[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

TAYLOR AND OTHERS; Ex parte ROACH.

H. C. OF A. 1951.

SYDNEY, *May* 2, 3, 10.

Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Industrial Arbitration (Cth.)—Stevedoring industry—Award—Application by members of union for variation—Strike of members—Hearing of application adjourned—Undertaking by union official—Attack on judge by official—Contempt of Court—Power of Arbitration Court to punish for contempt—Functions—Judicial—Arbitral—Prohibition by High Court—Commonwealth Conciliation and Arbitration Act 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *ss.* 17, 25, 59, 60, 62, 119—*Stevedoring Industry Act* 1949 (*No.* 39 *of* 1949), *ss.* 49, 50.

The Commonwealth Court of Conciliation and Arbitration, being constituted by statute a superior court of record, has, by the common law, power to punish summarily for contempt of its judicial authority. This power extends to the punishment of contempts directed to undermining the authority of a judge when exercising arbitral powers, if such contempts reflect upon him as an occupant of the office of a judge of the court.

R. v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union* (1951) 82 C.L.R. 208, distinguished.

MOTION.

After the Commonwealth Court of Conciliation and Arbitration had pronounced its decision on 12th October 1950, in respect to the basic wage, an application was made on behalf of the Waterside Workers' Federation of Australia by its Assistant General Secretary, Edward Charles Roach, and one Baker, to *Kirby* J., exercising jurisdiction under the *Stevedoring Industry Act* 1949, to vary the Waterside Workers' Award in accordance with that basic wage decision. There were several adjournments of the application, but on 14th December 1950, upon being informed that the members of the Mackay branch of the Federation were on strike, *Kirby* J. announced that he would continue the hearing and that he would

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not make known his decision while those members were on strike. At the continuation of the hearing on 15th December 1950, *Kirby* J. was informed that those members were still on strike, whereupon the judge refused to continue the hearing and adjourned the matter until 18th December 1950. Upon the resumption of the hearing on 18th December, Roach and Baker each gave an undertaking that the members of the Mackay branch of the Federation would resume work forthwith and would abide by the decision of and continue to work in accordance with the conditions to be determined by the local representative of the Stevedoring Industry Board. *Kirby* J. thereupon accepted the undertaking and delivered his decision.

On 4th January 1951, Roach was served with a summons to appear before *Kirby* J. on 11th January 1951 to answer a charge of contempt of court in connection with the undertaking, it being alleged in the summons that he, Roach, "gave the said undertaking in bad faith and with reckless indifference as to whether it would be carried out or not and failed to take proper steps to ensure that the said undertaking was carried out, and the undertaking was not in fact carried out".

On 5th January 1951 Roach caused to be circulated to all the branches and councillors of the Federation a circular, signed by him as Acting General Secretary, which, so far as material to this report, was as follows:—

"Dear Comrade,

MACKAY DISPUTE AND CONTEMPT PROCEEDINGS.

During the course of the final stages of the basic wage case, Kirby J. said he was ready to deliver judgment on Friday, the 15th December but because Mackay had a dispute and ships were held up, he refused to deliver judgment notwithstanding our protests that the Mackay dispute had no relation to the basic wage, and adjourned the case to 11 a.m. on Monday the 18th December . . . After discussing the dispute and the basic wage adjourned decision with the local Branch Secretary . . . on the phone on the week-end, the Branch, at a meeting on the Monday morning agreed to resume work under the conditions set out by the Chairman and I received a wire to this effect and gave a guarantee to the Court that the men would resume work in accordance with the direction of the Chairman, Mr. Griffith, and gave an undertaking that the men would accept the decision that Mr. Griffith made.

I knew nothing of the dispute that had broken out again other than what the employers and the Board reported. I proceeded

to the Court and asked for an adjournment to enable me to consult the Mackay Branch and the matter was adjourned to the following day.

Kirby, during the discussions, said he accepted the fact that I gave the assurances in good faith.

As a result of my discussions with the Mackay Branch, I then told the Court, on the following day, that it was unfortunate that I gave the undertaking in good faith; the Branch resumed work but the members apparently felt that there was merit in their dispute and I believed that the dispute contains some merit too. It was regrettable but that was the decision we were confronted with and the Judge became very abusive. Reference to the transcript of the 21st December will show the character of the proceedings on that day and as a result of the matter, Kirby decided to exclude Mackay from the basic wage increase of 4d. per hour.

It is to be noted that on the Wednesday he referred to a portion of my undertaking that if necessary I would fly to Mackay to have the undertaking carried out but on the Thursday I pointed out to him that the type of summons he had served (a subpoena to attend Court in person on 20th December 1950 and thence from day to day as required) precluded me from flying to Mackay without release from the Court itself.

A reference to . . . the transcript will give a fuller description of the discussion that ensued around this point and it will be seen that Kirby became quite rattled at the fact that his attempt at intimidation of myself as a Federation officer by the use of his security police and his bright idea of a summons backfired on him and as a consequence he became unusually insulting and abusive for a Judge of the Court.

However, he adjourned the Court after the exclusion of Mackay from the 4d. per hour discussion. The Court was not again reconstituted until the Crown Solicitor's office communicated with me by letter received on Tuesday morning, 2nd January, that the Crown was intervening to take action against the Port of Mackay.

It was no coincidence that proceedings were not commenced on Tuesday after the Crown Solicitor's communication that they were intervening, it was because our Federal Executive was being called together to decide positive policy in regard to Kirby's wage steal. The Court sittings were adjourned until the Wednesday to coincide with our Executive meeting in the hope, I believe, of disrupting these deliberations.

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To confirm this, a telephone message was received in this office that the case would commence at 10.30 in the morning and it said, also, the Crown wasn't quite ready and an adjournment would be sought until 2.30 in the afternoon.

However, at 10.30 Counsel for the Crown and the Stevedoring Board got up and spoke of the devastating effect of the strike on the economy of Queensland but Kirby said he appreciated that and thanked the Crown for its intervention, then said: '. . . important as that aspect is, it is overshadowed by the fact that a solemn undertaking was given in open court and on the faith and basis of that undertaking the Court adopted a certain course. It gave a reserved judgment which it otherwise would not have given and which affected over 20,000 wharf labourers throughout Australia. . . . I feel that the Commonwealth, having intervened, should give consideration to advising the Registrar of this Court as to whether or not proceedings against Mr. Roach should not be commenced, calling upon him to show cause why he should not be dealt with for contempt of Court in regard to that undertaking, in that it was either given in bad faith or that it was given with reckless indifference as to whether it would be carried out or not, or whether, having been given either in good faith or in bad faith, Mr. Roach has not taken proper steps to see that his undertaking and his words have been honoured. . . .' Doesn't this statement by Kirby show clearly that he had in mind action against me as a means of intimidation and an endeavour to disrupt the holding of our Federal Executive meeting? Doesn't it show, also, an attempt to intimidate members of the Federal Executive from making important national decisions that are required by members in such a situation as this? The reaction throughout our Federation to the basic wage decision is such that discontent is seething in such a way on the waterfront that members are demanding the full pound as determined by the Full Bench and a reversion to the 30-hour divisor. They have bombarded the Court from all directions with telegrams of protest and threatened action.

The Court and the Government are extremely concerned and apprehensive at the possible way in which this hostility of members is going to find expression in our industry. They are very much concerned that a Federal Executive was called specifically for this purpose and they are therefore making Mackay a national issue and the proceedings against me for contempt of Court are diversionary issues in the hope that they can select the ground to fight the Federation on rather than the Federation selecting the ground

around the 32 hour divisor and the wages steal to fight the Government and the Court.

The decisions of the Federal Executive have already been conveyed to Branches and it will be agreed from these decisions that we have not allowed the attempted diversionary moves of the Court and the attempted intimidation to prevent us from commencing the campaign around the real issues."

On 13th January 1951, there was published by the Federation a newspaper called "The Maritime Worker", in which appeared, *inter alia*, the contents of the above-mentioned circular at length; a cartoon portraying a person wearing wig, bib and robe as a judge, playing what is known as "the thimble and pea trick", with the caption "Sleight of hand and the £1 Basic Wage Rise"; a reference to "the Kirby decision" and "a scurvy deal"; "Kirby's Confidence Trick"; "Justice Kirby in making his recent decision robbing our members of £13,000 a week to which they were justly entitled in accordance with the Full Bench Arbitration Court decision, and increasing the divisor, is firing the first shot in a campaign against the militant trade unions in an endeavour to carry out the policy enunciated by Menzies at his recent infamous Adelaide speech when he said that we will have to make more sacrifices and that two workers, in future, will have to do the work of three."

On 11th January 1951 the summons referred to above was adjourned to 30th January 1951, on which date it was stood over to a date to be fixed.

On 14th February 1951 two summonses were issued out of the Arbitration Court on the application of the Industrial Registrar, James Edward Taylor, calling upon Roach to answer on 28th February 1951 charges of contempt of court arising out of the said circular and the said issue of "The Maritime Worker" newspaper. By the summons relating to the circular Roach was charged with committing contempt of the Arbitration Court in that between 3rd and 13th January 1951 he caused to be published a circular which was intended and calculated to embarrass that Court in arriving at its decisions, to detract from the authority and influence of its judicial decisions, to lower the authority of the Court as a whole and that of its Judges, to impair the confidence of the people in the Court's judgments, and to cause misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office of the Court in matters litigated before it. By the summons relating to "The Maritime Worker" newspaper issued on 13th

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January 1951, Roach was charged with causing to be published in that newspaper "Certain words, figures, captions and a certain cartoon which were intended and calculated to embarrass the Court" as set out in the summons mentioned above.

After considering the evidence tendered by the Registrar, and the evidence given by and on behalf of Roach the Full Court of the Commonwealth Court of Conciliation and Arbitration, on 1st March 1951, found Roach guilty of contempt of court on each charge and ordered that he serve a term of twelve months' imprisonment in respect of each charge, the sentences to be concurrent.

An application made on behalf of Roach to *Williams* J. for an order nisi for a writ of prohibition or of certiorari directed to the Registrar and *Foster*, Acting Chief Judge and *Dunphy* and *Wright* JJ. of the Commonwealth Court of Conciliation and Arbitration to show cause why the said convictions and sentences should not be quashed, was refused.

From that decision an appeal was made to the Full Court of the High Court pursuant to s. 1, r. 7 of the Appeal Rules.

There was not any appearance by or on behalf of the respondents other than the respondent Registrar.

S. Isaacs K.C. (with him *F. W. Paterson*), for the prosecutor. The Commonwealth Court of Conciliation and Arbitration has no power to imprison as for contempt in respect of publications scandalizing a judge of that Court in respect of his exercise of arbitral functions under the *Stevedoring Industry Act* 1949. In the exercise of the powers conferred by that Act, the Judge was exercising the arbitral functions of the Court and not judicial functions; he was not exercising mixed functions. The power of the Arbitration Court, which is challenged by the prosecutor, is rested on s. 17 (3) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. That sub-section constitutes the Court a superior court of record. The Court possesses only common law power of imprisonment for contempt in respect of its judicial functions and not in respect of its arbitral functions. The Court is not a court in the judicial sense when it exercises arbitral functions under the Act. Only superior courts exercising judicial functions have the common law power of punishing for contempt of that Court committed out of court. There cannot be a contempt of court unless the tribunal that is offended is a court in the judicial sense. The distinction between arbitral functions and the judicial functions of the Court is shown in *Waterside Workers' Federation of Australia*

v. *J. W. Alexander Ltd.* (1); *Jacka* v. *Lewis* (2); *Barrett* v. *Opitz* (3) and *Consolidated Press Ltd.* v. *Australian Journalists' Association* (4). The functions of the Court are clear and separate and are divisible into the two groups of judicial and arbitral functions; the arbitral function being the earlier acquired function. Merely because the Court has been constituted a court in the judicial sense for the purpose of complying with s. 72 of the Constitution does not convert the arbitral functions of the Court into judicial functions. There cannot be a contempt of court unless the tribunal itself is a tribunal exercising judicial functions. If a tribunal has both functions, then it is only in respect of those functions which could properly be the subject of contempt proceedings at common law, to which are attributed the common law powers of punishment for contempt by the establishment of the Court as a court of record. The statement in s. 17 (3) that the Court shall be a superior court of record is not conclusive. Where the Court is not exercising the judicial function the common law power of imprisonment for contempt, which is a characteristic of the superior court of record, does not apply. Sub-section (3) of s. 17 has already been cut down by the decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (5) and in *R.* v. *Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union* (6). There cannot be a contempt of court unless the body said to be a court is a court in the judicial sense; that it is incidental to the exercise of judicial power that contempt of court arises (*Kielley* v. *Carson* (7)). If a body has both judicial and non-judicial functions and it is called by statute a court of record, the power of committing for contempt attaches only to that function which exercises judicial power (*Ex parte Brown* (8); *R.* v. *Almon* (9); *R.* v. *Nicholls* (10)). The last-mentioned case shows that merely because a judge of the Court has another function to perform in relation to some other Act, and is attacked in relation to the performance of his duties under that Act does not invoke the power of the court of which he is a member to attach for contempt of that court: see also *Oswald* on *Contempt of Court*, 3rd ed. (1910),

(1) (1918) 25 C.L.R. 434, at p. 464.
(2) (1944) 68 C.L.R. 455, at p. 460.
(3) (1945) 70 C.L.R. 141, at p. 164.
(4) (1947) 73 C.L.R. 549, at p. 564.
(5) (1949) 78 C.L.R. 389, at pp. 398, 399.
(6) (1951) 82 C.L.R. 208, at p. 241.
(7) (1842) 4 Moo. P.C. 63, at p. 90 [13 E.R. 225, at p. 235].
(8) (1864) 5 B. & S. 280, at pp. 281-286, 293-297 [122 E.R. 835, at pp. 836, 837, 840, 841].
(9) (1765) Wilm. 243 [97 E.R. 94, at pp. 98, 99].
(10) (1911) 12 C.L.R. 280, at pp. 284, 286.

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pp. 1-3. The emphasis is always upon the judicial functions of the Court (*Ex parte Goldsbrough Mort & Co. Ltd.*; *Re Magrath* (1)). Very frequently, in considering awards and variations of awards, legal problems do arise and have to be determined, but just because they arise incidentally or collaterally to the exercise by the Court of the jurisdiction, does not take away the attribute of arbitral function from the function which the judge is performing. The matter is one that goes to the jurisdiction of the Court. It depends entirely upon the question as to whether or not the proper construction of s. 17 (3) gives the power to the Arbitration Court to punish for contempt in respect of matters relating to its arbitral functions.

S. G. Webb K.C. (with him *H. Snelling*), for the respondent Taylor. In the article complained of the allegation was to the effect that the judicial processes of the Court were being used by the Government and the Court in concert to defeat the proper arbitration claims made on behalf of members of the Waterside Workers' Federation of Australia. It is an allegation that the Court is using its judicial functions, namely, the issuing of a summons for contempt. That has nothing to do with arbitral proceedings. It does not matter whether a court is sitting arbitrally, judicially, or not at all, if there is such criticism of the court which is intended to, or even if not intended, calculated to so disparage the court or its judges so as to make the public lose confidence in the court and lessen the authority of the court, that is a contempt (*R.* v. *Dunbabin*; *Ex parte Williams* (2); *R.* v. *Davies* (3); *Ambard* v. *Attorney-General for Trinidad and Tobago* (4)). That question was really never decided in *R.* v. *Nicholls* (5). The whole article only allows one inference and that is a charge of dishonesty against the Judge. The cases cited on behalf of the prosecutor are distinguishable. In *Kielley* v. *Carson* (6) the tribunal was not a court; it was a House of Parliament which did not have any judicial functions and it committed for contempt relying on the fact that the House of Commons had that power. In *Ex parte Brown* (7) the tribunal was the House of Keys, which sometimes sat as a court and sometimes as a legislative body. The order under s. 29 (b) (c) must be really judicial (*R.* v. *Metal Trades*

(1) (1931) 32 S.R. (N.S.W.) 338, at pp. 340, 341; 49 W.N. 137.
(2) (1935) 53 C.L.R. 434, at p. 442.
(3) (1906) 1 K.B. 32, at p. 40.
(4) (1936) A.C. 322, at p. 335.
(5) (1911) 12 C.L.R. 280.
(6) (1842) 4 Moo. P.C. 63 [13 E.R. 225].
(7) (1864) 5 B. & S. 280 [122 E.R. 835].

Employees' Association; *Ex parte Amalgamated Engineering Union* (1)). There is nothing in the judgment in *R.* v. *Nicholls* (2) which indicates that the Court had considered whether there could be contempt of the Arbitration Court sitting arbitrally. The matter was a *lis pendens*; it was a proceeding before a court sitting judicially, and it was in respect of that that the contempt lies. There can be a contempt anywhere if it sufficiently disparages the law (*Re a Special Reference from the Bahama Islands* (3)). A disparagement of a judge, although not related to any particular *lis pendens* or to a judicial proceeding, is capable of being a contempt (*R.* v. *Brett* (4)). When the Arbitration Court or any judge of that Court is exercising arbitral functions there can be contempt (*Taylor* v. *Metal Trades Employers' Association* (5)). By necessary implication, upon an examination of the whole Act, with particular regard to s. 17 and s. 111, the Arbitration Court was made a superior court of record both in respect of its arbitral functions and its judicial functions. If there is a contempt of the Arbitration Court sitting arbitrally, then the Act, by necessary implication, confers upon the Court sitting judicially power to punish for contempt.

S. Isaacs K.C., in reply. In *R.* v. *Nicholls* (6) a distinction was clearly drawn between the two functions of a judge exercising judicial power in this Court and exercising functions in another sphere. That case deals with the situation of two functions being exercised separately under different Acts. It makes no difference that the judge exercises two different functions under the one statute. The clearest statement appears in *Kielley* v. *Carson* (7). Contempt of Court is only contempt of the King's judges in the administration of that power which has been delegated by the King to the judges, namely, the judicial power. Where there is found in an Act a body possessing the two powers, judicial and arbitral, and there also be found superimposed or added to that a power which is only to apply to the one power, then it should be construed as applying to that one power. The alleged contempt must be in some way connected with the judge in his judicial office.

[DIXON J. referred to *Miller* v. *Knox* (8).]

That is not different from what was said in *Ex parte Goldsbrough Mort & Co. Ltd.*; *Re Magrath* (9). The matter is one of juris-

(1) (1951) 82 C.L.R. 208.
(2) (1911) 12 C.L.R. 280.
(3) (1893) A.C. 138, at pp. 148, 149.
(4) (1950) V.L.R. 226.
(5) (1945) Print No. 1A221, miscellaneous No. 35/48.
(6) (1911) 12 C.L.R., at p. 286.
(7) (1842) 4 Moo. P.C., at pp. 89-91 [13 E.R., at p. 235].
(8) (1838) 4 Bing. (N.C.) 574, at p. 593 [132 E.R. 910, at p. 916].
(9) (1931) 32 S.R. (N.S.W.) 338, at pp. 340, 341; 49 W.N. 137.

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diction because the Arbitration Court cannot give itself any greater power by a misconstruction of s. 17 (3) than it possesses by a proper construction of that sub-section.

Cur. adv. vult.

May 10.

The following written judgments were delivered:—

DIXON, WEBB, FULLAGAR and KITTO JJ. This is an application to the Full Court pursuant to rule 7 of s. 1 of the Appeal Rules for an order for a writ of prohibition directed against the judges of the Commonwealth Court of Conciliation and Arbitration and the Industrial Registrar. An application for an order nisi was refused by *Williams* J. The application to the Full Court was made upon notice and it is desired by the respondents to the motion that the motion to the Full Court should be treated, as we understand it, as an application for a rule absolute in the first instance.

The tenor of the writ sought is to prohibit the Arbitration Court from proceeding further upon two orders made on 1st March 1951. The orders found the prosecutor guilty of two several contempts of the Arbitration Court and sentenced him to terms of twelve months' imprisonment concurrent. Each order was made upon a summons calling upon him to answer a charge that he had been guilty of contempt, in the one case, in that between 3rd and 13th January 1951 he caused to be published a circular and, in the other case, in that on 13th January 1951 he caused to be published matter in a newspaper named "The Maritime Worker", which circular and matter were intended and calculated to embarrass the Arbitration Court in arriving at its decisions, to detract from the authority and influence of its judicial decisions, to lower the authority of the Court as a whole and that of its judges, to impair the confidence of the people in the Court's judgments, and to cause misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office of the Court in matters litigated before it. The circular contained an attack upon one of the judges of the Arbitration Court who had been sitting in the exercise of the jurisdiction conferred upon the Court by the *Stevedoring Industry Act* 1949, Part V. It appears that the learned judge had had before him an application to vary the award which concerned the Waterside Workers' Federation in consequence of the decision pronounced on 12th October 1950 by the Full Court of the Arbitration Court with reference to the basic wage. His Honour, on being informed that a particular branch of the union was on strike, refused to continue the hearing of the application and adjourned it until 18th December 1950. On that date the

prosecutor, who was the assistant general secretary of the union, gave an undertaking that the branch would resume work forthwith and abide by the decision of, and continue to work in accordance with the conditions to be determined by, the local representative of the Stevedoring Industry Board. The undertaking was accepted and the learned judge gave his decision. On 4th January 1951 a summons was served upon the prosecutor requiring him to appear on 11th January before the learned judge to answer a charge of contempt in relation to the undertaking. The prosecutor caused the circular to be issued on 5th January. It is unnecessary to say more concerning the circular than that it contained an unrestrained attack upon the judge for the decision he had delivered on 18th December and for the course he had taken. It imputed an intention to intimidate the prosecutor and the executive of his union as well as other improper motives and it concluded with a reference to the proceedings against the prosecutor for contempt, which it described as a diversionary issue. The article in the newspaper of 13th January repeated the circular and added other matter to it.

The writ of prohibition is sought upon the ground that the jurisdiction of the Arbitration Court does not extend to punishing as contempts attacks made upon the members of the Court in respect of the exercise of their arbitral powers as distinguished from their judicial powers. The *Stevedoring Industry Act* 1949, Part V, confers upon the Arbitration Court, as such, power to prevent or settle by conciliation and arbitration industrial disputes extending beyond the limits of any one State in connection with stevedoring operations. It also confers upon the Arbitration Court power to regulate industrial matters in connection with stevedoring operations in so far as the operations relate to trade and commerce with other countries and among the States or are performed in a Territory. The powers given by Part V are to be exercised by a single judge. The Court is not limited to the matters specified in s. 25 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. Sections 49 and 50 of the *Stevedoring Industry Act* made applicable provisions of the *Commonwealth Conciliation and Arbitration Act*.

Section 17 (3) of that Act provides that the Commonwealth Court of Conciliation and Arbitration shall be a superior court of record. It is in virtue of its status as a superior court of record that the Arbitration Court has exercised a summary power to punish for contempt. The question whether the result of s. 17 was that the Court possessed such a jurisdiction was considered

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in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union* (1), and although the decision of the majority of this Court was that the special provisions contained in ss. 59, 60, 62 and 119 operated as special enactments dealing with the particular question of the enforcement of orders and awards and so excluded the existence of a power to punish for contempt as a concurrent or alternative means of enforcing orders, it was not denied by any of the judges of this Court that, apart from the implications of such particular provisions, a general power of punishing contempt ensued as a consequence of the possession by the Arbitration Court of the status of a superior court of record. The question is not whether it is part of the meaning of s. 17 to invest the Arbitration Court with a summary jurisdiction to punish for contempt. What the legislature meant to do by s. 17 (3) was simply to establish the Court as a superior court of record. In other words, it is not a question of legislative intention but of the legal consequences of giving a court such a status. The common law gives to a superior court of record power to punish summarily for contempts of its judicial authority. Contempt of court, other than what is called contempt in procedure, is a misdemeanour at common law and, according to ancient authority, it is an offence punishable on indictment: *Hawkins, Pleas of the Crown*, 8th ed. (1824), Book 1, Ch. 6, s. 8, vol. I., p. 63; Book 2, Ch. 25, s. 4, vol. II., p. 289: *Skipworth's Case* (2). But the offence may be punished summarily by a superior court of record, for it is considered necessary to arm such a court with a prompt and summary power of maintaining its authority. "A Court of Justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community": *Oswald* on *Contempt*, 2nd ed. (1895), p. 11. But the offence by its very nature is concerned with judicial power. "It is a summary remedy for obstructions in the course of justice and causing the process of the law to be obeyed": per *Parke* B., *Miller* v. *Knox* (3). By definition contempt is confined as an offence to courses of conduct prejudicial to the judicial power and does not extend to impairments of other forms of authority. Obstructions to the exercise of executive power, administrative power, legislative power or other governmental power are not within the conception of the offence of contempt of court. This distinction was made

(1) (1951) 82 C.L.R. 208.
(2) (1873) L.R. 9 Q.B. 230, at p. 233.
(3) (1838) 4 Bing. (N.C.) 574, at p. 614 [132 E.R. 910, at p. 925].

in *Ex parte Brown* (1), between the two capacities in which the House of Keys of the Isle of Man sat, legislative and judicial, and it was held that reflections upon it in the former capacity were not punishable as contempts. Accordingly it is contended for the prosecutor that the publications in respect of which he has been convicted for contempt were not within the conception of that offence because they related entirely to the arbitral or industrial functions of the Court and to the manner of the exercise of such functions by the learned judge upon whom the publication reflected.

The form of contempt which is in question in the present case is that often called scandalizing the court. In the Practical Register in Chancery quoted by *Patteson* J. in *Miller* v. *Knox* (2) it is said: "A contempt is a disobedience to the Court or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court. Sometimes it arises by one or more; their opposing or disturbing the execution or service of the process of the Court, or using force to the party that serves it; sometimes by using words importing scorn, reproach or diminution of the Court, its process, orders, officers, or ministers, upon executing or serving such process or orders."

The publications in the present case are directed to undermining the authority of the Arbitration Court, and though they arise out of the exercise by a member of the Court of the industrial or arbitral powers of the Court, they reflect upon him as an occupant of the office of judge of the Court and "import scorn, reproach or diminution of the Court". The legislation establishes a court to which jurisdiction is given forming part of the judicial power of the Commonwealth and to which an authority of an entirely different character is given falling outside the judicial power of the Commonwealth and derived under an exercise of the legislative power conferred by s. 51 (xxxv.) of the Constitution. There is thus combined a double power in one office. It is evident that the distinction upon which the prosecutor's application for a writ of prohibition depends is one which it may be difficult to maintain when imputations are made upon the conduct or character of a judge occupying an office in which these diverse functions are combined and the tendency of the imputations is to impair confidence in the administration of his office. In the present case,

(1) (1864) 5 B. & S. 280 [122 E.R. 835].

(2) (1838) 4 Bing. (N.C.), at pp. 593, 594 [132 E.R., at p. 918].

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although the occasion of the attack arises out of the exercise by the judge of his industrial functions, the attack is associated with an intended exercise by him of the jurisdiction forming part of the judicial power of the Commonwealth, namely, the jurisdiction to entertain an application to commit for contempt in breach of the undertaking. Moreover, the imputations made upon the learned judge go to his qualifications for exercising any part of the functions attached to his office. The attack is violent and makes imputations upon him calculated to undermine confidence as much in the exercise of the judicial power belonging to his office as in the industrial or arbitral power and to weaken the authority of the Court in both aspects. Conceding, therefore, the validity of the distinction which it is sought to make on behalf of the prosecutor between what is a contempt of the judicial power and what concerns other kinds of power, the case is nevertheless one in which it was competent for the Arbitration Court to find in the publications a contempt against the administration of justice, that is to say, the exercise of the judicial power of the Arbitration Court. We are dealing here with an application for a writ of prohibition, and the question whether the writ should go or not must depend upon the existence of a jurisdiction in the Arbitration Court to make the orders complained of.

In our opinion the Court of Conciliation and Arbitration had jurisdiction to make the orders which it is sought to prohibit and the motion is therefore refused.

McTIERNAN J. The applicant claims a writ of prohibition in respect of two orders of the Commonwealth Court of Conciliation and Arbitration. By each of these orders the applicant is found guilty of a contempt of that Court and sentenced to a term of twelve months' imprisonment. The sentences are made concurrent. The orders were made on 1st March 1951 and the applicant is detained in gaol under the authority of the two orders.

The ground of the present application is that each order is beyond the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. The summons upon which each order was made professes to charge the applicant with contempt of the Commonwealth Court of Conciliation and Arbitration and each order professes to find him guilty of that offence. The ground upon which the applicant challenges the jurisdiction of the Court is that the matters which the Court found to be contempt of the Court are not within the legal definition of the offence. The respondents

to the motion joined issue with the applicant upon that ground and were content that the decision of the question raised by it should determine the result of this application. They raise no point whether the ground relied upon by the applicant is a good ground for prohibition.

What the Court found to be contempt of court were two publications, for which the applicant was responsible, of statements impugning the integrity of a judge of the Commonwealth Court of Conciliation and Arbitration and accusing him of improper conduct in connection with a matter within his jurisdiction as a judge of the Court. The jurisdiction of the judge is a combination of judicial and arbitral powers. It is urged for the applicant that the matter fell within his arbitral powers and this is a sufficient consideration upon which to deny that the publications were contempts of court. The view that the judge was dealing with a matter entirely within his arbitral powers may need some qualification before it is accepted. But the view may be accepted for the purpose of considering the applicant's submission which is that the publications were not contempts of the Commonwealth Conciliation and Arbitration Court. The submission invites this Court to consider only the occasion in reference to which the publications were made, and, if it was not an occasion on which the judge was exercising judicial powers, to hold that the publications were not contempts of court, notwithstanding their meaning, intent and tendency, matters which were not contested by the applicant. The published statements make no nice distinctions between judicial and arbitral powers. Whatever were the particular powers that the judge was exercising on the occasions to which the statements apply, it is important to notice that he was exercising jurisdiction vested in him as a judge of the Court. An attack impugning the integrity of his conduct in connection with a matter which was to be the subject of an administrative order could not fail to reflect in some way upon the Court. The attack made upon the judge in these publications is so gross and outrageous that the Commonwealth Court of Conciliation and Arbitration could not possibly be in error in holding that its tendency was to destroy confidence in the Court, assails its authority, and bring scorn on a judge of the Court. This conduct is contempt of court. In these proceedings it is sufficient to say that the Commonwealth Court of Conciliation and Arbitration could reasonably reach that conclusion. By s. 17 (3) the Commonwealth Court of Conciliation and Arbitration is made a Superior Court of Record. The consequence of this

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provision is that it has jurisdiction to punish the applicant for the contempt: *Metal Trades Case* (1).

The application should be refused.

Motion refused with costs.

Solicitors for the prosecutor, *C. Jollie Smith & Co.*

Solicitors for the respondent Taylor, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1951) 82 C.L.R. 208.