such price or rate which became due during the period of twelve months immediately preceding the date of the application (where such person is still in the employment of such employer at that date) or within the last twelve months of the employment with such employer (where the employment was terminated before the date of the application). An application under this sub-section made after the termination of the employment shall be made not later than six months after the date of such termination. . . . The industrial magistrate may make any order he thinks just . . . (3) Such person may, in lieu of applying for an order under sub-section two of this section, sue for any balance due as aforesaid in any district court or court of petty sessions . . ."

At the hearing of the action the district court judge formally found as facts that the plaintiff's employment with the defendant was determined on 23rd December 1948, and that the proceedings in this action were instituted on 26th September 1949. His Honour held that he had jurisdiction to entertain the action and entered judgment for the plaintiff for the amount of £140.

The Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) made absolute an order nisi for a prerogative writ of prohibition directed to the plaintiff and to the district court judge restraining them from further proceeding on the judgment: *Ex parte Nugan Packing Co. Pty. Ltd.*; *Re Prentice* (1).

From that decision the plaintiff appealed, by special leave, to the High Court.

(1) (1950) 50 S.R. (N.S.W.) 222; 67 W.N. 37.

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J. H. McClemens K.C. (with him *A. Richardson*), for the appellant. The limitation of time in which to sue in any district court or court of petty sessions under the provisions of sub-s. (3) of s. 92 of the *Industrial Arbitration Act* 1940, as amended, is not cut down by the period of time stipulated in sub-s. (2) of that section. The only limitation is as provided in the Statute of Limitations. Sub-section (2) provides a remedy before the Industrial Magistrate and application must be made within the time therein stipulated. Sub-section (3) provides a remedy before a district court or a court of petty sessions without any stipulation as to time, the former limitation having been deliberately removed by the legislature. The two sub-sections cannot be read together—they represent separate remedies with different stipulations as to the time within which action may be commenced, the one specifically in the sub-section and the other under the general statute.

R. L. Taylor (with him *A. V. Maxwell*), for the respondent. Sub-section (3) of s. 92 of the *Industrial Arbitration Act* 1940-1948 (N.S.W.) means that the proceedings in a court of petty sessions or a district court are subject to the same period of limitation as those taken under sub-s. (2) before the industrial magistrate. The legislature's intention was made clear by the use in sub-s. (3) of the words " in lieu of ", which mean " instead of ". The insertion of those words in sub-s. (3) was intended to make proceedings under that sub-section co-extensive with proceedings under sub-s. (2) except as to forum. Under sub-s. (2) it is an order that is applied for, that is, an order for the payment of any balance due by the employer to the employee in respect of a rate or price due under an award. What is sued for under sub-s. (3) is the same balance due under the award. Under sub-s. (2) there is a limitation of the period for which the rate or price may be recovered and unless that same limitation applies to sub-s. (3) the rights given by sub-s. (3) are rights in addition and not in lieu of those given by sub-s. (2). Under sub-s. (2) the employee applies for an order directing the employer to pay the full amount of any balance due in respect of such price or rate. The employee sues under sub-s. (3) in a district court or a court of petty sessions and applies, in effect, for the same order. The order of a district court or of a court of petty sessions is in the form of a judgment, but it is nevertheless an order for the payment of the balance due just as is an order of the industrial magistrate. The balance due is by sub-s. (2) limited in the case of an employee who is still employed to whatever balance should be due over a period of twelve months

and no longer, and in the case of an employee who has ceased to be employed to whatever balance may be due over the last twelve months of his employment which is sued for within six months of the date on which his employment terminated. In other words, if, in the case of an employee whose employment has terminated, there is not any application made within six months from the date it so terminated, there cannot be any balance due. The amending Act of 1943 completely changed the method of limiting the period during which a balance due under an award could be recovered. By that amending Act the period during which wages due under an award could be recovered was limited not by limiting the time within which an application could be made but by a specific provision that the application was restricted to a balance due in respect of a price or rate which became due during the period of twelve months immediately preceding the date of the application in the case of an employee who was at the date of the application still in the employment. In the case of an employee who had ceased to be in the employment he could recover over the same period provided he brought an application within six months of so ceasing. In view of that alteration the words " within the said period of six months " that had previously existed in sub-ss. (2) and (3) became inappropriate. If it be conceded, as it must, that an employee still in the employment proceeding under sub-s. (3) can only recover a balance due over a period of twelve months, the question arises: Why should there be any difference between such an employee and an employee who has ceased to be in the employment ? The period of limitation was fixed at six months by the *Industrial Arbitration Act* 1912 (N.S.W.).

[McTIERNAN J. referred to *Josephson* v. *Walker* (1).]

In *Josephson* v. *Walker* (1) it was held that any person seeking to recover an amount due under s. 49 of that Act was restricted to proceedings either in the industrial magistrate's court, or a court of petty sessions, or a district court, and could not seek to defeat the limitation provision of six months by maintaining an action in the Supreme Court. Section 92 of the *Industrial Arbitration Act* 1940 substantially re-enacted s. 49 of the 1912 Act so far as sub-ss. (2) and (3) are concerned. The history of the legislation shows that the legislature has, for obvious reasons, always sought to impose a period of limitation in respect of the time during which an employee could claim for wages due. As to the reasons for that limitation see *Josephson* v. *Walker* (2). To

(1) (1914) 18 C.L.R. 691. (2) (1914) 18 C.L.R., at pp. 696-698, 702, 703.

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construe the Act as meaning that a district court or a court of petty sessions had jurisdiction to entertain such a claim up to a period of six years would lead to absurd results, e.g., the jurisdiction of an industrial magistrate—who, having greater experience thereof, might be regarded as an expert in these matters—would be limited to twelve months whilst the jurisdiction of a police magistrate would extend to six years.

J. H. McClemens K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

Nov. 24.

LATHAM C.J. The *Industrial Arbitration Act* of New South Wales 1940-1948 makes provision in s. 92 for the recovery of wages fixed by an award or an industrial agreement by employees who are still in the employment of the employer against whom the claim is made, and also by employees whose employment with that employer has been terminated. In each case the right to recover is limited to a right to recover up to twelve months' wages as specified in the section. Under s. 92 (2) the employee may apply to an industrial magistrate for an order for payment of wages. It is provided that an application made after the termination of the employment shall be made not later than six months after the date of such termination. Section 92 (3) provides that an employee may, in lieu of applying for an order under sub-s. (2), sue for any balance due as aforesaid in any district court or court of petty sessions. The question which arises upon this appeal is whether proceedings in a district court must be taken within six months of the termination of the employment or whether they may be taken at any time, subject to the claim being met by any statute of limitations which, apart from s. 92, is applicable to the claim.

The appellant N. B. Prentice, on 26th September 1949, sued the respondent, the Nugan Packing Co. Pty Ltd., for £184 18s. 4d. for wages in the district court. He had been employed by the respondent company under an award, but that employment had ceased on 23rd December 1948. Accordingly, the proceedings were not instituted within six months of the termination of the employment. The district court judge gave judgment for the plaintiff but in prohibition proceedings in the Supreme Court it was held by the Full Court that the proceedings were out of time on the ground that the provision relating to the limited period of six months applied to proceedings in a district court or a court of petty sessions as well as to an application to an industrial magistrate.

Section 92, so far as relevant, is in the following terms :—

"(1) Where an employer employs any person to do any work for which the price or rate has been fixed by an award, or by an industrial agreement, made under this Act, or by the conditions of a permit issued under section eighty-nine of this Act, he shall be liable to pay in full in money to such person the price or rate so fixed without any deduction except such as may be authorised by any award or industrial agreement or permit as the case may be. (2) Such person may apply in the manner prescribed to an industrial magistrate for an order directing the employer to pay the full amount of any balance due in respect of such price or rate which became due during the period of twelve months immediately preceding the date of the application (where such person is still in the employment of such employer at that date) or within the last twelve months of the employment with such employer (where the employment was terminated before the date of the application). An application under this subsection made after the termination of the employment shall be made not later than six months after the date of such termination. Such order may be so made notwithstanding any smaller payment or any express or implied agreement to the contrary. The industrial magistrate may make any order he thinks just, and may award costs to either party, and assess the amount of such costs. Where, in any proceedings under this section, it is made to appear that the employer has committed a breach of section ninety-three or section ninety-six of this Act, the industrial magistrate may, in addition to any order made under this section, impose any penalty which he might have imposed in proceedings for a penalty under section ninety-three or section ninety-six of this Act as the case may be. (3) Such person may, in lieu of applying for an order under subsection two of this section, sue for any balance due as aforesaid in any district court or court of petty sessions : . . . "

If s. 92 contained no provision relating to limitation of time for taking proceedings and if s. 92 (1) is regarded as merely attaching incidents to a simple contract of employment, the period of limitation would be six years under 21 Jac. I, c. 16, s. 3 ; if, however, sub-s. (1) of s. 92 is regarded as creating a statutory obligation and therefore as the foundation of a specialty debt, the period of limitation would be twenty years under 3 & 4 William IV, c. 42, s. 3. It is not necessary in the present case to determine which of these periods of limitation might be applicable, because the proceedings would be within time in either case.

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The second paragraph of s. 92 (2) contains the provision as to the limitation of time for making an application to an industrial magistrate "under this subsection." The third paragraph contains a provision against contracting out. The fourth paragraph contains a provision empowering an industrial magistrate "in any proceedings under this section" to impose a penalty for breach of an award. If the provision in the second paragraph of sub-s. (2) does not apply to proceedings under sub-s. (3) it would be reasonable to hold also that the provisions in the third and fourth paragraphs of sub-s. (2) were not applicable to proceedings under sub-s. (3). The result would be that in proceedings before the district court the limitation as to time would not apply. Further, the employee might be met by a defence that he had bound himself by a contract not to claim full wages and the district court would not have power in a proceeding before it to impose any penalty. Whether or not these provisions would be applicable would therefore depend simply upon the choice by the employee of a forum. The Full Court was of opinion that no rational ground could be assigned for drawing such a distinction between proceedings before the industrial magistrate and proceedings before a district court or court of petty sessions, and, in view of what was regarded as the absurd result produced by the construction of the section for which the appellant contends, it was held that the provision as to the limitation of time for taking proceedings applied to proceedings in the district court.

Absurd results may follow from a parliamentary enactment. If, however, the words are clear a court must give effect to the enactment as it stands. Where, however, absurd and irrational results follow as a consequence of a particular construction, it becomes particularly important to pay careful attention to the precise words which Parliament has used. The words of s. 92 (3) are "such person may in lieu of applying for an order under sub-s. (2) of this section, sue for any balance due as aforesaid in any district court or court of petty sessions". The words "balance due as aforesaid" refer to the provisions in sub-s. (2) limiting the right of recovery to a balance due in respect of a twelve months' period. These words are clear. But what is the meaning of the words "in lieu of applying for an order under sub-s. (2)"? The argument for the appellant gives no effect to these words. It construes the sub-section as if it provided simply that the employee might sue for any balance due in a district court or a court of petty sessions. In my opinion the determination of the question under consideration depends upon

attaching some meaning or, on the other hand, no meaning, to the words " in lieu of " et seq. in s. 92 (3). These words, in my opinion, mean that instead of doing one thing, the employee may do another thing. They assume a possibility of choice of proceedings at the time when proceedings are taken. At any time within the relevant period of six months there can be such a choice. After that period has expired there can be no application to an industrial magistrate. If, therefore, after the expiry of that period the employee sued in a district court he would not be so suing " in lieu of applying for an order under sub-s. (2) ". He would not be choosing one of two then presented alternatives. Thus, in my opinion, in order to give a meaning to the words " in lieu of " et seq. in s. 92 (3) this provision should be construed as providing that an employee, at any time while he is still employed, or if his employment has been terminated, at any time within six months after the termination, may proceed to recover the balance of wages referred to in sub-s. (1) by applying either (1) to an industrial magistrate, or (2) to a district court or court of petty sessions.

In my opinion this construction is justified by the words of the section and it avoids absurd consequences. It may be observed that in sub-s. (2) the second paragraph refers to " an application under this subsection ". In the fourth paragraph of the same sub-section the words used are " in any proceedings under this section ", not " subsection ". It is thus expressly provided that in any proceedings under the section, and therefore in proceedings under sub-s. (3), as well as under sub-s. (2), penalties may be imposed. But it must be conceded that the limitation as to time is in terms confined to applications under sub-s. (2). But when it is appreciated that proceedings under sub-s. (3), if they are instituted, are taken in lieu of another then available alternative, namely an application under sub-s. (2), it is seen that the right to take proceedings under sub-s. (3) is subject to the same limitation as that applying to proceedings under sub-s. (2).

For the reasons which I have stated I am of opinion that the decision of the Supreme Court was right and that the appeal should be dismissed.

Dixon J. This is an appeal by special leave from a rule of the Supreme Court of New South Wales making absolute an order nisi for a prerogative writ of prohibition. The writ is directed to a judge of the district court of the Northern District restraining further proceedings upon a judgment in that court for a money sum and costs. The sum was recovered upon particulars of claim

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In my opinion this construction is justified by the words of the section and it avoids absurd consequences. It may be observed that in sub-s. (2) the second paragraph refers to " an application under this subsection ". In the fourth paragraph of the same sub-section the words used are " in any proceedings under this section ", not " subsection ". It is thus expressly provided that in any proceedings under the section, and therefore in proceedings under sub-s. (3), as well as under sub-s. (2), penalties may be imposed. But it must be conceded that the limitation as to time is in terms confined to applications under sub-s. (2). But when it is appreciated that proceedings under sub-s. (3), if they are instituted, are taken in lieu of another then available alternative, namely an application under sub-s. (2), it is seen that the right to take proceedings under sub-s. (3) is subject to the same limitation as that applying to proceedings under sub-s. (2).

For the reasons which I have stated I am of opinion that the decision of the Supreme Court was right and that the appeal should be dismissed.

DIXON J. This is an appeal by special leave from a rule of the Supreme Court of New South Wales making absolute an order nisi for a prerogative writ of prohibition. The writ is directed to a judge of the district court of the Northern District restraining further proceedings upon a judgment in that court for a money sum and costs. The sum was recovered upon particulars of claim

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which alleged that the plaintiff in the action, a respondent to the order nisi, was employed by the defendant, the prosecutor in the proceedings for prohibition, to do certain work, to wit the work of a motor waggon driver for which the price or rate had been fixed by the Carters and Motor Waggon Drivers (State) Award and that the defendant did not pay the plaintiff in full the sum constituting the full amount of the balance due within the last twelve months of the employment. The prohibition was granted because more than six months had elapsed from the time the plaintiff's employment with the defendant had terminated before the action was brought. The question is whether the Supreme Court was right in considering the expiry of six months fatal. The action was brought in purported pursuance of sub-s. (3) of s. 92 of the *Industrial Arbitration Act* 1940-1948 of New South Wales. That sub-section is not intelligible without sub-ss. (1) and (2) of s. 92. The material part of sub-s. (1) provides that where an employer employs any person to do any work for which the price or rate has been fixed by an award he shall be liable to pay in full in money to such person the price or rate so fixed without any deduction except such as may be authorized by the award.

The plaintiff's claim was founded upon the statutory liability created by this provision. Sub-section (2) consists of four separate paragraphs. The first of them runs thus:—"Such person may apply in the manner prescribed to an industrial magistrate for an order directing the employer to pay the full amount of any balance due in respect of such price or rate which became due during the period of twelve months immediately preceding the date of the application (where such person is still in the employment of such employer at that date) or within the last twelve months of the employment with such employer (where the employment was terminated before the date of the application)."

This paragraph, as will be seen, restricts the period in respect of which arrears of wages may be recovered. The paragraph which follows it, the second paragraph, deals with the time within which an application to an industrial magistrate must be made for an order for payment when the employment has been terminated. It provides that an application under the sub-section made after the termination of the employment shall be made not later than six months after the date of such termination.

The third paragraph of sub-s. (2) makes agreements to the contrary and payments of lesser sums no bar to an order and empowers the industrial magistrate to award costs. The fourth paragraph authorizes the industrial magistrate in a proceeding

under s. 92 to impose penalties for offences against the sections relating to breaches of awards and to failure to keep time sheets and pay sheets.

The material part of sub-s. (3) is expressed as follows :—" Such person may, in lieu of applying for an order under sub-section two of this section, sue for any balance due as aforesaid in any district court or court of petty sessions." The sub-section then goes on to give an appeal to the Industrial Commission from a judgment or order of the district court or court of petty sessions, just as an appeal is given from an industrial magistrate by s. 120 (1).

The question whether the limitation of six months from the termination of the employment imposed upon the application to an industrial magistrate by sub-s. (2) of s. 92 affects the recovery of wages under sub-s. (3) appears to me to depend upon the operation of the words in sub-s. (3) " in lieu of applying for an order under sub-section two of this section ". Do those words imply that the plaintiff must at the time he sues be in a position to apply under sub-s. (2) to an industrial magistrate ? If so, it follows that if he is out of time for making such an application he is not in a position to maintain an action under sub-s. (3).

Sub-section (3) gives a right of suit " in lieu of ", that is " in place of " or " in substitution for ", a right to apply. In my opinion the prima-facie effect of a grant of such a right is to make it necessary that the first or primary right to proceed shall subsist as an available alternative. It gives a choice of a second form of proceeding as a substitute for the first. If the first has gone and is no longer available how can it correctly be said that in resorting to the second the claimant is pursuing it in place of the first, which *ex hypothesi* no longer exists ?

I think that the prima-facie effect of the language employed is to give the alternative remedy so long only as the primary remedy is open. Accordingly, unless the prima-facie meaning is displaced, when six months have elapsed from the termination of his employment, the former employee cannot sue in the district court for the balance of wages underpaid during the last twelve months of his employment as he might within the six months. Then what grounds are there for displacing the prima-facie meaning of sub-s. (3) ?

The grounds put forward appear to me to be reducible to two reasons.

First there is the use in the second paragraph of sub-s. (2) of the words " under this subsection " after the words " an application " and the absence of any similar words in sub-s. (3). It is said

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that this points to an intention to confine the operation of the time limit to applications to industrial magistrates. But if it is correct that the remedy under sub-s. (3) is substitutional for that under sub-s. (2), why should the limitation be repeated? The intention in sub-s. (2) is to limit the application to the magistrate to a period of six months and naturally the words "under this subsection" are used to describe the nature of the application upon which the time limit is imposed. But that throws no light on the question whether the proceeding under sub-s. (3) was intended to be strictly "in place of" that under sub-s. (2) or to be more extensive in its availability in point of time.

Secondly, reliance is placed upon the history of the amendments to s. 92 since it was enacted in the consolidation of 1940. In that consolidation, as in the corresponding previous enactment, the provision contained in s. 92 was based upon a different policy. There was not a limitation of twelve months in respect of the period for which wages might be recovered. There was, however, throughout the section a limitation of six months, from the date when wages were due, upon the period within which proceedings for their recovery might be commenced whether by application to an industrial magistrate or by action in the district court or complaint in petty sessions. To bring about this result sub-s. (2) provided that such person might within six months apply to an industrial magistrate for an order for payment and sub-s. (3) provided that such person might within the said period of six months in lieu of applying for an order under sub-s. (2) sue for any balance due in a district court or court of petty sessions. Now when in 1943 the section was amended to bring about the present position in which twelve months' wages can be recovered by an application to the industrial magistrate but only if made not later than six months after the termination of the employment if that has happened, both sub-s. (2) and sub-s. (3) necessarily underwent a recasting. In sub-s. (3) the words "within the said period of six months" were omitted. It is said that by omitting them the legislature indicated its intention that no such time bar should apply to an action. This inference goes beyond the evident reason for the amendment. Once sub-s. (2) was recast so as to do away with the limitation of six months from the time when the money became due to give a right to an order for twelve months' wages, it became necessary to take out these words from sub-s. (3). It was necessary to do so because the new limitation of six months applied only when the employment was terminated and not to the case of the employment remaining on foot.

There is therefore an explanation of the repeal of those words which does not support the inference that it was intended to create a right of suit barred only by the expiry of the period appropriate to statutory obligations. It is said, and with truth, that it would have been easy for the legislature to write in again in sub-s. (3) a limitation fully expressed in suitable words. But the inference to be drawn from the failure of the legislature to express itself with more directness and fullness is speculative. If speculative inferences are to be considered, it may equally well be said that if the legislature intended to make an important departure from the principle to which it had so long adhered of limiting the time for the recovery of wages under an award to a comparatively short period and to do so by introducing an otherwise irrational distinction between an application to a special magistrate and a proceeding in petty sessions or in a district court, it might have been expected to do so in clear and express language. But the better course is to avoid such speculations and to adhere to the meaning of the text the legislature has adopted. It does not matter that the text is formed by a process of amendment. The amendments are made textually and the result is a recension which should be read and construed as the formal expression of the legislative will. So read, I think the prima-facie meaning accords with the interpretation adopted in the Supreme Court and that there is nothing to displace it. I think that the decision of the Supreme Court as to the meaning of the statute is right. But I am not disposed to think that the time limit goes to the jurisdiction of the district court: see *Parisienne Basket Shoes Pty Ltd.* v. *Whyte* (1)). If so proceedings by prohibition are in my opinion misconceived. Be this as it may, this point was not taken in the Supreme Court or by counsel here. If it were taken here, it ought in my opinion only to lead to our rescinding special leave. I therefore think the appeal should be dismissed and with costs.

McTIERNAN J. I agree that this appeal should be dismissed. I have read the reasons of the Chief Justice and *Dixon* J. and I do not wish to add anything.

WILLIAMS J. I agree substantially with the reasons of the Chief Justice and my brother *Dixon* for holding that the action in the district court was brought out of time.

The essence of the matter appears to me to be that all that s. 92 (3) of the *Industrial Arbitration Act* 1940-1948 (N.S.W.)

(1) (1938) 59 C.L.R. 369.