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3. On the basis of this valuation the equity of redemption was worth only £113.

4. The *Land Sales Control Act*, 1948, had ceased to apply to the house since the testator died. As a result some increase of value might be expected but the respondent's counsel said that the interest in the cottage would not be worth much at the date of the hearing.

5. Out of the proceeds of sale of the equity there had to be discharged funeral expenses (£31), the costs of obtaining probate, the costs of the application before *Sugerman* J., any other testamentary expenses and the liability, if established, of the testator to the appellant.

6. *Sugerman* J. found the appellant's claim to be supportable at least to the extent of £200 and £300.

If that be the correct view of the facts, it seems difficult to say that the learned judge did not judicially exercise the discretion intrusted to him by the Act or indeed that the conclusion he reached that the estate was insolvent was not justified.

In the Full Court it would appear that the only points seriously argued were first as to the admission of the fresh evidence, and secondly that the Court ought to make an order even though the estate might be insolvent. With the first point their Lordships have already dealt. Sir *Frank Soskice* repeated the second submission before this Board. He argued that unless it was conclusively established that there was no net estate, the court, if satisfied that the widow had made a case on what he called the merits, must make an order. Their Lordships do not find it necessary to decide what is the proper course for a judge to adopt who is left in doubt as to whether the estate will ultimately prove to be solvent or not since as they read the learned judge's judgment he reached a definite conclusion that the estate was hopelessly insolvent. Sir *Frank Soskice* did not dispute that if that conclusion was right, the learned judge was justified in refusing the order.

Their Lordships do not think that the High Court took a different view of the law. As their Lordships read the judgments of the learned judges of the High Court they came to the conclusion that on the evidence before him *Sugerman* J. should have come to the conclusion that the estate was solvent and that there would be a surplus available to meet the widow's claim. They based this conclusion on two grounds. The first and that on which they chiefly relied was that in their opinion the house had a value considerably above £1,000 in the middle of 1950. The second was that they were not satisfied that the appellant had a valid claim against the estate.

The validity of the appellant's claim against the estate depended mainly on whether her evidence was accepted. The learned judge who saw her treated her as a witness of truth and their Lordships do not consider the High Court was justified in disturbing his finding on that point.

The main issue was as to the value of the house. *Dixon* J. relied for his conclusion on the fact that the *Land Sales Control Act*, 1948, had ceased to apply to the house and the effect that in his view that event must have had on the price of houses such as the testator's. *McTiernan* J. took the same view. It is plain however that the trial judge took notice of the fact that the consequence of terminating control was that the market price of cottages rose and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. He reached his conclusion with these considerations in mind. It may have been wrong but it plainly did not shock the judges of the Full Court. Moreover, the circumstances to which *Dixon* J. and *McTiernan* J. refer must have been present to the minds of the legal advisers of the respondent when the matter was before *Sugerman* J., and they called no evidence to support the view that there was the substantial rise which the High Court assumed to be a matter of notoriety. The issue is one as to a matter of opinion and their Lordships think that in all the circumstances the High Court was not justified in disturbing the order of *Sugerman* J., supported by the evidence before him and confirmed by the Full Court because they differed from him on a matter of opinion on a subject as to which the opinions even of experts generally differ. On this branch of the case their Lordships agree with the observations of *Street* C.J., which they have already cited.

Their Lordships feel great sympathy with the respondent but they agree with *Street* C.J. when he said :—" It is impossible for this court, within the limits which necessarily control it, to achieve abstract justice in every case. It must work within its prescribed limits, and rules must be observed and complied with in the general interests of justice, and one general interest is that there should be an end to litigation, once it is instituted, and that parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the court, and seek to have the matter reopened on that ground."

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For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and restore the order of the Full Court. The respondent must pay the appellant's costs of the appeals to the High Court and to this Board.

Appeal allowed. Order of the Full Court of the Supreme Court restored. Costs of the appellant of the appeals to the High Court and to the Privy Council to be paid by the respondent.

Solicitors for the appellant, *Farrer & Co.*
Solicitors for the respondent, *Light & Fulton.*

J. B.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

BLACKBURN AND ANOTHER;

EX PARTE TRANSPORT WORKERS' UNION OF AUSTRALIA.

THE QUEEN

AGAINST

GALVIN AND ANOTHER;

EX PARTE TRANSPORT WORKERS' UNION OF AUSTRALIA.

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SYDNEY, *July* 29–31; *Aug.* 1, 15.

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

Industrial Arbitration (Cth.)—Conciliation and arbitration—Award—Variation—Powers of commissioner—Limitation—Reference to Arbitration Court—Discretion of commissioner—Amending statute—Reference by direction of Chief Judge—Pending application—Prohibition directed to commissioner prior to amending statute—Appropriateness of remedy—Conciliation and Arbitration Act 1904-1951 (*No.* 13 *of* 1904—*No.* 58 *of* 1951), *ss.* 13, 16, 25—*Conciliation and Arbitration Act* 1952 (*No.* 34 *of* 1952), *s.* 6.

Section 13 of the *Conciliation and Arbitration Act* 1904-1951 provides that " a Conciliation Commissioner shall not be empowered to make an order or award altering . . . " certain enumerated matters. Section 6 of the *Conciliation and Arbitration Act* 1952 (which amends s. 16 of the *Conciliation and Arbitration Act* 1904-1951, provides, so far as material: " If, in relation to a matter before a Conciliation Commissioner, the question whether he is, having regard to the provisions of section thirteen of this Act, empowered to exercise jurisdiction in relation to that matter has not been referred for the opinion of the Court, then, notwithstanding anything contained in this

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Act, the Conciliation Commissioner is empowered to exercise jurisdiction in relation to the matter ".

Held that in a case where s. 16 applies, s. 13 ceases to be an imperative limitation upon the powers of a conciliation commissioner to proceed with a matter which a party alleges falls outside his authority. He may proceed according to the course laid down by s. 16 as amended.

Section 16 (2) of the Act as amended by the *Conciliation and Arbitration Act* 1952 provides :—" A Conciliation Commissioner may, and, at the direction of the Chief Judge, shall, refer a question of law arising in relation to a matter before him, including a question whether he is empowered to exercise jurisdiction under this Act in relation to such a matter, for the opinion of the Court ".

Held that this sub-section applies to pending applications for variations of awards as well as to applications brought after the commencement of the 1952 Act.

ORDER NISI for prohibition.

By affidavits respectively made on 24th and 26th May 1952, John Patrick Horan, the Federal Secretary of the Transport Workers' Union of Australia (hereinafter called the prosecutor), an organization of employees registered in accordance with the provisions of the *Conciliation and Arbitration Act* 1904-1951, deposed that between 12th November 1948 and 17th January 1949 he caused a log of claims to be served on employers throughout South Australia, Tasmania, Victoria and New South Wales, including the South Australian Chamber of Manufactures (Incorporated), an organization of employers registered under that Act.

The claims not having been agreed to, the dispute so created came before Mr. Conciliation Commissioner Blackburn who, on 16th May 1949, made an interim award which incorporated certain of the provisions of the Road Transport Workers' (General) Award 1940, as amended, but neither of those awards incorporated or brought into operation by reference or otherwise (subject to certain immaterial exceptions) any of the provisions of any other award or determination.

On 19th May 1950 the conciliation commissioner made an award, entitled the Transport Workers' (General) Award 1950, which superseded the previous awards, by incorporating therein all variations thereof which are material to the application referred to hereunder, provided, *inter alia*, by clause 4 (d) (iii), that " Any respondent employer whose principal business or undertaking is a business, industry, occupation or calling other than the transport of materials upon public highways, who is bound by an award, determination or industrial agreement, Commonwealth or State, which contains

any of the (thirty-three) classifications enumerated in Table 'B' of clause 10 of this award shall, in respect of employees engaged in such classifications, be bound by clauses 5 (definitions), 7 (casual employees), 8 (juniors), 10 (wages), 25 (provision of gear), 27 (horse stabling), and 33 (appointment and functions of board of reference)".

Clause 10 provided: "(a) The minimum rate of wage required to be paid by employers shall, in any area or place indicated in the following table 'A' comprise the amount of the basic wage (subject to adjustment hereunder) assigned therein to that area or place, and in addition the amount assigned in the following table 'B' for an employee or work of a class indicated therein. *Basic Wage.* (b) An adult male employee shall be paid at the respective rates per week set out in the table hereunder as a basic wage being the amount which the Court declares to be just and reasonable without regard to any circumstance pertaining to the work upon which . . . he is employed". Table "A" showed the basic wage (adjustable) at various places in the various States including, Melbourne £8 2s. 0d. per week; Adelaide £7 18s. 0d. per week; Hobart £8 0s. 0d. per week, and Launceston £7 17s. 0d. per week. Table "B" showed thirty-three classifications and the total additional wage, comprising margin and loading, per week.

No other award or determination purported to cover the particular business, industry, occupation or calling carried on by any employer respondent to the Transport Workers' (General) Award 1950, nor did any such award or determination contain any of the classifications enumerated in table "B" of clause 10 of that award, but certain Federal awards contained certain of those classifications.

On a summons dated 23rd February 1951, taken out by the Victorian Chamber of Manufactures for a variation of the Transport Workers' (General) Award 1950, Mr. Conciliation Commissioner Galvin rejected a submission by Horan, the deponent, that he, the commissioner, was not empowered to make the variation, and decided that no order be made until the matter was restored to the list on notice by either party. Neither party had applied for such restoration.

By an award made on 16th January 1952 applicable to the Metal Trades Industry and to the South Australian Chamber of Manufactures (Incorporated), Mr. Conciliation Commissioner Galvin prescribed certain provisions (clause 32) headed "Emergency Provisions" and relating to ordinary standard hours of work or

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ordinary hours of work. Such provisions were applicable in New South Wales, South Australia and Victoria.

On 6th May 1952 a summons was issued under the *Conciliation and Arbitration Act* 1904-1951, at the instance of the South Australian Chamber of Manufactures (Incorporated) and served upon the union, seeking a variation of the Transport Workers' (General) Award 1950 by inserting a proviso to clause 4 (d) (iii) therein in the following form:—"Provided, however, that any such respondent employer shall be entitled to apply in respect of his employees coming within the scope of this award provisions relating to standing down employees because of a breakdown of plant and/or machinery or failure or restriction or rationing of power or a shortage of material or a strike or any cause for which the employer cannot reasonably be held responsible which are contained within the Award, Determination or Industrial Agreement covering the majority of his employees", or by making such other order as the conciliation commissioner should deem proper.

The deponent said that among the employers who were respondents to the Transport Workers' (General) Award 1950, there was a substantial number of employers who (in each case), while employing members of the union coming within the scope of that award, also employed other persons (who comprised the majority of the employees of the particular employer) covered by (1) the Metal Trades Award; (2) some other award made under the Commonwealth *Conciliation and Arbitration Act* which contained provisions in form identical with the emergency provisions of the Metal Trades Award (reference was made to seven specified awards); (3) an award made under that Act, which contained provisions relating to the matters referred to in the proposed proviso to clause 4 (d) (iii) or to some of such matters in a form not identical with those emergency provisions (reference was made to four specified awards), and (4) an award or determination made under a State Act, which contained provisions relating to the matters referred to in the said proposed proviso or some of such matters (reference was made to the Cement Manufacturing and Stone Quarrying—Consolidating Award of the Industrial Court of South Australia, and to the Determination of the Radio Board of Victoria).

Horan further deposed that he was advised and believed that if the said proposed proviso was inserted in the Transport Workers' (General) Award 1950, it would operate to permit the various employers mentioned above to apply at any particular time to members of the union employed by them, the said provisions of the

particular Commonwealth or State awards or determinations above-mentioned appropriate to each such employer at the particular time.

Horan said that the amount of the basic wage payable under the Transport Workers' (General) Award 1950, as adjusted to 16th May 1952 was (according to the locality), Melbourne, £10 12s. 0d.; Adelaide, £10 11s. 0d.; Hobart, £10 14s. 0d.; and Launceston, £10 12s. 0d.

The summons for variation came on for hearing before Mr. Conciliation Commissioner Blackburn on 16th May 1952. Horan submitted that the commissioner was not empowered to make an order inserting the said proposed proviso, on the grounds that such an order would be an order altering (a) the standard hours of work in an industry; and (b) the basic wage or the principles on which it is computed.

The summons was adjourned for one week in order to afford an opportunity for an application to be made for a writ of prohibition.

In his affidavits in support of the application for such a writ, Horan deposed that the union feared that classifications as enumerated in table "B" of clause 10 referred to above might be incorporated from time to time in awards other than the Transport Workers' (General) Award 1950, including awards referred to above, by the action of the conciliation commissioners dealing with disputes in the industries dealt with in such awards; that he had been informed that there had been inserted in a certain determination of a South Australian Wages Board some of the classifications enumerated in the said table "B" of clause 10 with the object of making the conditions of that determination operate within the terms of clause 4 (d) (iii) of the Transport Workers' (General) Award 1950; that he was advised and believed that the effect of inserting those classifications and/or "stand down" provisions in awards or determinations other than the Transport Workers' (General) Award 1950 would be to cause such "stand down" provisions to operate within that award by virtue of clause 4 (d) (iii); and that the union contended that the conciliation commissioners had no power to make the various orders and variations referred to.

The prosecutor obtained in the High Court (1) an order nisi directed to the South Australian Chamber of Manufactures (Incorporated) and Mr. Conciliation Commissioner Blackburn for a writ to prohibit them and each of them from further proceeding on clause 4 (d) (iii) of the Transport Workers' (General) Award 1950 (as varied) as set out in the summons issued on 6th May 1952 at the instance of that association, upon the grounds that the said clause 4 (d) (iii) (as

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varied) was and the said proviso would be an award or order altering (a) the standard hours of work in an industry contrary to the provisions of s. 13 of the *Conciliation and Arbitration Act* 1904-1951, and (b) the basic wage for adult males or the principles upon which it was computed contrary to s. 13 of the Act; and (2) upon the same grounds, an order nisi directed to the Victorian Chamber of Manufactures and Mr. Conciliation Commissioner Galvin for a writ to prohibit them and each of them from further proceeding with an application by that association for a variation of the Transport Workers' (General) Award 1950 by inserting therein the provisions set out in the summons dated 23rd February 1951, as follows :—

"(1) Notwithstanding anything elsewhere contained in this Award, whenever an employer is subjected to interference in the conduct of his business due to failure, limitation, rationing, prohibition or interruption of the use of electric energy or coal gas, whether as the result of orders or regulations issued by some lawful authority or through emergency disconnection of or technical fault in the supply of the said power or gas or by any other means beyond the employer's control, the following provisions shall apply :—(a) If by reason of such interference he is unable usefully to employ an employee for the whole or part of any day or shift he may deduct from the wages of that employee payment for any part of the day or shift such employee cannot be usefully employed provided that—(i) if an employer requires the employee to attend for work but is not able to employ him usefully the employee shall be entitled to be paid for two hours' work ; (ii) where an employee commences work he shall be entitled to be paid for four hours' work ; (iii) this sub-clause shall not apply to apprentices. (b) He may require any day worker to perform his ordinary hours of work (or any of such ordinary hours of work) at any time on any day on the basis of 40 hours per week. The following rates of pay shall apply for such work—(i) for work performed on Mondays to Fridays from 7 a.m. to 5.30 p.m. and on Saturdays from 7 a.m. to noon—ordinary time ; (ii) for work performed between noon and midnight on Saturdays—ordinary rates plus 25 per cent ; (iii) for work performed between midnight on Saturdays and midnight on Sundays—time and a half ; (iv) for work performed at all other times—ordinary rates plus 10 per cent. Provided that when a worker is required to commence work between the hours of 9.30 p.m. and 6 a.m. the amount that he shall receive shall not be less than an amount of 2s. 6d. more than the amount he would receive if paid at ordinary day rates. (c) He may require any

shift worker to perform his hours of work at any time on the basis of 40 hours per week. The following rates of pay shall apply for such work:—(i) for day work or day shift work—ordinary time; (ii) for work performed between noon and midnight on Saturdays—ordinary rates plus 25 per cent; (iii) for work performed between midnight on Saturdays and midnight on Sundays—time and a half; (iv) for afternoon and night shifts—ordinary rates plus 10 per cent. Provided that when a shift worker is required to commence work between the hours of 9.30 p.m. and 6 a.m. the amount he shall receive shall not be less than an amount of 2s. 6d. more than the amount he would receive if paid at ordinary rates. (v) Nothing contained in this sub-clause shall operate so as to reduce the shift premiums payable to employees who were shift workers working on afternoon and night shifts only at the date of such interference as aforesaid and who continue to work on such shifts. (d) He may alter the time at which meal breaks are usually taken and/or the duration of them, in order to avoid or mitigate the effects of such interference, without being liable to pay penalty rates for work done during the normal meal breaks; provided that the commencing time of any meal break is not made more than one hour earlier or later than usual and that a meal break of at least twenty minutes is allowed. Provided also that the employer shall, whenever it is practicable, consult with the representative of the Union or Unions before acting under this paragraph. (e) He may, by agreement with an employee, allow to such employee the whole or any part of the annual leave prescribed by this Award, without being liable to give to such employee the notice normally required for that purpose. (2) Notwithstanding anything elsewhere contained in this Award, the provisions of this clause shall also apply (*mutatis mutandis*) in the case of an employer who uses auxiliary power plant for the purposes of providing employment for employees whilst such interference is occurring and who—(a) is unable usefully to employ an employee for the whole of any day or shift by reason of a breakdown in, stoppage of or a limitation in the use of such plant through no fault of his own; or (b) because of the inability of the auxiliary power plant to meet the normal demands for power—(i) finds it necessary to require any employee to perform his ordinary hours of work (or any of such ordinary hours of work) outside the hours normally worked by such employee; or (ii) finds it necessary to alter the time at which meal breaks are usually taken and/or the duration of them. (3) In the case of an employer who is

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unable to resume his normal operations immediately after the lifting of notified restrictions or rationing, the operation of these foregoing provisions shall be extended for a period not extending beyond—(i) Should notification of the lifting of such restrictions or rationing be received between midnight on Friday and noon on Thursday in any week—7 a.m. on the following Saturday. (ii) Should notification of the lifting of such restrictions or rationing be received between noon on Thursday and midnight on Saturday in any week—7 a.m. on the Saturday in the following week ".

After the orders nisi were granted the *Conciliation and Arbitration Act* 1952 (No. 34) was enacted and came into operation. That Act empowered the Chief Judge to direct a conciliation commissioner to refer a matter to the Arbitration Court.

The relevant provisions of that Act are sufficiently stated in the judgment hereunder.

G. Gowans Q.C. (with him *D. Corson*), for the prosecutor in each case. There are three sets of proceedings which are challenged by these three orders nisi, namely (i) the making of an award by Mr. Conciliation Commissioner Blackburn on 19th May 1950, in which clause 4 (d) (iii) is included, the effect of which was to bring about the incorporation in that award of certain provisions of other awards, including the stand-down provisions. That award is in operation; (ii) a summons for the variation of that award by the insertion of " power rationing stand-down provisions " heard by Mr. Conciliation Commissioner Galvin in March and April 1951, who decided that he had jurisdiction and stood over the application. The matter is still stood over; and (iii) a summons for the variation of the Transport Workers' Award by the addition of a proviso to clause 4 (d) (iii) which would provide for the incorporation from various other awards and determinations, both State and Federal, of general stand-down provisions depending not upon power rationing but upon a number of other emergency situations. That summons was part heard by Mr. Conciliation Commissioner Blackburn and was adjourned on 16th May 1952 to enable these proceedings to be taken. Neither the appeal provisions of the *Conciliation and Arbitration Act* 1952, nor the reference provisions of that Act can have any bearing at all upon proceeding (i). The appeal provisions in s. 13 of the 1952 Act, now contained in the new s. 31A, cannot apply because they are only applicable if the application for leave to appeal is made within fourteen days after the award and order. The reference provisions of the 1952 Act contained in s. 16, as amended, cannot apply to

that particular proceeding because it is no longer a proceeding before the conciliation commissioner. Obviously an award made in 1950 should not be the subject of the appeal provisions in s. 13. The question of law referable by the Chief Judge is a question of law arising in relation to a matter before him, including the question of whether he is empowered to exercise jurisdiction in a matter. Neither the appeal nor the reference provisions of the 1952 Act are applicable in respect of proceeding (ii) to alter or modify rights accrued, or are applicable to proceedings pending before the conciliation commissioner at the time of the coming into operation of that Act. Therefore the provisions of that Act do not afford any bar to the application for prohibition in respect of this summons by Mr. Conciliation Commissioner Galvin. Both the appeal provisions and the reference provisions of the Act affect the right of parties to proceedings which are before the conciliation commissioner. There was, prior to the coming into operation of the 1952 Act, the right in a party to a proceeding for an award or its variation to a final award or order without appeal. The withdrawal of the right to appeal by the amending Act was a substantive matter and was not really a matter of procedure.

[DIXON C.J. referred to *Newell* v. *The King* (1).]

The situation is also illustrated by *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2).

[WILLIAMS J. referred to *Australian Coal and Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (3).

DIXON C.J. It was held in *Ex parte Matthews* (4) that an appeal could not be heard upon a judgment pronounced before the *Judiciary Act* came into force.]

Prior to the 1952 Act a party to a proceeding before a conciliation commissioner had a right to the exercise by him of a jurisdiction limited by s. 13, or the obverse is a party who was a party to a dispute had a right to have certain matters determined by the court and not by a conciliation commissioner. This Act in certain circumstances extends the jurisdiction of conciliation commissioners so far as the subject matter is concerned. That too would, if it were applicable to proceedings which were before a conciliation commissioner, affect the substantive rights of parties before such tribunal. It substitutes the opinion of the court for the provisions of s. 13, and it substitutes the opinion of the conciliation commissioner in that case where there is any reference. It may mean that notwithstanding the provisions of s. 13 there is an

(1) (1936) 55 C.L.R. 707.
(2) (1905) A.C. 369, at p. 372.
(3) (1942) 66 C.L.R. 161.
(4) (1904) 2 C.L.R. 93.

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extension of jurisdiction as to subject matter. If that is the effect of the Act, that is the reason for the Act not operating so as to affect proceedings in which the jurisdiction of the conciliation commissioner in its narrower form was invoked by proceedings taken out before the Act came into operation. Just as s. 4 is a substantive provision which according to all the principles would not be treated as applicable to pending proceedings, so also s. 16 is a substantive provision concerned with jurisdiction which, according to the principles, would not be treated as applicable to pending proceedings or rights which have accrued before. In *Kraljevich* v. *Lake View and Star Ltd.* (1) the amending legislation did not apply, and apart from its affecting substantive rights, it could not be applicable to pending proceedings. When a commissioner is called upon to certify that a dispute is in existence and takes charge of a dispute by directing a conference, the matter is before him even though he may, at that stage, be acting as a conciliator and not as an arbitrator. If the extension of the power of the tribunal to grant relief is a substantive matter, then the extension of the power of the tribunal over subject matter must be equally a substantive matter. Having regard to s. 8 of the *Acts Interpretation Act* 1901-1950, the substantive nature of s. 16 of the *Conciliation and Arbitration Act* cannot be gainsaid. The right to take advantage of a statutory enactment does not cover the case where there is a right to go to the court and obtain either a final determination from that court or obtain a determination from that court which can be made the subject of appeal. The right in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2) might be described as merely a right to take advantage of a statutory enactment.

[DIXON C.J. The qualification that the appeal should be final was only a condition imposed on the passing of legislation invoking Federal jurisdiction: see *Lorenzo* v. *Carey* (3).]

The granting of the order nisi gave the prosecutors the right to have the question of the commissioners' powers determined on the facts as they existed at the date of the granting of that order. If the 1952 Act is to be treated as applying to pending proceedings so as to affect the jurisdiction over subject matter, which the conciliation commissioner would exercise, then there must be, obviously, some point of time at which it could be said that the Act affected the subject matter of the jurisdiction. The operation of this provision was to incorporate in the award an obligation to observe certain provisions in other determinations or awards,

(1) (1945) 70 C.L.R. 647, at pp. 649-651.

(2) (1905) A.C. 369.

(3) (1921) 29 C.L.R. 243.

State or Federal, and include in those other provisions. Clause 4 (d) (iii) gave Federal effect to State provisions, as well as giving effect under the Transport Workers' Award to Federal provisions contained in other awards. In effect it provided that the stand-down provisions from various other Federal awards or State determinations applied to the Transport Workers' Award in relation to non-transport business, and in relation to employees for any particular classifications. It altered the basic wage because it provided, with regard to a substantial number of workers in circumstances relating to the employers, the amount prescribed as the basic wage for transport workers need not be paid. The standing-down did not affect the engagement of an employee. The effect was that he should not get for any particular week in which there was not any work for him, the basic wage. Prior to the insertion of clause 4 (d) (iii) the basic wage was prescribed by the Transport Workers' Award without any stand-down provisions in it at all. It is not agreed that the practical effect of inserting clause 4 (d) (iii) into the award was merely to leave the conditions of the workers in the same position as they were prior to the coming into operation of clause 4 (d) (iii). Prior to the coming into operation of the 1950 award the provisions of the Transport Workers' Award, as it then operated without any stand-down provisions, would come into conflict with any State determination, or possibly with an earlier Federal award which did not contain stand-down provisions and the practical effect was that whereas prior to the 1950 award transport workers employed in a mixed or non-transport business could not be stood down after the award came into operation, they could be stood down by the incorporation, either at that time or at any future time, of stand-down provisions in any of the awards so incorporated, and the effect that was thus given was a Federal effect and a Transport Workers' Award effect. On the proper construction of the Act there cannot be any question of an appeal from a conciliation commissioner or a question as to whether he is empowered under s. 13. Section 16 makes it obvious that if an application be made to a conciliation commissioner, and either a question is not referred to the Arbitration Court or the question is referred to that Court and determined, then he has jurisdiction one way or the other, according to what has happened under the section. Once the jurisdiction of a commissioner is determined in that way there cannot be any question of appeal. There cannot be an appeal on the question of whether he is empowered under s. 13. The only way to determine that is under s. 16. The question of whether the commissioner is empowered under s. 13

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may depend upon whether the Chief Judge will direct him to state a question on that point. If neither of those things happened and a question were not stated, then the jurisdiction is fixed by operation of s. 16. There cannot be any appeal on that point from the award of the commissioner. In respect of proceedings to which the new Act applies the situation present in *R.* v. *Galvin*; *Ex parte Metal Trades Employers' Association* (1) has changed. The question of whether the new Act is concerned with substance or is merely a matter of procedure must be determined upon a consideration of the whole of the operations of the new Act, not merely in its relation to the prosecutors' rights, but in respect of all rights of all parties to pending proceedings. A determination on the question of whether the new Act is retrospective or not depends upon considerations of all those matters. Once that jurisdiction was invoked the prosecutors had a right (a) to have the jurisdiction exercised in its favour at that time, (b) to have it dealt with, without any provision relating to the appeal, and (c) to have this Court determine this question of the demarcation of jurisdiction upon the obtaining of an order nisi from the Court. The question set down for argument here should be answered by saying that there is not any bar created by the new Act in respect of either the first proceeding or the second or subsequent proceedings.

P. D. Phillips Q.C. (with him *L. H. Williams*), for the respondent Chambers of Manufactures. The real question for decision is, whether or not the new Act applies to the proceedings, does prohibition lie? There is not any ground for prohibiting further proceedings on clause 4 (d) (iii) standing alone and irrespective of the application to add a proviso. There cannot be a prohibition in respect of the making of clause 4 (d) (iii). The award re-published previously existing obligations—some Federal and some State—in the form thereafter of Federal obligations. It is not arguable that that alters either standard hours or the basic wage. It has never been suggested that when a commissioner ascertains what the basic wage is and inserts it in an award he supersedes the prior award. That is not an altering of the basic wage. Clause 10 does no more than specify what the basic wage is at that date. It did not alter the basic wage and it was within the commissioner's power to prescribe it in the award. The commissioner did the one thing that made this specification of the basic wage valid. He put the basic wage into clause 10, and then provided that " all other provisions shall continue to operate ". If a stand-down

(1) (1949) 77 C.L.R. 432, at p. 445.

clause was part of the basic wage or affected it, then by continuing the stand-down clause by those words he guaranteed that there was not any alteration in the basic wage. The prosecutor is seeking to prohibit the one clause which above everything else maintains the *status quo* and cannot be said to be altered. There is not any evidence before the Court that any of the awards, determinations or industrial agreements binding employers in respect of transport classifications, ever did contain a stand-down clause. Not only did the Transport Workers' (General) Interim Award 1949 and the Road Transport (General) Award 1950 not incorporate any of the provisions of any other award or determination as deposed to on behalf of the prosecutor, but they specifically excluded from the operation of the award every employer of a transport worker who was bound by any other award or determination in respect of such a worker. The commissioner did not make any new law, and, therefore, did not alter the basic wage. There is not any evidence to show that at the date of the award, 19th May 1950, or at any time since, any of the awards or determinations which operate upon transport classifications in table "B" and bound any of the respondents, did contain any stand-down clauses. Nobody under clause 10 was bound to observe any new obligations other than the amount of the basic wage payable under the tables or in respect of stand-down clauses or otherwise. The clause maintains the *status quo*. The order nisi should be discharged on the ground that the basic wage was not altered. On the other matters, prima facie, Parliament has repealed a procedural provision, a provision authorizing a conciliation commissioner to refer a question of law, and replaced it by the same procedural provision plus a duty upon the commissioner to refer a question of law when directed by the Chief Judge. On the face of it that is a procedural modification of the proceedings of a commissioner, and has nothing to do with any individual person's or organization's rights or duties at all. It confers a power and imposes a duty on the commissioner which, prima facie, do not appear to be vested rights. Every procedural provision in the course of either litigation or arbitration, which may affect a litigant party, is not necessarily a right. No one had any vested rights in the form of the arbitral process. All that the new s. 16 (2) does is to add a procedure, namely, the obligation to state a case on the order from the Chief Judge. The quality of the decisions of the commissioner and the Full Arbitration Court has been altered by giving them a conclusive character.

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Sections 13 and 32 operate to confer jurisdiction on the commissioner to proceed and decide the question for himself or to refer it for decision by the Full Arbitration Court. The power does lie within the organization consisting of himself, the Chief Judge and the Full Arbitration Court. The commissioner's jurisdiction cannot be prohibited, but it may be defeated by a subsequent decision of the Full Arbitration Court. The true scope of the Act is that it operates in regard to all matters which come before the bodies after the date when the Act came into operation. Section 31A operates with regard to all orders and awards made after 14th June.

G. Gowans Q.C., in reply. There is a difference between re-writing a clause in an award already operating in an industry and re-writing it in an award such as is customarily done by a conciliation commissioner, merely re-writing the basic wage provision in an award he is making for an industry. There is a difference between that and writing in for the first time a clause taken from a State determination or another source. To write it into this award gives it new force and new sanction, and treats it as having an effect which it did not have before. The writing-in of a stand-down provision in an award which had a basic wage provision and not any stand-down provision would affect the basic wage, and similarly with respect to the standard-hours provision. It cannot be said that because the basic wage clause in the Transport Workers' (General) Award was not changed the basic wage was not altered by bringing in a stand-down provision. If the last three lines of clause 4 (d) (iii) were deleted the general provisions of that award would apply to all those persons who are now affected by clause 4 (d) (iii) because this is put in as " exemptions and modifications ". There is not any basic wage *in globo*. Reference is made to an award to ascertain what is the basic wage for the purposes of that award (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (2)). There is not any reason why the order nisi should not be limited to the last three lines in clause 4 (d) (iii). So far as the matter dealt with by Mr. Conciliation Commissioner Galvin is concerned, that stands on its own; and the order nisi in respect of the matters dealt with by Mr. Conciliation Commissioner Blackburn could be stood over on the one ground. The question as to whether an amending statute of this kind is to be treated as retrospective or otherwise is one of

(1) (1933) 49 C.L.R. 589.

(2) (1949) 78 C.L.R. 389.

intention (*Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (1); *Newell* v. *The King* (2)). A statutory right of appeal is such a right of a substantial nature as to be not affected by amending legislation unless it be clearly shown that it did apply (*Australian Coal and Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (3)). The above-mentioned cases show that a statutory right or a common law right is not to be affected by amending legislation unless it appeared to be so. The prosecutor in this case has been put in peril of a variation being made against its members. It has a right to say that its applications shall be dealt with according to the jurisdiction invoked by it when it made its application prior to the amending legislation. Here it is a right accrued or privilege. If the prosecutor is unsuccessful by reason of the coming into operation of the amending legislation there should not be any order for costs made against it.

Cur. adv. vult.

Aug. 15.

THE COURT delivered the following written judgment :—

These are two orders nisi for writs of prohibition directed to conciliation commissioners. The first seeks a writ prohibiting further proceedings in respect of two matters. One matter consists in a particular clause in an existing award. It is clause 4 (d) (iii) in the Transport Workers' (General) Award 1950 as varied. The other matter is a pending application to vary the clause by adding a proviso. The second order nisi seeks a writ prohibiting proceedings in respect of one matter only, namely, a pending application for the variation of the same award by adding a new clause. In all three instances the ground for seeking to prohibit the proceedings is the same. The ground is that an infringement of s. 13 of the *Conciliation and Arbitration Act* 1904-1951 is involved because, in the case of the clause in the existing award, it does operate, and in the case of the variations applied for, they would operate to alter the standard hours of work in an industry or to alter the basic wage for adult males or the principles upon which it is computed. These are things which, under s. 13, a conciliation commissioner may not do.

The contention in support of these grounds depended upon the relation, or absence of relation, with standard hours and basic wage which the provisions or proposed provisions possess. The purpose of the two pending applications is to introduce into the award clauses

(1) (1917) 24 C.L.R. 28.
(2) (1936) 55 C.L.R. 707.
(3) (1942) 66 C.L.R. 161.

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which would enable employers to take certain measures if their industrial operations were affected by interruptions of or restrictions upon the supply of electrical energy or gas or by certain other untoward events. It is not necessary to describe the measures. It is enough to say that the clauses would enable them to require their employees to work at different times, to make deductions from wages for some parts of a day when men could not be usefully employed and to adopt certain other expedients to meet the position.

The clause in the existing award (clause 4 (d) (iii)) relates to classifications of transport workers employed by employers whose chief trade or business is not transportation. The clause brings these classifications under provisions of the award fixing or otherwise dealing with rates of pay but, for the remaining industrial conditions, it refers to the provisions contained in Federal or State awards, determinations or industrial agreements binding the employers. The materials before the Court do not make it clear whether, at the time when the clause was adopted, any such instruments existed which contained provisions similar to those sought by the pending applications for variation. It is not certain whether the clause intends to incorporate by reference the provisions to which it refers and to give them a new and independent authority or on the contrary it means no more than that they are to have room to continue in operation of their own force. Nor is it certain whether the clause intends to refer only to instruments of industrial regulation already in existence or to include also those which might come into existence after the commencement of the operation of the clause. If the latter is intended, there cannot but be some question as to the validity of such an intention.

After the orders nisi were granted the *Conciliation and Arbitration Act* 1952 (No. 34) was passed and came into operation. A question then arose whether the provisions of this Act did not stand in the way of the prosecutor. For it was at least a tenable view of the provisions that they applied not only to future proceedings before conciliation commissioners but to those already pending and that they provided machinery by which the jurisdiction of a commissioner to deal with such a case might be settled. Accordingly the orders nisi were placed in the list so that the question might be argued whether the amendments made by Act No. 34 of 1952 did apply to the proceedings before the two commissioners and make it proper to discharge the orders nisi. Upon the argument it became plain that the clause in the existing award, clause 4 (d) (iii) of the Transport Workers' (General) Award 1950 as varied, stood in

an entirely different position from the two pending applications. It was not contended for the respondents that the amendments made by Act No. 34 of 1952 had any bearing upon the validity of that clause. What was contended was something quite different, namely, that, so far as the materials before the Court disclosed, there was no ground for supposing that the clause did or could fall within the ground assigned in the order nisi for impeaching the validity of the clause, that is to say, for denying that it was within the authority of a conciliation commissioner to make. As the argument proceeded it became evident to the parties themselves that it was not only necessary that further materials be laid before the Court but it was desirable that some further consideration be given to the meaning and implications of the clause as a whole and to the consequences of impeaching it as an entirety; and the parties agreed that some course should be taken for deferring this particular issue arising from the presence of the clause in the award. After hearing the parties we formed the conclusion that the better course would be to discharge the order nisi so far as it sought a writ prohibiting further proceedings upon the clause but to do so without prejudice to the question whether the clause or any part of it was a term of the award made without jurisdiction and void. This conclusion we announced at the end of the argument. It is, therefore, necessary now to deal only with the question whether the effect of the amendments made by Act No. 34 of 1952 is to place the authority of the conciliation commissioners over the two pending applications for variations upon a basis which would make it no longer a proper case for prohibition even if the prosecutor were to make it appear to this Court that the variations sought would involve, within the true meaning of s. 13, an alteration of the standard hours of work in an industry or of the basic wage for adult males or of the principles upon which it is computed.

This question may be logically divided into two parts, of which it is composed. The first part concerns the operation of the provisions as amended in cases to which they apply. The second part concerns what was the real matter in contest during the argument, namely the application of the amended provisions, that is to say, of the amendments, to matters pending before conciliation commissioners at the time of the commencement of the amending enactment, No. 34 of 1952. It is convenient to deal with these component questions in that order. But in order to deal with both of them it is necessary first to state the effect of the relevant statutory provisions.

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The provision which makes the controversy possible is of course s. 13 (*a*) and (*b*). This says that a conciliation commissioner shall not be empowered to make an order or award (*a*) altering the standard hours of work in an industry; (*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 circumstances pertaining to the work upon which, or the industry in which he is employed) or the principles upon which it is computed. The division of the authority between the commissioners and the Arbitration Court, which s. 13 together with s. 25 accomplishes, has in the past been taken to import that s. 13 is an imperative provision which can be infringed only at the cost of invalidity. Hence orders and awards made in violation of the true meaning of its terms have been treated as exposed to the remedy of prerogative writ of prohibition under s. 75 (v.) of the Constitution and, of course, so have proceedings before commissioners for an order or award of that description.

Section 16 (2)-(5) enabled a conciliation commissioner, if he thought fit, to refer to the Arbitration Court any question of his jurisdiction and, upon the question being so determined to make an order or award not inconsistent with the determination of the Arbitration Court. Of the amendments made by Act No. 34 of 1952 in the *Conciliation and Arbitration Act* 1904-1951 those most closely touching the present question are the amendments in s. 16 effected by s. 6 of Act No. 34. For sub-s. (2) of s. 16 a new sub-section is substituted. The difference between this and the old provision is that the discretion of the commissioner to refer the question is no longer unqualified; the Chief Judge may direct him to refer it. The crucial amendments, however, consist in two new sub-sections that are added, sub-ss. (6) and (7). They are as follows:—

"(6.) Where a question referred to the Court under this section is whether the Conciliation Commissioner is, having regard to the provisions of section thirteen of this Act, empowered to exercise jurisdiction in relation to a matter—(*a*) if the opinion of the Court is that the Conciliation Commissioner is so empowered, then, notwithstanding anything contained in this Act, the Conciliation Commissioner is empowered to exercise jurisdiction in relation to that matter; or (*b*) if the opinion of the Court is that the Conciliation Commissioner is not so empowered, then, notwithstanding anything contained in this Act, the Conciliation Commissioner is not empowered to exercise jurisdiction in relation to that matter

but the Court is empowered to exercise jurisdiction in relation to the matter.

(7.) If, in relation to a matter before a Conciliation Commissioner, the question whether he is, having regard to the provisions of section thirteen of this Act, empowered to exercise jurisdiction in relation to that matter has not been referred for the opinion of the Court, then, notwithstanding anything contained in this Act, the Conciliation Commissioner is empowered to exercise jurisdiction in relation to the matter."

It will be seen that, upon a question whether the restrictions imposed by s. 13 on a commissioner's jurisdiction do or do not take a given matter outside his authority, the criterion of his power to exercise jurisdiction is no longer the true meaning and application of s. 13 but the determination of the Arbitration Court, when the question is referred to it. Until the question is referred to that court, it is to be taken provisionally that s. 13 does not exclude the matter from his authority. Once he has referred the question, either of his own choice or under the direction of the Chief Judge, the commissioner, by an amendment of sub-s. (4), ceases to have power to decide it himself.

It may be that sub-ss. (6) and (7) of s. 16 as now amended are not necessarily confined to questions arising with reference to s. 13. For the words " having regard to the provisions of section thirteen " are somewhat vague and might possibly be considered not to restrict the provisions to questions concerning the operation of s. 13 on the authority of an arbitrator. But, even if this be so, the sub-section would not be interpreted as covering questions arising upon the Constitution which could not be concluded under such provisions. But statutory limitations upon the power of an industrial arbitrator may be made to depend on any criterion the legislature chooses, so long as it is relevant to the subject matter of legislative power. There is no reason why the restrictions imposed by statute should not be against doing what, to give one example, the Arbitration Court regards as altering standard hours of work in an industry rather than against what, in fact and in law, constitutes such an alteration. Nor is there any reason why the restriction should not be made inoperative by the legislature pending a decision of the Arbitration Court, and that is so even if the possibility of the question ever coming before the Arbitration Court is made to depend upon successive exercises of discretion reposed in the commissioner and the Chief Judge. For the restrictions imposed by s. 13 are entirely the work of the legislature. The result is that where s. 16, as amended by Act No. 34 of 1952, applies s. 13 ceases