[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

FOSTER AND OTHERS;

EX PARTE THE COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LIMITED.

H. C. OF A. 1951–1952.

1951.
SYDNEY,
Dec. 10, 11.

1952.
MELBOURNE,
March 11.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ.

Industrial Arbitration (Cth.)—Conciliation and arbitration—Industrial dispute—Relation of employer and employee—Industrial and life assurance policies—Premiums—Canvassers and collectors—Agreement—Employees or independent contractors—Principal and agent—Master and servant—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*)—*Conciliation and Arbitration Act* 1904-1951 (*No.* 13 *of* 1904—*No.* 18 *of* 1951), *ss.* 4, 32 (2), 39 (*b*).

An award of the Arbitration Court made in respect of persons engaged by an industrial and life assurance company to canvass and collect premiums on its face was restricted to "employees" of that company. The company applied for a prohibition on the ground that the award was made without jurisdiction because by virtue of an agreement between the parties the persons so engaged were independent contractors or "agents" and not "employees", and that therefore the supposed dispute in respect of which it was made was not an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1951, inasmuch as it was not a dispute in relation to employment or as to any industrial matter pertaining to the relations of employers and employees and that it was not an industrial dispute within s. 51 (xxxv.) of the Constitution.

Held, (1) that the evidence failed to show that there was not any industrial dispute inasmuch as it failed to exclude to the satisfaction of the Court the possibility that the real relation between some or all of the agents and the prosecutor company in their actual work, week in week out, was not in fact that of employer and employee despite the provisions of the agreement.

(2) In making the award, which applied to every adult "employee" of the company who was a member of the respondent organization employed or to

be employed at the work mentioned in the award, the Arbitration Court had not exceeded or presumed to exceed its jurisdiction.

Per *Dixon*, *Fullagar* and *Kitto* JJ.: The kind of relationship to which the definition of "industrial matters" in s. 4 of the Act refers by the expressions "employer" and "employee" is in substance the relation called at common law master and servant.

PROHIBITION.

Upon the application of the Commonwealth Life (Amalgamated) Assurances Ltd., *Dixon* J., on 15th June 1951, granted an order nisi for a writ of prohibition directed to *Foster*, *Kirby* and *Dunphy* JJ., judges of the Commonwealth Court of Conciliation and Arbitration, to restrain further proceedings upon the order or award pronounced or given on 5th June 1951, wherein the Industrial Life Assurance Agents' Union was the claimant, and the prosecutor, the applicant company, was respondent, purporting to order or prescribe in relation to the prosecutor basic wage rates on the ground that such order or award was made without jurisdiction because the supposed dispute in respect of which it was made was not an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1950, nor (by amendment) within s. 51 (xxxv.) of the Constitution inasmuch as it was not a dispute in relation to employment or as to any industrial matter pertaining to the relations of employers and employees.

The industrial officer of the prosecutor company said, by affidavit, that that company in the course of its business of life assurance appointed agents. The standard form of agreement which the company executed with its agents provided that it was agreed that the company appointed the agent its agent and the agent accepted the agency on terms which provided a full and detailed account of the duties of the agent. The remuneration of the agent was fixed by schedules on the basis of percentage commissions. The agent was not subjected to the will of the company as to the manner in which he should perform and carry out the duties specified in the agreement. By cl. 27 of the agreement it was mutually agreed and declared: (a) that the agreement contained the whole of the terms of the agency existing between the company and the agent, and it was intended thereby that the relationship between the company and the agent would be strictly that of principal and agent and not in any way whatsoever that of employer and employee; (b) that the agent would be under no obligation to perform and that the company should have no right to require the performance of the agent of any duties other than those thereby

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contracted and agreed to be performed; and (c) that no communication, whether verbal or in writing, given by the company or any officer or officers of the company, to the agent which was in any way inconsistent with, or which either directly or indirectly in any way varied, altered or added to the terms of the agreement or any of them should be binding on the agent, and any such communication if given might be regarded by the agent merely as in the nature of guidance and advice which he should be under no obligation to accept.

The industrial officer further deposed as follows:—In September 1942 Chief Judge *Piper*, of the Commonwealth Court of Conciliation and Arbitration, made an award in respect of certain alleged employees of insurance companies and reserved leave to the company to make any further application it might deem desirable. In March 1948 a log of claims was served on the company by the Industrial Life Assurance Agents' Union (an organization of employees registered under the *Conciliation and Arbitration Act* 1904-1950). After the service of that log of claims a summons was served on the company and upon the hearing thereof Mr. Conciliation Commissioner Wallis found that a dispute existed between the company and that union. On 2nd November 1948 the company obtained an order nisi from *Williams* J. for a writ of prohibition directed to the union and to the commissioner on the following grounds:—(a) that Mr. Wallis as such commissioner had not ascertained that the prosecutor was a party to the dispute before him; and/or (b) that the prosecutor was not a party to the dispute before Mr. Wallis as such commissioner and if Mr. Wallis as such commissioner had decided that the prosecutor was such a party then the decision was wrong and the commissioner was without jurisdiction. On the return of the order nisi before the Full Court of the High Court the hearing was adjourned *sine die* until after the hearing of a similar case by Associated Dominions Assurance Society Pty. Ltd. against Mr. Commissioner Wallis and the Industrial Life Assurance Agents' Union. On 9th February 1950 *Webb* J. made absolute the order nisi obtained in the case of the Associated Dominions Assurance Society Pty. Ltd. against Mr. Commissioner Wallis and the union. His Honour found that the relationship of master and servant existed between that society and its agents. Upon an appeal by that society the Full Court of the High Court, on 10th August 1950, varied the order appealed from by striking out therefrom the words " This Court did find that the relation of master and servant did exist between the prosecutor and its agents " and in all other respects dismissed the appeal. The

union, on 15th December 1950, served the company with a log of claims, and a summons was later served on the company. The log of claims was in respect of all adult employees wholly or mainly employed or engaged by the company in canvassing for industrial and ordinary life assurance policies and/or collecting the premiums payable by or on behalf of insured persons. At the hearing of the summons, which took place on 5th June 1951, before the Commonwealth Court of Conciliation and Arbitration, consisting of *Foster*, *Kirby* and *Dunphy* JJ., the company's industrial officer informed the court that the company's position was similar to what it was when the order nisi for a writ of prohibition was granted by *Williams* J., namely, that the company was not a party to the dispute because the relationship of master and servant did not exist between the company and its agents. Copies of the orders made in the Associated Dominions Assurance Society's case were handed to the members of the court. An application by the industrial officer for an adjournment of the proceedings to enable him to call evidence on the question as to whether or not a dispute existed between the company and the union was refused by the court, and after hearing some evidence called by the union the court made an order in the following terms: "In this matter the court proposes to make the order asked for. It dismisses the application made on behalf of the respondents that the matter should be further delayed by an adjournment for the purpose of considering matters which should have been ready and available to the court at this moment. On the facts before the court presented by the affidavit and the oral evidence the court is satisfied that a dispute exists and the relationship, in conformity with the judgment of the High Court, of employer and employee, master and servant exists in this case and justifies exercising jurisdiction by this case. In that case we shall make the standard order to be settled by the registrar, with the right reserved to the parties to refer the matter to this court if there is any difficulty about that settlement."

The scope of the award and the parties bound thereby were as indicated above, whether the said adult employees were members of the union or not. The award provided that it was to operate as from 15th December 1950 and should continue in force until 15th December 1951.

Upon the return of the order nisi the Federal president of the respondent union and honorary secretary of the New South Wales branch thereof, deposed, by affidavit, that he was an industrial life assurance agent of another society and had followed that

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occupation for fifteen years, he was familiar with the conditions under which agents of the prosecutor carried out their duties. He deposed that in the performance of their duties those agents were under the supervision and control of the executive officers and other supervising personnel of the prosecutor, and that they were obliged to perform and observe the directions and instructions of the executive officers and other supervisory personnel of the prosecutor in regard to the performance of their duties.

Dr. *F. Louat*, for the prosecutor. The governing and general definition of "industrial matters" in s. 4 of the *Conciliation and Arbitration Act* 1904-1951, is a matter pertaining to the relations of employers and employees. If the relationship of employer and employee does not exist between the parties to a dispute then that dispute is beyond the cognizance of the Arbitration Court. It is clear from what actually took place before the Court and from the fact that the prosecutor was mentioned by name in the award, that the Court intended to bind all agents. The union in this case, being the Industrial Life Assurance Agents' Union, any application it can have can only be to the agents who work under contract with the prosecutor company. The affidavit sworn to-day by the Federal president of the union is inadmissible on the ground that it is merely "hearsay". The mere fact that the deponent is designated as the leading office bearer of the union does not make him an expert, particularly an expert on the private contractual relations between an individual and a corporation, he not being one of the individuals or a member of the corporation. The award purports to bind the prosecutor in respect of one or more life assurance agents, but the prosecutor only has agents who work under the contract. For that reason prohibition should go.

R. C. Teece K.C. (with him *J. R. Nolan*), for the respondent Industrial Life Assurance Agents Union. The question of whether the prosecutor's "agents" are or are not employees can be tested upon proceedings taken against it for breach of the award. The matter is quite within jurisdiction. Even though the prosecutor may not presently have any persons who are, in the strict sense, employed, it may at any immediate or later subsequent time have some such persons, or engage agents, and if so the award would bind them. The award relates to the employment of adult employees of the prosecutor company whether members of the respondent union or not. It is a good award even though no member of the respondent union is an employee.

[DIXON J. referred to *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1) .]

There is nothing to prohibit. On its face the award is perfectly good, therefore it is no answer to say that at present there are no employees. There might be an employee in the very near future.

Dr. *F. Louat.* It is evident from the judgment of the court below that all that remained to be done by the registrar was something ministerial. It is unmistakably clear that the court intended to bind the life assurance agents at present in a contractual relation with the prosecutor. The facts of this case with regard to the log of claims and the nature of the demand, and therefore the limits of the jurisdiction of the Federal Arbitration Court, are the same as they were in *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1). The prosecutor had and has no employees of the class which is concerned with this award, and it follows irresistibly that there never was a dispute. It does not follow, merely because there can be and is a union organization which is able to include persons who are really employees and who are also life assurance agents, that they are the same type of people as the people who are in a contractual relation with the prosecutor. When one looks at the award and construes it narrowly it applies only to people who are real employees. The prosecutor has a *locus standi* to complain on the ground that it is directed to the prosecutor because it is evident that the Arbitration Court intended to make the award binding on the prosecutor. Until they are otherwise instructed by some court the agents themselves will consider that they are entitled to the benefits of the award. That will introduce grave dislocation into the prosecutor's business. The terms of the agreement on which the prosecutor's agents are engaged show that there is not any question of employment. There was not anybody in the prosecutor's employment at all who could possibly be within the field covered by the dispute or the award. The provision in the award that it shall come into operation on 15th December 1950 and shall continue in force until 15th December 1951 is not in conformity with s. 48 (2) of the Act. It is not a complete award, but is something drafted on to the 1942 award. The Arbitration Court had no jurisdiction to make a fresh award in this matter. The only way in which an award could be made would be by purporting to alter something. This award does not purport to alter anything. The 1948 award never applied to

(1) (1935) 54 C.L.R. 387.

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the prosecutor. In the absence of a dispute between employer and employees the court had no power under s. 48 (3) of the Act to make the award retrospective to 15th December 1950. The real relationship appears from the agreement.

R. C. Teece K.C. The right of the prosecutor in regard to the prohibition sought depends on facts which cannot be determined by affidavits. The test of master and servant is whether a person who is engaged has got to do as he is told and has to carry out his duties in the way directed and commanded by his alleged employer. The real purpose of the affidavit by the Federal president is to reveal to the Court that the agreement referred to by the prosecutor is a sham, and that really the so-called agents are employees and their work is done under such conditions as to bring them within the rule of law. The prosecutor should supply the facts so that the oral evidence can be heard by a Justice of this Court. The fact that there was an award in 1942 is the strongest prima-facie evidence that at that date the prosecutor employed persons in the business of industrial agents, persons who were employees, and that being so, that it may have employed or may employ them again, even though at any particular time they may not be so employed. The prosecutor is seeking to prohibit the order which the judges of the Arbitration Court have in fact made. Whether or not an " agent " is an employee within the scope of the award can be determined in proceedings for breach of the award. There is not any evidence before the Court that the prosecutor employs in its business persons other than " agents ", or that none of them is a member of the respondent union. Section 32 (2) committed to the Arbitration Court the jurisdiction to inquire whether a particular matter, which is a condition of its power to act, exists, therefore this Court will not interfere with the finding of the Arbitration Court, that is, it will not substitute its own opinion for the opinion of that court, even though it thinks that that court was wrong; if the finding is a valid one justified by the evidence before it, it will not issue a prohibition (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation (No. 1)* (1); *R.* v. *Blakeley*; *Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (2)).

[McTIERNAN J. referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.* (3).]

(1) (1930) 42 C.L.R. 527.
(2) (1950) 82 C.L.R. 54, at pp. 92, 97.
(3) (1949) 78 C.L.R. 389.

The prosecutor had every opportunity to go into evidence in the court below. The agency agreement could have been, but was not put before that court. The prosecutor did not offer any evidence whatever. Although the jurisdiction of the Court to grant a prohibition may not be ousted, a writ of prohibition is discretionary and the Court will not grant it where the prosecutor has been guilty of such conduct (*R.* v. *Murray and Cormie* (1), *Broad* v. *Perkins* (2)).

W. J. V. Windeyer K.C. (with him *R. Else-Mitchell*), for the Commonwealth, intervening by leave. By reason of s. 32 (2) of the Act prohibition in this case cannot go. It is not within this Court's province or power to make an order remitting the matter to a justice of the Court for the purpose of taking evidence as suggested on behalf of the respondent union. Section 32 (2) was not available to aid the conclusion at which *Williams* J. arrived in *R.* v. *Blakeley* (3) because it does not apply to conciliation commissioners. The Arbitration Court clearly exercised as a court a judicial function which was preliminary to exercising a function which was primarily arbitral. The court had to decide whether the matter was one in which it could exercise its arbitral function. Section 32 (2) applies to such an inquiry. On this particular issue the contention that the relationship was not that of employer and employee went back to a decision in *Federated Clerks Union of Australia* v. *Industrial Life Assurance Agents Association* (4), but, in the absence of the definition in the Act the question which now arises under s. 32 (2) would not have arisen. The expression "industrial dispute" as defined in the Act is necessarily narrower than "industrial dispute" as defined in the Constitution. The Arbitration Court clearly addressed itself to the point. The court's finding that there was a dispute pertaining to the relations between employers and employees was made in its judicial capacity and is not a subject which, even if it be erroneous, can be made a ground for prohibition (*R.* v. *Murray*; *Ex parte Proctor* (5); *R.* v. *Blakeley* (6); *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (7); *R.* v. *Dayman* (8)). Sub-section (2) of s. 32 is valid.

(1) (1916) 22 C.L.R. 437, at p. 462.
(2) (1888) 21 Q.B.D. 533.
(3) (1950) 82 C.L.R., at pp. 81-86.
(4) (1942) 46 C.A.R. 578, at pp. 584, 585.
(5) (1949) 77 C.L.R. 387, at pp. 398, 399.
(6) (1950) 82 C.L.R., at pp. 78, 82-84, 88, 97, 98.
(7) (1933) 50 C.L.R. 228.
(8) (1857) 7 El. & Bl. 672 [119 E.R. 1395].

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[McTIERNAN J. referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. Ltd.*; *Ex parte Municipal Tramways Trust, Adelaide* [*No.* 1] (*Tramways Case*) (1).]

The section does not mean that something which was not an industrial dispute within the meaning of the Constitution could validly be treated by the Court as being an industrial dispute within the meaning of the Act. "Industrial dispute" in the sense in which it is used in s. 51 (xxxv.) of the Constitution is in no way confined to disputes arising between employers and employees. On its true construction s. 32 (2) is limited to questions which arise between disputants who are engaged in an industrial dispute which has come before the Court because it is within the constitutional purview of the Court. This Court could, if prohibition lies, prohibit the Arbitration Court whether it was exceeding its judicial power or its statutory arbitral power. In either event, in relation to such a proceeding s. 32 (2) is valid and operates according to its terms. That section is justified under s. 51 (xxxv.) and s. 77 (1) of the Constitution. The relationship of employer and employee does not necessarily exclude an independent contractor and it is not necessary for the purpose of the Act to restrict it to the relation of master and servant. Section 32 (2) applies to the court but does not apply to a conciliation commissioner. *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2) turns upon the effect of s. 32 (1). The proposition is put quite clearly in *R.* v. *Hickman*; *Ex parte Fox and Clinton* (3). If there be no industrial dispute within the meaning of those words in the Constitution, then the Court not only can, but, it is assumed, must grant a prohibition. But it does not follow because there is not any relationship of employer and employee in the sense in which those words are used in the Act, that there be no industrial dispute within the meaning of the Constitution, and if the mistake is simply as to the statutory concept of employer and employee and does not carry the matter outside the constitutional limitations then that mistake is a mistake made within jurisdiction, and prohibition does not lie. On the question of whether the relationship of employer and employee exists see *R.* v. *Bolton* (4); *R.* v. *Dayman* (5); *Amalgamated Society of Carpenters and Joiners, Australian Section* v.

(1) (1914) 18 C.L.R. 54.
(2) (1951) 82 C.L.R. 208, at pp. 249, 250.
(3) (1945) 70 C.L.R. 598, at pp. 606, 614.
(4) (1841) 1 Q.B. 66 [113 E.R. 1054].
(5) (1857) 7 El. & Bl. 672 [119 E.R. 1395].

Haberfield Pty. Ltd. (1); and *R.* v. *Blakeley* (2). By substituting the present form of the enactment the legislature has done what is shown in *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* (*No.* 1) (3). The affidavit sought to be read is inadmissible. The question of whether the persons who are engaged in the industry are "masters and servants" cannot arise in this Court. The antithesis between a contractual relationship which is strictly described as master and servant and a contractual relationship described as that of an independent contractor (which is the true position here) is a matter which does not directly concern the Commonwealth. The statutory concept which appears in the Act in the form as "matters pertaining to the relations of employers and employees" is not limited to cases of the contractual relationship of master and servant in the strict sense. The Act defines "employer" as an employer in any industry, and "employee" means any employee in any industry and includes any person whose usual occupation is that of employee in any industry. In both instances where this Court has said that there is not any distinction between an employer and an employee on the one hand and a master and a servant on the other hand, it said it for the purposes of the wages and pay-roll tax (*Federal Commissioner of Taxation* v. *J. Walter Thompson* (*Aust.*) *Pty. Ltd.* (4); *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (5)). Guidance may be obtained from *Federated Clerks Union of Australia* v. *Industrial Life Assurance Agents Association* (6) and *Addar Khan* v. *Mullins* (7). Having regard to the context and the words "employer" and "employee", and considering the power under which this legislation was enacted, not only is the decision of the Arbitration Court not examinable, it is also not erroneous.

[KITTO J. referred to *Addar Khan* v. *Mullins* (8) and *Yellow Cabs of Australia Ltd.* v. *Colgan* (9).]

The Arbitration Court took evidence and its decision on that evidence is not examinable by this Court. The statutory concept is not limited to the contractual relationship of master and servant. The constitutional concept of "industrial dispute" is not limited to cases where the disputants are respectively employers and employees (*Federated Municipal and Shire Council Employees' Union*

(1) (1907) 5 C.L.R. 33.
(2) (1950) 82 C.L.R. 54.
(3) (1930) 42 C.L.R., at pp. 546, 556.
(4) (1944) 69 C.L.R. 227.
(5) (1945) 70 C.L.R. 539.
(6) (1942) 46 C.A.R., at p. 584.
(7) (1920) A.C. 391, at p. 394.
(8) (1920) A.C., at p. 395.
(9) (1930) 29 A.R. (N.S.W.) 137.

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of Australia v. *Melbourne Corporation* (1)). It is one with very great connotations and a very extensive range (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (2)).

[DIXON J. referred to *Citizens' Life Assurance Co. Ltd.* v. *Brown* (3).]

Section 32 (2) of the Act is a valid enactment. It operates according to its terms and always, within the constitutional limitations, it confers conclusive and exclusive jurisdiction in those matters on the Arbitration Court.

Dr. *F. Louat*, in reply. The evidence of the finding of the Full Arbitration Court that the relationship of master and servant existed; the formal order of the Court; that the agreement is the only agreement; that that agreement applies to all the prosecutor's agents; that the effect that the practices and the operation of the agreement are exactly the same as the operation of the agreement in *Federated Clerks Union of Australia* v. *Industrial Life Assurance Agents Association* (4) justifies the granting of prohibition. The judgment in that case proves most decisively that the agreement is not a " sham ". The effect of the material referred to above is to show that the agreement, with incidents in its actual operation which do not prevent it being an agreement with an independent contractor, is the real operative agreement between the parties. The question of employer and employee was considered in *Performing Right Society Ltd.* v. *Mitchell and Booker* (*Palais de Danse*) *Ltd.* (5); *Federal Commissioner of Taxation* v. *J. Walter Thompson* (*Aust.*) *Pty. Ltd.* (6) and *Dillon* v. *Gange* (7). Clause 27 of the agreement was not in the agreement considered by *Webb* J. in 1949. The giving of instructions by a principal to an agent who is in the position of an independent contractor is not necessarily inconsistent with that relationship: *Bowstead* on *Agency*, 9th ed. (1938), p. 90, art. 45. It has not been found as a fact that the agreement was never intended to operate as a legal document between the parties (*Inland Revenue Commissioners* v. *Westminster* (*Duke*) (8)). In the light of sub-s. (1) of s. 32, sub-s. (2) of that section cannot be read as operating merely *inter partes*. An examination of the definition shows that what was done by the amendment in 1947 and by earlier amendments was progressively to extend definitions so that they can now cover

(1) (1919) 26 C.L.R. 508, at pp. 554, 555.
(2) (1931) 45 C.L.R. 409, at p. 421.
(3) (1904) A.C. 423; 4 S.R. (N.S.W.) 642.
(4) (1942) 46 C.A.R., at p. 585.
(5) (1924) 1 K.B. 762, at p. 767.
(6) (1944) 69 C.L.R. 227.
(7) (1941) 64 C.L.R. 253, at p. 265.
(8) (1936) A.C. 1, at p. 29.

matter which on almost any construction of s. 51 (xxxv.) would go beyond the Constitution. Section 32 (2) is invalid. On any view of that section it was an effort to commit to the Arbitration Court the function of defining the limits of its own powers; it was a legislative attempt to submit to the Arbitration Court the whole delineation of its powers and nothing else. Even if valid that section does not protect a decision of the Court in excess of jurisdiction where that decision is manifestly wrong in law (*R.* v. *Blakeley* (1)). The Court below exceeded its jurisdiction.

Cur. adv. vult.

March 11.

The following written judgments were delivered :—

DIXON, FULLAGAR AND KITTO JJ. This is an order nisi for a writ of prohibition directed to the judges who formed the Court of Conciliation and Arbitration which made, on 5th June 1951, an award called the *Industrial Life Assurance Agents* (*Commonwealth Life* (*Amalgamated*) *Assurances Limited*) *Basic Wage Award*, 1951. The purpose of the writ sought by the prosecutor is to prohibit further proceedings upon the award. The jurisdiction to make the award is denied on the ground that the supposed dispute in respect of which it was made was not an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1951 inasmuch as it was not a dispute in relation to employment or as to any industrial matter pertaining to the relations of employers and employees and that it was not an industrial dispute within s. 51 (xxxv.) of the Constitution.

The award is expressed to bind the prosecutor, the Commonwealth Life (Amalgamated) Assurances Ltd., and the respondent the Industrial Life Assurance Agents' Union and the members thereof. An introductory clause states under the heading "scope of the award" that the award relates to the employment of adult employees wholly or mainly employed or engaged in the industrial life assurance industry in canvassing for industrial and ordinary life assurance policies and in collecting the premiums payable by or on behalf of insured persons. The clause purporting to make the award binding on the prosecutor company does so only as to the employment by it of any person employed in the beforementioned class of work, but whether he is a member of the respondent union or not. The operative clause of the award says that an adult male employee covered by the award shall be paid at the rate of £8 per week as a basic wage, being the amount which the Court

(1) (1950) 82 C.L.R. 54.

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declares to be just and reasonable without regard to any circumstance pertaining to the work upon which or the industry in which he is employed. This form of award pursues the terms in which the authority of the Arbitration Court with reference to the basic wage for males is conferred by s. 25 (*b*), which provides that the Court may for the purpose of preventing or settling an industrial dispute make an order (*b*) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed.

The use of the word " employed " should be noticed. It is in keeping with the definition of " industrial dispute " as contained in s. 4. That definition limits the conception of an industrial dispute to a dispute as to industrial matters and the expression " industrial matters " is in turn defined so that, no material part of the definition goes beyond the relations of employers and employees. " Industrial matters " means, says s. 4, all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes (among other matters the relevant matter of) (*c*) wages, allowances and remuneration of persons employed. Until the passing of the *Commonwealth Conciliation and Arbitration Act* 1947, the Act had not limited the conception of industrial disputes to matters pertaining to the relations of employer and employee. The prosecutor company alleges that the persons whose services it uses in canvassing for industrial and ordinary life assurance policies or in collecting the premiums payable by insured persons are not employees. The company maintains that they render these services as independent contractors, so that there is no relation of employer and employee between the company and them. On this ground the company impugns the validity of the award as made without jurisdiction.

It appears that all the persons whom the company engages for this work enter into a contract in writing in a common form. Such a person is described by the agreement as " an agent ". The document begins by a statement that the company appoints him as its agent and he accepts the agency on terms it proceeds to enumerate. The terms are contained in twenty-eight clauses and these provide a full and detailed account of the duties of the agent. His remuneration is fixed by schedules on the basis of percentage commissions. None of the clauses subjects the agent to the will of the company as to the manner of carrying out the duties thus specified and the twenty-seventh clause goes out of its way to

exclude the relationship of employer and employee, which no doubt the agreement treats as that of master and servant. The clause says that the document contains the whole of the terms of the agency and that it is intended thereby that the relationship between the company and the agent will be strictly that of principal and agent and not in any way whatever that of employer and employee. It goes on to say that the agent is to be under no obligation to perform any duties other than those contracted for in the instrument and that no communication from the company or its officers inconsistent with the agreement or varying or adding to it is to bind the agent and he may regard it as in the nature of guidance and advice which he is to be under no obligation to accept.

Provisions of this character are perhaps more likely to arouse misgivings as to what the practical situation of the agent may be in fact than to prevent a relation of master and servant being formed.

For, if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual. But there is a more important clause. Clause 27 provides that the duties of the agent under the agreement may be performed by his clerks or servants or by himself personally and that nothing in the agreement is to prevent him from engaging in any other business or employment while the agency continues. If this clause is in fact allowed any operation it goes a long way to exclude the relation of master and servant. It was not contended for the respondent union that the document considered alone amounted to anything but an independent contract for services: it was readily conceded that its provisions contained no contract of service.

The case for the respondent union simply is that it does not represent the reality of the relation in practice of the agents and the prosecutor company. For the Commonwealth intervening an argument was presented to the effect that the relation of employer and employee to which the definition of "industrial matters" in s. 4 refers does not require a contract of service, a relation of master and servant. A similar question seems to have been raised upon the *Industrial Arbitration Act* 1901 (N.S.W.) in the case of *Ex parte Haberfield Pty. Ltd.* (1). The Supreme Court of New

(1) (1907) 7 S.R. (N.S.W.) 247; 24 W.N. 26; 5 C.L.R. 33.

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South Wales assumed that the relation must be, in effect, that of master and servant and decided that in the particular case such a relation did not exist in fact. In this Court it was held that the existence of the particular relation was a question upon which the Arbitration Court might, in the proceedings there under attack, decide finally. Accordingly the correctness or incorrectness of their decision was not a matter arising in prohibition, which was the remedy sought. But *Griffith* C.J. said that he was strongly disposed to think that it was a correct view that the question whether the relationship of employer and employee existed was substantially the same question as whether the relationship of master and servant existed (1). *O'Connor* J. expressed his concurrence in the view of the Supreme Court that no relationship of employer and employee existed in that case, and this view necessarily implied the substantial identity of the relationship with that of master and servant. The legislation of New South Wales, although *in pari materia* with the Commonwealth *Conciliation and Arbitration Act* may conceivably be distinguished on the ground that it possessed a definition of "employee" which contained indications that the draftsman had so understood the expression. But not much importance appears to have been attached to them and both in New South Wales and in Queensland the view seems to have been adopted that there must be a contract of service, or a relation of service, if a man was to be an employee: see, for instance, *Yellow Cabs of Australia Ltd.* v. *Colgan* (2); *Gaskin Bros.* v. *McGowan* (3); *Thiel* v. *Mutual Life & Citizens' Assurance Co. Ltd.*; *Ex parte Thiel* (4).

In *Austine* v. *Retchless* (5) the conception was slightly extended on the authority of *Addar Khan* v. *Mullins* (6), which the Court said indicated that the definition of employee in *The Industrial Conciliation and Arbitration Act* 1932 to 1941 (Q.) covered a wider class than servants because it extended to persons employed under contracts for labour only or substantially for labour only.

The view that there is no material distinction between what is described as the relation of employer and employee and that of master and servant accords with the interpretation which this Court placed on the expressions in the *Pay-roll Tax Assessment Act* 1941-1942; *Federal Commissioner of Taxation* v. *J. Walter Thompson (Aust.) Pty. Ltd.* (7); *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (8).

(1) (1907) 5 C.L.R., at p. 39.
(2) (1930) 29 A.R. (N.S.W.) 137.
(3) (1941) 40 A.R. (N.S.W.) 645.
(4) (1919) 14 Q.J.P. 5, particularly per *Macnaughton* J. at pp. 17, 18.
(5) (1941) 35 Q.J.P. 117.
(6) (1920) A.C. 391, at pp. 394, 395.
(7) (1944) 69 C.L.R. 227, at p. 229.
(8) (1945) 70 C.L.R. 539.

We think that the kind of relationship to which the definition in s. 4 of " industrial matters " refers by the expressions " employer " and " employee " is, under another name, in substance the relation called at common law master and servant. But this only means that in the interpretation of the Act the prosecutor company has a sound commencing point from which to proceed in its contention that the Arbitration Court acted without jurisdiction. It by no means establishes that contention.

In the first place the award on its face is restricted to employees. It does not purport to operate outside the Act. If in truth the prosecutor's agents are not employees within the meaning of the *Conciliation and Arbitration Act*, then we do not think the award will apply to them. To give it a construction which does not make the character of employee essential to its operation in the case of an agent would be to overlook the purpose of the expressions in the award, which, clearly enough, was to follow the requirements of the Act.

On its face therefore the award wears the appearance of being within jurisdiction. Moreover, when you go back to the industrial dispute for the settlement of which the award was made, you find that it is the result of a log of claims seeking a minimum rate of wages for adult employees wholly or mainly employed or engaged by the prosecutor in canvassing for industrial and ordinary life assurance policies and in collecting the premiums payable by or on behalf of insured persons.

The log of claims, the dispute itself and the award of the Arbitration Court are therefore all concerned with a relation that is strictly within the Act. The prosecutor's only case for attacking the jurisdiction to make the award must be that, notwithstanding the log of claims, there could be no industrial dispute because no members of the respondent union in fact were or could be employees of the prosecutor company, so that the paper demand was necessarily without any practical basis. To obtain a prohibition on this ground it is incumbent upon the prosecutor to exclude the possibility of the log having any subject matter by clear proof leading unmistakably to that conclusion. The burden of establishing clearly the facts which show absence of jurisdiction always rests upon a prosecutor seeking a writ of prohibition. But here there is a number of considerations increasing the difficulty of discharging the burden. To begin with the allegation that the contract between insurance canvassers or agents and the company for whom they act does not represent the true relation and is nothing but an attempt, by means of a form, to escape industrial

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regulation is no new thing. This conflict between form and reality in reference to the status of insurance canvassers or agents appears to go back over a considerable period of time. It is the subject of the decision in *Re Life Assurance Canvassers' Submission* (1); *Thiel* v. *Mutual Life & Citizens' Assurance Co. Ltd.* (2); and *Austine* v. *Retchless* (3).

In *Federated Clerks Union of Australia* v. *Industrial Life Assurance Agents Association* (4) Chief Judge *Piper* decided almost the very question of fact in issue here. The form or forms of agreement were similar though the matter arose in another way. His Honour held that industrial life assurance agents employed by life assurance companies for the purpose of canvassing and collecting are "employees" within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. In this Court *Webb* J. tried the same issue between the Associated Dominions Assurance Society Pty. Ltd. and the Industrial Life Assurance Agents' Union, the form of agreement being almost identical. His Honour found that the agents were employees of the company (5).

In the present case the question was raised before the Conciliation and Arbitration Court and that Court passed upon it before making the award. It is true that there appears to have been no independent investigation of the matter and that the Court merely acted upon the information that *Webb* J. had so decided. At the same time, in the circumstances, the prosecutor, before resorting to prohibition ought in all reason to have made clear to the Court to whose jurisdiction he objected that he sought from it an opportunity of establishing on evidence the absence of its jurisdiction.

Section 32 (2) of the *Conciliation and Arbitration Act* 1904-1951 provides that a determination or finding of the Court upon any question as to the existence of an industrial dispute shall, in all courts and for all purposes, be conclusive and binding on all persons affected by that question.

It is therefore clear that the policy of the legislature was to leave questions such as that in issue to the Arbitration Court. There are constitutional difficulties about the provision. Section 51 (xxxv.) of the Constitution would not enable the Parliament to confer upon the Court authority to determine its own jurisdiction in so far as it depended on the limitations upon that very legislative power. Possibly Chapter III. of the Constitution contains a legislative power sufficient for the purpose, but *In re Judiciary and*

(1) (1916) Q.W.N. 25.
(2) (1919) 14 Q.J.P. 5.
(3) (1941) 35 Q.J.P. 117.
(4) (1942) 46 C.A.R. 578.
(5) Unreported 9/2/50.

Navigation Acts (1) decides that power may not be conferred upon a Federal Court to decide a question in the abstract so as to bind all the world; it must be the determination of some right, duty, or liability *inter partes*. Section 32 (2) is expressed in a way which may possibly go beyond this.

Whether and how far judicial and arbitral functions may be mixed up is another question, one which fortunately the Court has never been called upon to examine. In the present instance we doubt whether the Arbitration Court proceeded in the purported exercise of judicial power. At all events there is no curial order. But in any case the presence of the provision in the Act did not lessen the practical responsibility of the prosecutor in pressing his objection before the Court of Conciliation and Arbitration and seeking to prove before it the facts upon which the objection was founded.

The materials laid before this Court are by no means full or exact or satisfactory and they fail to satisfy us that there was no "industrial dispute". In saying this we mean that they fail to exclude to our satisfaction the possibility that the real relation between some or all of the agents and the prosecutor company in their actual work, week in week out, is not in fact that of employer and employee, whatever the agreement may say. It would, of course, be possible for us to settle an issue for trial upon oral evidence and await the finding of a single justice before disposing of the order nisi. But we do not think that we should do that. After all, the question whether a given agent is or is not an employee is not foreclosed by the award.

We think that the proper course is to discharge the order nisi.

McTIERNAN J. I agree that the order nisi be discharged.

The award which is challenged by the prosecutor deals only with wages. Clause 5 prescribes that "an adult male employee covered by this award shall be paid at the rate of £8 per week, as a basic wage". The wage is prescribed "for work done". It appears from cl. 2, which prescribes the scope of the award, that the award "relates to the employment of adult employees, wholly or mainly employed or engaged in the industrial life assurance industry in canvassing for industrial and ordinary life assurance policies and/or in collecting the premiums payable by or on behalf of insured persons". These, then, were the classes of persons covered by the award and the classes of work for which the rates of wages are prescribed.

(1) (1921) 29 C.L.R. 257.

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The parties to the award are the Industrial Life Assurance Agents' Union, a registered organization of employees, and the Commonwealth Life (Amalgamated) Assurances Ltd. The organization represents its members and the award covers only the adult members who are employees of the company and are employed in the work mentioned above. The award is based upon "industrial matters", namely, "the wages . . . of persons employed or to be employed". See Commonwealth *Conciliation and Arbitration Act* 1904-1951, s. 4 (*c*). The "industrial matters" dealt with by the award are the wages of the members of the organization, employed or to be employed by the company, in this "industry".

The ground of this application for prohibition is that the relations between the company and the persons whom it engages in the abovementioned work, are governed by an agreement of which Exhibit A is a copy, and the relations so created are principal and agent (the term used in the agreement), not employer and employee. If the true construction of the agreement is that the company's canvassers and collectors, engaged according to its terms, are agents in the strict sense, I should require to hear further argument before deciding that by the device of such an agreement the company could drive a coach and four through the Act. The award in the present case does not in form travel beyond the terms of s. 4 of the Act: indeed the award pursues the terms of the section, so far as it defines an industrial dispute and an industrial matter. The Court has not exceeded or presumed to exceed its jurisdiction. If a canvasser or collector, by reason of his special relation with the company is not an employee within the meaning of the Act, the award does not "cover" him (to use the terms of the award), and the company could resist claims by him, based on this award, for the basic wage, if it thought fit to do so. The award applies to every adult "employee" of the company who is a member of the respondent organization, employed or to be employed, at the work mentioned in the award. If the "agency" agreement creates a relation beyond the scope of the jurisdiction of the Court, no presumption can be made by this Court upon this application that departures resulting in the relationship of employer and employee have not been made or will not be made or, that during the currency of the award, no person will be engaged and kept in the post of canvasser or collector otherwise than strictly upon the basis of the agency agreement. The award is upon its face within the jurisdiction of the Court. The prosecutor has not shown that the Court has attempted to exercise jurisdiction over any subject matter which the Act does not place within its province.

WILLIAMS J. In my opinion the rule nisi should be discharged.

The award of the Commonwealth Court of Conciliation and Arbitration which it is sought to prohibit, No. 844 of 1950, is entitled the *Industrial Life Assurance Agents (Commonwealth Life (Amalgamated) Assurances Limited) Basic Wage Award*, 1951. Clause 2 states that the award relates to the employment of adult employees, wholly or mainly employed or engaged in the industrial life assurance industry in canvassing for industrial and ordinary life assurance policies and/or in collecting the premiums payable by or on behalf of insured persons. It binds (a) the Industrial Life Assurance Agents' Union and the members thereof; and (b) Commonwealth Life (Amalgamated) Assurances Ltd. as to the employment by it of any person employed on a class of work mentioned in cl. 2 of this award whether members of the said Industrial Life Assurance Agents' Union or not.

The Commonwealth Life (Amalgamated) Assurances Ltd. seeks to prohibit this award on the ground that it was made without jurisdiction because the dispute in respect of which the same was made was not an industrial dispute within the meaning of the Commonwealth *Conciliation and Arbitration Act* 1904-1950 (and by amendment within s. 51 (xxxv.) of the Constitution) inasmuch as it was not a dispute in relation to employment or to any industrial matter, namely, any matter pertaining to the relations of employers and employees. The Arbitration Act, so far as material, defines industrial dispute to mean "a dispute . . . as to industrial matters which extends beyond the limits of any one State". It defines industrial matters to mean "all matters pertaining to the relations of employers and employees". It was contended for the prosecutor company that there was no evidence of any industrial dispute before the Arbitration Court because the canvassers of the company were not its employees but its agents and no relationship of employer and employee existed between them. A form of agreement in writing entered into between the company and its canvassers was tendered in evidence, which, it is common ground, does not create a contract of service but a contract for services. But the Arbitration Court allowed the solicitor for the Industrial Life Assurance Agents' Union to supplement this evidence by certain material which the Court accepted as evidence showing that the document was colourable and that the real relationship between the company and its canvassers was that of employer and employee.

This material was not proper evidence of anything according to the ordinary rules of evidence, but s. 39 (*b*) of the Arbitration Act

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provides that in the hearing and determination of an industrial dispute the Court or commissioner shall not be bound to act in a formal manner and shall not be bound by any rules of evidence, but may inform its or his mind on any matter in such manner as it or he thinks just. Then there is s. 32 (2) of the Act, which provides that a determination or finding of the Court upon any question as to the existence of an industrial dispute shall, in all Courts and for all purposes, be conclusive and binding on all persons affected by that question. Section 32 (2) plainly intends, it seems to me, to give the Arbitration Court authority to decide the question of fact whether there is before it a dispute as to industrial matters which extends beyond the limits of any one State and for that purpose to decide whether the dispute is as to a matter pertaining to the relations of employer and employee. This authority is sufficient to empower the Court to decide the question rightly or wrongly. In *R.* v. *Blakeley*; *Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1), I formed a similar opinion with respect to conciliation commissioners, but I was in a minority. But s. 32 (2) appears to me to place the matter beyond doubt in the case of the Court. In the present case the Court, on the material before it, was satisfied that an industrial dispute existed and it had jurisdiction to make the award. The award is in terms limited to employees. It does not include canvassers who are not employees. Accordingly the award does not travel beyond the Arbitration Act or beyond s. 51 (xxxv.) of the Constitution. If the canvassers of the prosecutor are not its employees, the company will be able to raise this defence in proceedings to enforce the award.

Order nisi discharged with costs.

Solicitors for the prosecutor, *W. H. Hill & Weir.*

Solicitors for the respondent union, *Arthur Kennedy & Co.*

Solicitor for the Commonwealth of Australia, intervening, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1950) 82 C.L.R. 54.