[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THEIR HONOURS RICHARD CLARENCE KIRBY, EDWARD ARTHUR DUNPHY AND SIR EDWARD JAMES RENEMBE MORGAN, JUSTICES OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION, AND ANOTHER;

EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

H. C. OF A. 1954.

MELBOURNE, *Feb.* 22;

SYDNEY, *April* 23.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Industrial Arbitration (Cth.)—Inter-State industrial dispute—Ambit—Award—Agreement certified by conciliation commissioner—Application to Court to vary—Admission of absence of inter-State industrial dispute prior to certification—Conclusiveness—Validity of award—Prohibition—In respect of enforcement of agreement—Not merely in respect of order varying—Parties—Delay, etc., in objecting to validity of award—Conciliation and Arbitration Act 1904-1947 (*No.* 13 *of* 1904—*No.* 52 *of* 1947), *ss.* 16 (1), 37, 48, 49.

Section 37 of the *Conciliation and Arbitration Act* 1904-1947 makes provision for the certifying, by the court or a conciliation commissioner, of agreements reached as to the whole or any part of a dispute and provides that upon certification, the agreement "shall, as between the parties to the agreement . . . have the same effect as, and be deemed to be, an award for all the purposes of this Act". Section 16 (1) of the same Act provides that "An award or order of a Conciliation Commissioner shall not be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever".

An employer applied to the Arbitration Court, in October 1953, for an order varying an agreement, made by it with a union on 24th October 1947, and certified by a conciliation commissioner, pursuant to s. 37 of the Act, on 8th December 1947. The circumstances surrounding the making of this agreement were not clear, including the circumstance whether the union had served on the particular employer, as it had on other employers, a log containing, *inter alia*, a demand that "the minimum weekly wage to be paid to the following

H. C. OF A. 1954. THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

classes of employees shall be—in addition to the basic rate "—certain specified amounts for the classifications respectively set forth therein. The variation of the agreement sought was the substitution of the following clause for a clause therein: "An adult male employee . . . shall be paid at the rate of 40s. 4d. per day as a basic wage (non-adjustable) being the amount which the Court 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, for work done after the 20th October, 1953". At the hearing of the application in the Arbitration Court, upon counsel for the union contending that the court had no jurisdiction to vary the agreement because, at the time it was made and certified, no dispute existed between the union and the employees or, alternatively, if a dispute existed, it did not extend beyond the limits of any one State, the representative of the employer obtained an adjournment to secure instructions. Upon the resumption of the hearing he informed the court that he accepted the position "that before the agreement was made and certified no dispute existed which extended beyond the limits of any one State". The Arbitration Court ordered that the agreement be varied as sought. The union obtained an order nisi for prohibition in respect of the order of variation. The order nisi was not directed to the conciliation commissioner who had certified the agreement.

Held that the admission by the representative of the employer should be treated as conclusive of the facts to which it referred. Consequently at no relevant time was the employer a party to any dispute with the union extending beyond the limits of any one State. In these circumstances neither s. 16 (1) nor s. 37 operated to give to the agreement the attributes of an award for any purpose.

Held further that, notwithstanding the delay and the fact that the parties had long acted on the basis that the agreement, as certified, constituted a valid award, prohibition should issue restraining the enforcement of the agreement either in its original form or as the order complained of purported to vary it. It was not an objection to this course that the conciliation commissioner who purported to certify the agreement was not a party to the proceedings. *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1924) 34 C.L.R. 482, at pp. 552-553 applied.

Held further, that, assuming that the log of claims determined the ambit of the original dispute, the variation was within the ambit of the dispute.

ORDER NISI for Prohibition.

The Transport Workers' Union of Australia, an organization of employees registered pursuant to the provisions of the *Conciliation and Arbitration Act* 1904-1946, in November 1946, served a log of claims on E. W. Batson and certain other employers in the State of Tasmania and also on certain employers in the State of Victoria. Clause 3 of the log was as follows:—

" 3. Wages.

The minimum weekly wage to be paid to the following classes of employees shall be—in addition to the basic rate :

(a) bus drivers driving vehicles with accommodation for forty or more persons .. .. .. £2 10s. per week

(Then followed provision for a number of classes of employees, in similar form)."

The claims in the log not having been acceded to by the employers served therewith, the matter came on for hearing, on 21st April 1947, before G. A. Mooney, Esq., the chief conciliation commissioner appointed under the provisions of the *Conciliation and Arbitration Act* 1904-1946. At the hearing, the employers served in Victoria having contended that there was no inter-State industrial dispute, the matter was referred into court.

On 24th October 1947 an agreement was made between the organization of employees and certain of the employers served with the log in Tasmania, namely, those who were members of the Tasmanian Road Transport Association (Road Passenger Service Operators Division). On the same day the organization of employees entered into an agreement in similar form with the Transport Commission of Tasmania, a body corporate constituted under the *Transport Act* 1938 (Tas.) which was not a party to the proceedings. On 8th December 1947 both agreements were certified pursuant to the provisions of s. 37 of the *Conciliation and Arbitration Act* 1904-1947 by A. S. Blackburn, Esq., a conciliation commissioner appointed under the said Act. Prior to certifying the agreement to which the Transport Commission of Tasmania was a party, the conciliation commissioner, on the application of the representative for the commission and the representative for the organization of employees, made an order joining the commission as a party to the proceedings. The relevant portions of the agreement between the commission and the organization of employees were as follows :

" Memorandum of agreement made 24th October 1947, between the Transport Commission of Tasmania (hereinafter called the ' commission ') of the one part and the Transport Workers' Union of Australia (Tasmanian branch), an organization of employees duly registered under the provisions of the *Conciliation and Arbitration Act* 1904-1947, whose registered office is at the Trades Hall, Melbourne, Victoria (hereinafter called the ' union ') of the other part. Whereas the said union submitted certain claims to the said commission and whereas the representatives of the union and of the commission have met in conference and have agreed to a

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

settlement of all matters in dispute between them as hereinafter set forth. Now this agreement witnesseth and it is hereby mutually agreed as follows :—The minimum rates of pay and conditions of employment applicable to members of the union in the employ of the commission shall be as follows :—

Basic Wage

The basic wage payable shall be the amount of the basic wage for Hobart as determined by the Commonwealth Court of Conciliation and Arbitration and as varied from quarter to quarter in accordance with the fluctuations (if any) of the court's retail price index numbers (second series).

Term of agreement

This agreement shall come into operation as to cll. 2 and 3 of this agreement as from the beginning of the first pay period to commence after 2nd October 1947, and as to all other clauses from 1st January 1948, and shall remain in operation for a period of three years."

The certificate of the conciliation commissioner on the agreement was as follows :—

" In pursuance of s. 37 of the *Conciliation and Arbitration Act* 1904-1947 I hereby certify that the document within written is a memorandum of the terms of an agreement which has been arrived at on 24th October 1947, between the Transport Commission of Tasmania of the one part and the Transport Workers' Union of Australia of the other part in settlement of industrial dispute numbered 34 of 1947 in so far as the Transport Commission of Tasmania and the Transport Workers' Union of Australia are concerned in the said dispute.

I am satisfied that the terms of the said agreement are not opposed to the national interest and I approve of the said agreement. Dated at Hobart the 8th December 1947.

(Signed) Arthur S. Blackburn,
Conciliation Commissioner."

On 28th January 1948 Mr. Blackburn gave his written decision on the submissions of the Victorian employers. The relevant portion of the decision was as follows : " The Victorian respondents have taken a preliminary objection to any award being made against them in these proceedings on various grounds, but it is only necessary for me to deal with two of such grounds :—(i) That no dispute exists in Victoria between members of the Transport Workers' Union of Australia and the named respondents ; (ii) That

in any event if there is any dispute existing between the respondents and their employees it is one proper to be dealt with by the state industrial authority of Victoria. The facts proved before me show that since 1912 there has been no stoppage of work or serious trouble or dispute in Victoria in regard to operators of private passenger transport. Since that date the industry has been operating under awards of the wages board established under State legislation. The evidence shows that most of the employees employed by the respondents in the industry *at present* belong to the Motor Transport and Chauffeurs' Association of Australia, a duly registered organization. At the time the claim was lodged there were a few employees in the industry employed by some of the respondents who were members of the Transport Workers' Union of Australia. Since the lodging of the claim however, practically every one of these particular employees has resigned from the Transport Workers' Union or has applied for a clearance from that organization or at least has joined the Motor Transport and Chauffeurs' Association of Australia. It appears that at the extreme outside there are now, when the matter comes on for hearing, considerably less than a dozen employees of the respondents who are members of the Transport Workers' Union and the probability upon the evidence is that there are only one or two, if any. The Transport Workers' Union contends with considerable force that the sole and only reason for this is because it has not got an award of the court to cover the working conditions of its members if employed by the respondents and consequently those employees who would join and are desirous of joining the union, do not do so but have in many cases resigned and joined the other organization which can offer the benefits of a State wages board determination. The Transport Workers' Union strongly presses its claim to an award as a means of obtaining members. It contends that its desire is to embrace in its union all employees engaged upon transport and that if an award is made it will have no difficulty in enrolling many of the men now employed by the respondents as members of the Transport Workers' Union. However much one may sympathise with the officials of that union in this view, it is not a matter, in my opinion, which can unduly influence me in deciding the objections to an award put before me by the respondents. One of my duties under the Act is to promote goodwill in industry and to encourage the continued and amicable operation of orders and awards. It is my duty to do all in my power to prevent disputes and to settle disputes once they have arisen. The Transport Workers' Union alleges that from enquiries made by its officials

H. C. OF A. 1954

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

many employees of the respondents are dissatisfied with their conditions. The Motor Transport and Chauffeurs' Association on the other hand alleges that there is no dissatisfaction in the industry and that the employees are satisfied to have any matters which arise for adjustment dealt with by the wages board. In support of this the secretary of the latter union says that no complaints against the existing practice of having matters dealt with by the State wages board have reached him and further that on occasion a number of employees who did once belong to the Transport Workers' Union after being addressed by representatives of both unions have left the Transport Workers' Union and joined the Motor Transport and Chauffeurs' Association. I am pleased to note that this is not a quarrel between the two organizations each of which appears to respect the other and to work in harmony with the other. However my duty is to decide the questions before me according to my duty under the Act and without partiality to one or other of the organizations, both of which are registered organizations of employees. After a careful review of the evidence given before me I am not satisfied that in fact any dispute at all exists or is threatened between members of the Transport Workers' Union of Australia and any of the named respondents. This is fundamental to my jurisdiction to make an award. Even apart from this I must pay attention to the fact that the employees of the respondents are, and have been since 1912, working peaceably and amicably under the determination of the Motor Drivers' Board, i.e. under the determination of a State industrial authority and that upon the evidence before me an overwhelming preponderance of such employees desire to continue to have their industrial conditions dealt with under that authority. Section 40, sub-s. (d) of the Act provides that I may dismiss any matter or part of a matter or refrain from further hearing the dispute if it appears that the dispute is proper to be dealt with by a State industrial authority. Even if I held that a dispute did exist between the members or any substantial number of members of the Transport Workers' Union of Australia and the named respondents or any of them I consider it to be my duty in the public interest and in the interests of industrial peace to allow the working conditions of the industry in Victoria to continue to be dealt with by the State industrial authority and I would exercise the powers conferred upon me by this section. In the whole of the circumstances as proved by the evidence before me I consider it proper that I should dismiss the claim so far as concerns the named Victorian respondents and I accordingly do so."

By summons dated 23rd October 1953, the commission applied to the Commonwealth Court of Conciliation and Arbitration for the variation of the certified agreement between it and the organization of employees in the following manner:—(1) By deleting cl. 2 and substituting in lieu thereof the following:—"An adult male employee in the Transport Commission shall be paid at the rate of 40s. 4d. per day as a basic wage (non-adjustable) being the amount which the Court 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, for work done after the 20th October 1953", or (2) In such further manner as this Honourable Court deems fit. (3) That the foregoing variation shall apply as from 29th October 1953. The application was heard before *Kirby*, *Dunphy* and *Morgan* JJ. On 17th November 1953 the court delivered a written judgment, the relevant portion of which was as follows:—"No variation order has been made by this court in respect of the agreement. In our opinion the proper interpretation of the 'basic wage' clause in the agreement is that it refers to the basic wage as determined by this court at the time of the making of the agreement, subject to variation, as is explicitly stated in the clause, quarterly on the court's retail price index numbers (second series). It is apparent therefrom that the basic wage provided was not increased following upon this court's decision in the basic wage inquiry 1949-1950. Moreover it would appear that since following the decision in that inquiry, this court ceased to issue its second series index numbers, the basic wage payable under the agreement remains that at which the basic wage for Hobart stood at the time when this court ceased to issue the 'second series' of this court's retail price index numbers. It would appear however that the present applicant the Transport Commission of Tasmania, has paid wage rates as if the basic wage under the agreement had been increased in accordance with this court's decision in the basic wage inquiry 1949-1950 and thereafter adjusted in accordance with this court's retail price index (third series) which was issued by this court following upon the decision in that inquiry and which supplanted the earlier 'second series'. Furthermore the new 'basic wage' clause which this court is asked to insert in the agreement prescribes the sum of 40s. 4d. as the basic wage for adult males which we are informed is arrived at on a calculation made on the assumption that the decision in the basic wage inquiry 1949-1950 operated under this agreement, which in our opinion it did not. Mr. *Eggleston* for the Transport Workers' Union of Australia, the organization of employees bound by the

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

agreement, has submitted that, before the agreement was made and certified, no dispute existed as to the basic wage, that if such a dispute existed the Transport Commission of Tasmania was not a party to it, and further that in any event no dispute existed which extended beyond the limits of any one State. The representative of the Transport Commission of Tasmania obtained an adjournment of the hearing in order to get instructions, and on the hearing being resumed informed the court that he accepted the position that before the agreement was made and certified no dispute existed which extended beyond the limits of any one State. Mr. *Eggleston* therefore argued that the certification of the agreement by the conciliation commissioner was without jurisdiction, and that since there never was a relevant industrial dispute which extended beyond the limits of one State this court is without power to make a variation order in respect of the agreement, which of course is only clothed with the attributes of an award by the fact of its certification. On that aspect of the matter we should mention that we think that—for the purpose of this decision—there is no force in Mr. *Eggleston's* argument based upon the words 'as between the parties to the agreement' which appear in s. 37. The vital words are that an agreement when certified has the same effect as, and is 'deemed to be an award for all the purposes of the Act'. Section 16 (1) of the Act provides that "An award or order of a conciliation commissioner shall not be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition, mandamus or injunction in any Court on any account whatever'. Apart from the provisions relating to appeals to this Court against awards made by conciliation commissioners, which provisions are in no way invoked in these proceedings, the Act gives this court no power to call in question an award of a conciliation commissioner, in particular to determine or re-determine whether it was made upon the foundation of the existence of an inter-state dispute. Mr. *Eggleston* argued, on the basis of the decision of the Privy Council in *Colonial Bank of Australasia* v. *Willan* (1) that it is within the power and duty of this court to do so, in spite of s. 16 (1) of the *Conciliation and Arbitration Act*. The question is not without difficulty, but we have formed the opinion that the principles set out in that case, which relate to the power of a court to deal on a prerogative writ with a decision of an inferior court, do not apply to this court when considering an award made by a conciliation commissioner, at least when on the face of it, it is made within jurisdiction. On this question we see no distinction between an

(1) (1874) L.R. 5 P.C. 417.

award, and an agreement which by certification is deemed to be an award. We therefore are of opinion that we cannot question whether the dispute as a result of which the conciliation commissioner certified the agreement was of an inter-state nature or not, and so consider whether or not its certification was within the conciliation commissioner's power. We think that we are bound to regard it as certified following upon the existence of a dispute which extended beyond the limits of one State, and such being the nature of the original dispute we should regard it as continuing and the power of this court to vary it as being present. But we are of opinion that it is proper and necessary for us to consider whether the ambit of the original dispute related to the basic wage, and was wide enough to cover the order which is sought. On that aspect of the case we do not accept Mr. *Eggleston's* argument. In our opinion the order sought is within the ambit of the dispute. The order is made in terms of the summons. It will operate from the 31st October last for one year."

On 2nd December 1953, *Taylor* J., on the application of the Transport Workers' Union of Australia, as prosecutor, granted an order nisi for a writ of prohibition in respect of the variation sought by the summons dated 23rd October 1953, directed to their Honours *Richard Clarence Kirby*, *Edward Arthur Dunphy* and Sir *Edward James Renembe Morgan*, Justices of the Commonwealth Court of Conciliation and Arbitration, and the Transport Commission of Tasmania, as respondents, on the following grounds—(1) That the order made by the Commonwealth Court of Conciliation and Arbitration on 17th November 1953 was made without jurisdiction inasmuch as it was not within the ambit of any inter-State industrial dispute to which the said Transport Commission was a party; (2) That upon its true construction s. 16 of the *Conciliation and Arbitration Act* 1904-1952 did not require the court to assume that there was in existence an industrial dispute in respect of which the court's power of variation could be exercised.

R. M. Eggleston Q.C. (with him *Dermot Corson*), for the prosecutor. The variation was not within the ambit of the original dispute. The claim in the original dispute was for certain rates in addition to a basic rate. That was not a claim for a basic wage. If no industrial dispute existed prior to certification of the agreement, no provision of the *Conciliation and Arbitration Act* would give it validity. Section 16 (1) is restricted in its meaning to awards within constitutional limits. Certification of an agreement under s. 37 could not give it validity if outside constitutional limits. A

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

conciliation commissioner has no jurisdiction to determine conclusively whether or not an inter-State industrial dispute exists. [He referred to *R.* v. *Blakeley*; *Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1).] Unless it can be concluded that the inferior tribunal was given authority to determine the facts on which jurisdiction depends, a section such as s. 16 (1) does not apply to an order made without the necessary jurisdictional facts, because it is not an order at all. [He referred to *Colonial Bank of Australasia* v. *Willan* (2); *Clancy* v. *Butchers' Shop Employees' Union* (3); *Baxter* v. *N.S.W. Clickers' Association* (4).] The absence of jurisdiction to certify the agreement was admitted by the representative of the commission before the arbitration court. That admission must be accepted as conclusive.

J. G. Norris Q.C. (with him *R. K. Fullagar*), for the respondent Justices of the Commonwealth Court of Conciliation and Arbitration. The respondent justices submit to any order which this Court may make. [By leave of the Court they withdrew.]

Dr. *E. G. Coppel* Q.C. (with him *J. H. Dobson*), for the respondent commission. This proceeding is an attempt to prohibit an order while leaving and taking the benefit of the order upon which it depends and in which it is said there is a jurisdictional error. [He referred to *Ex parte Cosgrove* (5).] Certification of the agreement involved the acceptance by the conciliation commissioner and the representatives of both parties that there was an inter-State industrial dispute. What was said subsequent to the certification by Mr. Blackburn, conciliation commissioner, on 28th January 1948, was not inconsistent with the existence of an inter-State dispute at the date of certification. It was not a question for the Court of Conciliation and Arbitration whether there was in existence an inter-State dispute at the time the agreement was made. The application was for a variation of an agreement which had been certified. On the face of it, the certification was regular. The agreement had been in force for six years during which both parties had derived benefits from it and the prosecutor did not apply to have it set aside. Section 16 of the Act reinforces the position that a certification regular on the face of it should be acted on until it is set aside or action on it is prohibited. The arbitration court has

(1) (1950) 82 C.L.R. 54.
(2) (1874) L.R. 5 P.C. 417.
(3) (1904) 1 C.L.R. 181.
(4) (1909) 10 C.L.R. 114.
(5) (1904) 21 W.N. (N.S.W.) 228.

no jurisdiction to issue prerogative writs. Having regard to the fact that the prosecutor represented to the conciliation commissioner that the agreement was in settlement of an inter-State industrial dispute and the fact that the prosecutor has derived benefits under what it now contends is invalid, prohibition should be refused. [He referred to *Halsbury's Laws of England* (2nd ed.), vol. 9, pp. 826, 827; *London Corporation* v. *Cox*, per *Willes* J. (1); *Broad* v. *Perkins* (2); *Payne* v. *Hogg* (3); *Re Knowles* v. *Holden* (4); *Serjeant* v. *Dale* (5); *Worthington* v. *Jeffries* (6).] We accept the admissions of fact made by the representative of the commission in the arbitration court, but, so far as the admissions were on questions of law, the commission is not bound by them. The parties could not by admissions confer jurisdiction on the court. The demands in the log include the demand to have the basic wage fixed in accordance with some method. The variation substitutes a basic wage fixed in amount and not adjustable from time to time for a basic wage which was adjusted quarterly. All that has happened is that a new mode of computation has been arrived at. That is not outside the ambit of the dispute. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (7).]

R. M. Eggleston Q.C., in reply. There is nothing before this Court to show that the admission by the representative of the commission in the arbitration court was made under any misapprehension. The question whether or not an inter-State industrial dispute existed is one of fact although it may involve some consideration of questions of law. The certification of the conciliation commissioner, if it is a matter for prohibition at all, is a matter for prohibition against the arbitration court which has the function of enforcing the basic wage clause of the agreement. [He referred to *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (8).] If prohibition went in respect of the certification no additional parties would be required. The conciliation commissioner is an administrative officer only for this purpose. If he acted without jurisdiction the award would not be continued in force by virtue of s. 48 (2) of the Act. Prohibition lies against the respondent justices if it is shown by evidence admissible against the litigant parties that the justices were wrong. In applications for prerogative writs, it

(1) (1867) L.R. 2 H.L. 239, at p. 283.
(2) (1888) 21 Q.B.D. 533.
(3) (1900) 2 Q.B. 43.
(4) (1855) 24 L.J. (Ex.) 223.
(5) (1877) 2 Q.B.D. 558.
(6) (1875) L.R. 10 C.P. 379.
(7) (1920) 29 C.L.R. 106.
(8) (1920) 28 C.L.R. 456.

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

April 23.

has always been the practice for the superior court to proceed on the facts accepted by the inferior tribunal. This is at least so for purposes of the sufficiency of the prosecutor's case, although the respondent may raise an issue of fact.

Cur. adv. vult.

THE COURT delivered the following written judgment :—

This is an application to make absolute a rule nisi for prohibition addressed to three judges of the Commonwealth Court of Conciliation and Arbitration and to the Transport Commission (Tasmania) prohibiting them and each of them from further proceeding with or upon an order of the court purporting to vary an agreement made on 24th October 1947 between the respondent commission and the prosecutor union and duly certified pursuant to the provisions of s. 37 of the *Conciliation and Arbitration Act* 1904-1947.

The evidence before us shows that in November 1946 the union caused a log of claims relating to wages and working conditions to be served upon a number of employers in Tasmania and Victoria. This log, so far as it is relevant to the present case, claimed, by cl. 3, that : " The minimum weekly wage to be paid to the following classes of employees shall be—in addition to the basic rate—" certain specified amounts for the classifications respectively set forth. Apparently the claims of the union were not conceded and in April 1947 the matter of the dispute came before a conciliation commissioner and a submission was made on behalf of the Victorian employers concerned that there was not in existence in Victoria any dispute between members of the union and such employers or alternatively that, if any such dispute did exist, it was one proper to be dealt with by the State industrial authority of Victoria. The course which the conciliation commissioner took at this stage was to refer the " dispute " to the court. But before any other step in relation to this aspect of the matter was taken the union and the Tasmanian Road Transport Association, representing a number of employers in Tasmania, conferred and on 24th October 1947 the former entered into an agreement with the latter prescribing new rates of pay and conditions of employment. This agreement recited that the union had " submitted certain claims to the said Association " and that representatives of the union and of the association had met in conference and had agreed to a settlement of all matters in dispute between them as thereinafter set forth. On 8th December 1947 this agreement was, pursuant to s. 37 of the Act, certified by a conciliation commissioner.

The respondent commission was not a member of the association, nor, it is said, was it a party to the earlier proceedings before the conciliation commissioner but on 24th October 1947 the commission entered into an independent agreement with the union and this agreement was also certified by a conciliation commissioner on 8th December 1947. This agreement was, for the purposes of this case, in precisely similar terms to the first mentioned agreement and contained a recital that the union had submitted " certain claims to the said commission " and that representatives of the union and of the commission had met in conference and had agreed to a settlement of all matters in dispute between them as thereinafter set forth. Clause 2 of the agreement, which it is convenient at this stage to set out, is in the following terms : " The basic wage payable shall be the amount of the basic wage for Hobart as determined by the Commonwealth Court of Conciliation and Arbitration and as varied from quarter to quarter in accordance with the fluctuations (if any) of the Court's retail price index numbers (second series) ".

Subsequently to the certification of these agreements the submissions previously made by the Victorian employers were argued before a conciliation commissioner and on 28th January 1948 he dismissed the union's claim so far as those employers were concerned. In doing so, he pointed out that although at the time when the union's log was served a few members of the union were employed in Victoria by employers in the transport industry, practically every one of those particular employees had resigned from the union or had applied for a clearance from that organization or had joined the Motor Transport and Chauffeurs' Association of Australia. Thereupon he proceeded : " It appears that at the extreme outside there are, now when the matter comes on for hearing, considerably less than a dozen employees of the respondents who are members of the Transport Workers' Union and the probability upon the evidence is that there are only one or two, if any. The Transport Workers' Union contends with considerable force that the sole and only reason for this is because it has not got an award of the court to cover the working conditions of its members if employed by the respondents and consequently those employees who would join and are desirous of joining the union, do not do so but have in many cases resigned and joined the other organization which can offer the benefits of a state wages board determination.

The Transport Workers' Union strongly presses its claim to an award as a means of obtaining members. It contends that its desire is to embrace in its union all employees engaged upon transport and that if an award is made it will have no difficulty in

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

enrolling many of the men now employed by the respondents as members of the Transport Workers' Union. However much one may sympathise with the officials of that union in this view, it is not a matter, in my opinion, which can unduly influence me in deciding the objections to an award put before me by the respondents. One of my duties under the Act is to promote goodwill in industry and to encourage the continued and amicable operation of orders and awards. It is my duty to do all in my power to prevent disputes and to settle disputes once they have arisen ".

After a careful review of the evidence given before him the conciliation commissioner expressed himself as not being satisfied that in fact any dispute at all existed or was threatened between members of the union and any of the Victorian employers concerned. He did not, however, affirmatively find that no dispute did exist but went on to say that, even if he were of the opinion that a dispute did exist, he would consider it to be his duty in the public interest and in the interests of industrial peace to allow the working conditions in the industry in Victoria to continue to be dealt with by the State industrial authority.

We have referred to the decision of the conciliation commissioner in some detail because his observations became of some importance in the course of the application in which the order now attacked was made. This application, instituted by the respondent commission, sought a variation of the agreement of 24th October 1947 by the deletion of cl. 2 and the insertion in its place of the following clause: " An adult male employee in the Transport Commission shall be paid at the rate of 40s. 4d. per day as a basic wage (non-adjustable) being the amount which the court 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, for work done after the 20th October 1953 ".

Upon the application coming on for hearing, counsel for the union contended that the court had no jurisdiction to vary the agreement because at the time it was made and certified no dispute existed between the union and the commission and, alternatively, that if a dispute existed, it was not a dispute or part of any dispute which extended beyond the limits of any one State. Upon these contentions being raised the representative of the commission sought and obtained an opportunity of securing instructions and upon the resumption of the hearing he informed the court that he accepted the position " that before the agreement was made and certified no dispute existed which extended beyond the limits of any one State ". Nevertheless, the court was of the opinion that

it was precluded by s. 16 (1) of the Act from questioning " whether the dispute as a result of which the conciliation commissioner certified the agreement was of an interstate character or not, and so consider whether or not its certification was within the conciliation commissioner's power ". Accordingly the court held that it was " bound to regard it as certified following upon the existence of a dispute which extended beyond the limits of any one State ", and further observed that " such being the nature of the original dispute we should regard it as continuing and the power of this court to vary it as being present ".

A further independent submission that the variation was outside the ambit of any original dispute was also made, the basis of the submission being that a claim to be paid a marginal rate or rates in addition to the basic rate was not a claim for payment of or the prescription of a basic wage. In our opinion this last submission should be rejected. The original claim was for payment not only of marginal rates in addition to established and certain basic rates but was a claim to be paid a basic rate and in addition certain specified marginal rates. It does not appear that any basic rate had already been established in this industry and, in our view, it would have been well within the jurisdiction of the court, in making an award in settlement of an industrial dispute as to the matters specified in the log of claims, to provide that the basic wage payable should be the amount of the basic wage for Hobart as determined by the court and as varied from quarter to quarter. It is not without significance that the parties themselves considered that cl. 2 of the agreement, framed as hereinbefore set out, was an appropriate provision to make in settlement of their so-called dispute as to wages. The truth is that the log purported to be a " log of wages and working conditions " and that cl. 3 thereof purported to make a claim with respect to " wages " generally and not merely and with respect to " marginal rates ".

The real difficulty in the matter is occasioned by the intimation made to the arbitration court by the representative of the commission for if there was no dispute or no dispute extending beyond the limits of any one State in settlement of which the agreement was made, it is difficult to see how for any purpose the agreement could have acquired any of the attributes of an award by a purported certification under s. 37 of the Act. The difficulty is not overcome by the provisions of s. 16 (1) for that section, however far its operation may extend, cannot operate to render inviolate and so clothe with validity an award or order the making of which, having regard

H. C. OF A. 1954

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

to the limits of the relevant constitutional power, could not in the first instance have been authorized by the legislature.

Apart from the intimation which was given to the court there would seem to be sufficient material upon which to conclude that a dispute of some kind did exist originally between the union and the commission. The agreement recites that the former had made claims on the commission and that having met in conference the parties had agreed to a settlement of all matters in dispute between them as thereinafter set forth. Whether or not the log of claims which was served upon the association was also served upon the commission does not appear but the recitals referred to acknowledge the existence of a dispute and that the terms of the agreement were designed to settle the matters in dispute. The terms of the commissioner's certificate made, it is not unreasonable to assume, at the request of and with the concurrence of the parties, lead to the same conclusion. But of what value are these indications when the representative of the respondent commission, after consideration, deliberately concedes for the purposes of the application before the arbitration court "that before the agreement was made and certified no dispute existed which extended beyond the limits of any one State". It may be that the concession is the result of a misapprehension as to the significance of the finding of the conciliation commissioner on 18th January 1948 that he was not satisfied that any dispute existed or was threatened between the members of the union and any of the Victorian employers concerned. This, of course, was a finding on the facts as disclosed to the commissioner at that time and, for the reasons appearing from his observations, throws no real light on whether a dispute extending into Victoria existed in October or December 1947. But whether the concession was made under a misapprehension or not it was, as we have said, deliberately made and should in this Court, as it was in the arbitration court, be treated as conclusive of the facts to which it refers. It is unfortunate that the concession is stated in the form of a conclusion and that the relevant facts upon which the conclusion was based were not stated or proved but in the absence of the precise facts this Court is left to do its best with the material before it. This being so, it must be assumed for the purposes of the case that at no relevant time was the commission a party to any dispute with the union extending beyond the limits of any one State.

In these circumstances it is clear that the certification of the agreement in purported pursuance of s. 37 of the Act did not add anything to its efficacy. The agreement did not thereafter "have the same effect as" nor was it "deemed to be an award for all

purposes" of the Act for the terms of the section are designed to produce such a result only upon certification of an original agreement made in settlement of a dispute as to industrial matters extending beyond the limits of any one State.

To overcome the difficulty apparent upon the statement of this proposition the respondent commission relied upon the provisions of s. 16 (1) of the Act. But, though this section may have the effect of giving a practical operation to some awards or orders made without express legislative authority, it is, for the reason already given, incapable of protecting or preserving orders made not only in excess of the powers conferred by the Act, but also in excess of the capacity of the legislature to authorize the making of awards and orders in relation to industrial matters. Accordingly this case must be decided on the view that the agreement did not acquire the attributes of an award for any purpose, that it was not, pursuant to s. 48 of the Act, continued in force after the expiration of the specified period of its currency and that, in the circumstances, the court had no power, pursuant to s. 49, to make an award or order by way of variation of its terms. But it would be quite wrong for this Court to allow prohibition to go with respect only to the order of variation and thereby leave the parties apparently bound by the provisions of the agreement in its original form. For the objection to the jurisdiction of the court to vary the agreement is only consequential upon the submission that the agreement itself is in no sense an award and what must be restrained—if anything is to be restrained at all—is the enforcement of the agreement either in its original form or as the order complained of purported to vary it. The prosecutor, it may be said, cannot hope to succeed in destroying the order of variation by an argument that the original certification was without lawful authority and yet, apparently, maintain the original agreement in force as though it had been made in settlement of an industrial dispute within the meaning of the Act and thereafter certified pursuant to the provisions of s. 37.

Some point was made by the respondent that prohibition should be refused on the ground that the prosecutor union had secured the certification of the agreement by a representation to the conciliation commissioner concerned, that it had been made in settlement of an industrial dispute; but we know of no principle which, in the circumstances of this case, would enable us to take this course. No doubt, at the time, the union believed this representation to be true and, indeed, at a later stage, endeavoured without success to maintain that certain Victorian employers were parties to the dispute which, as regards Tasmanian employers, had already been

H. C. OF A. 1954.

THE QUEEN v. KIRBY AND ORS.; EX PARTE THE TRANSPORT WORKERS' UNION OF AUSTRALIA.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

settled by agreement. Nor, do we think, is the court entitled to refuse prohibition as was suggested on the ground that the parties had for a long time acted in the belief that the agreement had properly been certified and that there had been considerable delay in raising objections to its validity as an award.

For the reasons given we are of the opinion that prohibition should issue restraining the enforcement of the agreement either in its original form or as the order complained of purported to vary it. During the course of argument the suggestion was made that the Court might not feel free to take this course in proceedings to which the conciliation commissioner who purported to certify the agreement is not a party. We think that any such objection in the present case is disposed of by the observations of *Starke* J. in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1) concerning the basis upon which prohibition issues in respect of awards of the arbitration court.

Order absolute for a writ of prohibition prohibiting further proceedings upon the agreement made on 24th October 1947 *and certified on 8th December* 1947 *and the order of variation thereof made on 23rd October* 1953.

Solicitors for the prosecutor, *Maurice Blackburn & Co.*

Solicitor for the respondent Justices of the Commonwealth Court of Conciliation and Arbitration, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent, the Transport Commission of Tasmania, *Moule, Hamilton & Derham.*

R. D. B.

(1) (1924) 34 C.L.R. 482, at pp. 552-553.