[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

EX PARTE TRUTH AND SPORTSMAN LIMITED.

H. C. OF A. 1957.

MELBOURNE, *May* 13, *June* 12.

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

Industrial Arbitration (Cth.)—Commonwealth Industrial Court—Right of appeal to—From judgments etc. of State Courts in matters arising under the Conciliation and Arbitration Act—Whether right available in respect of judgment delivered by State Court in exercise of appellate jurisdiction—Conciliation and Arbitration Act 1904-1956 (*No.* 13 *of* 1904—*No.* 103 *of* 1956), *s.* 113.

Section 113 of the *Conciliation and Arbitration Act* 1904-1956 provides: "(1) The Court has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; or (*b*) the *Public Service Arbitration Act* 1920-1956 . . . (4) The jurisdiction of the Court under sub-section (1) of this section is exclusive of the jurisdiction of a State court or court of a Territory of the Commonwealth to hear and determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section."

Held, by *Dixon* C.J., *McTiernan*, *Williams*, *Webb* and *Taylor* JJ., *Fullagar* and *Kitto* JJ. dissenting, that the plan of s. 113 is to make the Commonwealth Industrial Court the exclusive appellate tribunal for the judgments decrees orders or sentences described in s. 113 (1) and therefore the provision did not give any right of appeal from the Industrial Commission sitting as an appellate tribunal in a case arising before s. 113 (1) came into force.

ORDER NISI FOR MANDAMUS.

On 25th October 1955 Voltaire Molesworth laid a complaint against Truth and Sportsman Limited, under the *Conciliation and Arbitration Act* 1904-1955 alleging that it did at Sydney commit a breach or non-observance of the *Journalists* (*Metropolitan Daily*

Newspapers) *Award* 1955 in that it did on or before 17th August 1955 terminate the employment of the complainant and did fail to give him eight weeks' notice of such termination or eight weeks' pay in lieu of such notice.

On the same day the above-named complainant laid a further complaint against the above-named defendant alleging that it did, at Sydney commit a breach or non-observance of the award in that it failed to pay to the complainant his ordinary wages from 15th-17th August 1955, both dates inclusive.

The complaints were heard together before *H. Isles* Esq., the Chief Industrial Magistrate, appointed under the provisions of the *Industrial Arbitration Act* 1940-1955 (N.S.W.), who, on 8th March 1956, ordered that the defendant be convicted and fined £10 with certain costs on each complaint and that it pay to the complainant the sum of £224 on the first complaint and the sum of £16 16s. 0d. on the second complaint.

From these decisions the defendant appealed to the Industrial Commission of New South Wales constituted by *Taylor*, *De Baun* and *Gallagher* JJ., which Commission, on 19th December 1956, ordered that the appeals be dismissed.

From these decisions the defendant appealed to the Commonwealth Industrial Court constituted by *Spicer* C.J., *Dunphy* and *Morgan* JJ., which Court on 19th February 1957 ordered that the appeals be dismissed for want of jurisdiction.

On 16th April 1957 *Taylor* J., on the application of Truth and Sportsman Ltd., as prosecutor, granted orders nisi for writs of mandamus directed to the above-named judges of the Commonwealth Industrial Court and Voltaire Molesworth on the following ground in each case "That the Commonwealth Industrial Court was in error in holding that s. 113 of the *Conciliation and Arbitration Act* 1904-1956 did not confer jurisdiction on it to entertain the appeal".

B. P. Macfarlan Q.C. (with him *K. A. Cohen*), for the prosecutor. Section 113 (1) of the *Conciliation and Arbitration Act* 1904-1956 covers both primary and appellate orders made after the date of coming into operation of the section. The order of the Industrial Commission of New South Wales is an order within the meaning of the section. [He referred to *In re An Application by Public Service Association of N.S.W.* (1).] The Commission was exercising appellate jurisdiction from what was a matter in the Chief Industrial Magistrate's Court when he determined whether or not there should

(1) (1947) 75 C.L.R. 430.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

be a conviction under s. 59 of the *Conciliation and Arbitration Act* 1904-1955. There is a right of appeal from a decision of the Chief Industrial Magistrate to the Industrial Commission. [He referred to *Australia Hotel Co. Ltd.* v. *Musicians' Union of Australia* (1).]

[DIXON C.J. Is this an appeal "in a matter arising" under the Act as those words are used in s. 113 (1) ?]

Yes. [He referred to *Ah Yick* v. *Lehmert* (2).] Further, there may be either a particular or a general investing of Federal jurisdiction. Section 39 of the *Judiciary Act* 1903-1955 is the general investing section and it is proper to construe s. 113 (1) of the *Conciliation and Arbitration Act* as investing federal jurisdiction in the various courts and bodies which are there described. The specific vesting of jurisdiction in the Chief Industrial Magistrate means that there are also invested courts to which an appeal may be taken from orders of the Chief Industrial Magistrate. [He referred to *Weldon* v. *Winslon* (3).] Sub-section (1) and sub-s. (4) of s. 113 are bounded by the same limits. The former is not to be read down by reference to the latter which is merely to emphasise that the Commonwealth Industrial Court is to have exclusive jurisdiction in respect of appeals from primary courts.

M. J. Ashkanasy Q.C. (with him *J. B. Sweeney*), for the respondent Molesworth. The decision of the Commonwealth Industrial Court was correct. At the base of the whole of s. 113 is the idea that there will be only one appeal from a decision of a State Court in a matter arising under the Act and that will be to the Commonwealth Industrial Court. In sub-s. (4) "judgment, decree, order or sentence" can only mean of the primary Court. The words must bear the same meaning in sub-s. (1). In sub-s. (1) "matter" means a matter of first instance. A right of appeal is a matter of substance not of procedure. [He referred to *Colonial Sugar Refining Co. Ltd.* v. *Irving* (4).]

R. K. Fullagar, for the respondent Judges to submit to any order which the Court might make.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

(1) (1927) 26 A.R. (N.S.W.) 476.
(2) (1905) 2 C.L.R. 593.
(3) (1884) 13 Q.B.D. 784.
(4) (1905) A.C. 369.

The following written judgments were delivered :—

DIXON C.J. These are two orders nisi for mandamus directed to the learned judges of the Commonwealth Industrial Court. The tenor of each of the two writs that are sought is to command their Honours to hear and determine according to law an appeal by the prosecutor against a judgment of the Industrial Commission of New South Wales. The two appeals were instituted in the Commonwealth Industrial Court as under s. 113 of the *Conciliation and Arbitration Act* 1904-1956. They were appeals from orders made by the State Industrial Commission in the exercise of a jurisdiction to entertain appeals from orders of an industrial magistrate. The orders in question of the industrial magistrate had been made under provisions of the *Conciliation and Arbitration Act* 1904-1955. In a full and careful judgment the Commonwealth Industrial Court discussed the application of s. 113 and held that the judgments or orders of the Industrial Commission from which it was sought to appeal did not fall under its operation. Accordingly the Commonwealth Industrial Court dismissed the appeals to it as incompetent.

The matter turns primarily upon the character of the proceedings and the dates on which the orders were made. Section 113 was enacted by s. 10 of Act No. 44 of 1956. There it appears as s. 41 but by the first schedule it is numbered s. 113. Act No. 44 was assented to on 30th June 1956 and the part containing s. 113 was proclaimed to commence on 14th August 1956. Almost a year before that date, namely on 11th August 1955, this Court in the case of *Collins* v. *Charles Marshall Pty. Ltd.* (1), pronounced wholly invalid s. 31 of the *Conciliation and Arbitration Act* 1904-1952. It is necessary to note this only because if s. 31 had been valid, an appeal to the Industrial Commission from the industrial magistrate exercising this particular kind of federal jurisdiction could not have been open. The proceedings before the industrial magistrate consisted of complaints made on 25th October 1955 against the now prosecutor under the *Conciliation and Arbitration Act* 1904-1955. One complaint was under what is now s. 119 for the non-observance of an award : the other was under what is now s. 123 for an amount of wages due under the award. On 8th March 1956 the industrial magistrate held the prosecutor liable on these complaints and made orders accordingly. On 27th March 1956 the prosecutor appealed from these orders to the Industrial Commission of New South Wales. The complaints under these sections of the *Conciliation and Arbitration Act* 1904-1955 with respect to the federal award may be taken as proceedings in the federal jurisdiction of the industrial

(1) (1955) 92 C.L.R. 529.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

Dixon C.J.

magistrate in consequence of s. 39 (2) of the *Judiciary Act* 1903-1955. The appeals were instituted in the Industrial Commission of New South Wales pursuant to s. 120 of the *Industrial Arbitration Act* 1940 of that State on the footing, no doubt, of the correctness of the decision of *Cantor* J. in *Atkins* v. *Ammonia Co. of Australia Ltd.* (1) (cf. *Australia Hotel Co. Ltd.* v. *Musicians' Union of Australia* (2)), followed by *De Baun* J. in *F. W. Hughes Pty. Ltd.* v. *Erskine* (3). The result of the decision of this Court in *Ah Yick* v. *Lehmert* (4), and the interpretation placed thereby upon s. 39 (2) of the *Judiciary Act*, it being assumed that no other enactment affected the matter, might, no doubt, be to convert State jurisdiction of the Industrial Commission to hear such an appeal into federal jurisdiction. If so, it may be assumed that the decision of the Industrial Commission would fall under the operation of par. (*c*) of s. 39 (2) of the *Judiciary Act* and so be subject to appeal to this Court by special leave. Although the appeals to the State Industrial Commission had been instituted before s. 113 of the *Conciliation and Arbitration Act* 1904-1956 came into operation, they were not in fact heard by the Industrial Commission until 21st November 1956, a date three months after the operation of the provision had commenced. The Industrial Commission reserved judgment and on 19th December 1956 dismissed both the appeals of the prosecutor. From the orders dismissing the appeals the prosecutor purported to appeal to the Commonwealth Industrial Court by notice of appeal dated 8th January 1957. It is these appeals which the Commonwealth Industrial Court has held to lie outside its jurisdiction and the question upon this proceeding is whether s. 113 confers jurisdiction to hear them.

Section 113 is in the following form: "(1) The Court has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; or (*b*) the *Public Service Arbitration Act* 1920-1956. (2) It is not necessary to obtain the leave either of the Court or of the court appealed from in respect of an appeal under the last preceding sub-section. (3) An appeal does not lie to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under sub-section (1) of this section. (4) The jurisdiction of the Court under sub-section (1) of this section is exclusive of the

(1) (1937) 36 A.R. (N.S.W.) 211.
(2) (1927) 26 A.R. (N.S.W.) 476.
(3) (1943) 42 A.R. (N.S.W.) 773.
(4) (1905) 2 C.L.R. 593.

jurisdiction of a State court or court of a Territory of the Commonwealth to hear and determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section." The question is whether, upon the true meaning of the whole section, sub-s. (1) is to be understood as covering the orders made by the Industrial Commission of New South Wales exercising a jurisdiction to hear appeals from the industrial magistrate.

It is clear enough that the proceeding before the industrial magistrate was a matter arising under the *Conciliation and Arbitration Act*; for the proceedings were complaints under the provisions of those Acts. As has already been stated, one was a complaint under s. 119, the other a complaint under s. 123. It is, however, open to doubt whether the appeals from the decision of the industrial magistrate to the Industrial Commission of New South Wales were matters arising under the Act. It must be remembered that the words "matter arising under" are an echo of s. 76 (ii.) of the Constitution which itself refers to original jurisdiction. An appeal is not based on the description of the matter before the court, but on the description of the judgment, decree, order or sentence of the court appealed from. It is, however, true that considerations of this kind did not prevent the Court in *Ah Yick* v. *Lehmert* (1), from holding that s. 39 (2) of the *Judiciary Act* included the appellate jurisdiction of the court of general sessions. But the verbal question whether the appeals were matters arising under the *Conciliation and Arbitration Act* may be put on one side. For when you turn to sub-s. (3) and sub-s. (4) of s. 113 the policy of the provision as a whole becomes apparent. The evident policy is, subject to s. 114 (2), to give one appeal in any matter arising under the *Conciliation and Arbitration Act* or the *Public Service Arbitration Act* and to confer jurisdiction in that one appeal upon the new Commonwealth Industrial Court. Once s. 113 obtained full operation, any transitional period having passed, it would be quite impossible for an appeal from the Industrial Commission exercising an appellate jurisdiction to come before the Commonwealth Industrial Court. The whole plan of s. 113 is to make the Commonwealth Industrial Court the exclusive appellate tribunal from the judgments, decrees, orders or sentences which are described in s. 113 (1). Once the full effect of s. 113 has been felt, there is clearly no room for such a question as arises in this case. As is remarked in the judgment of the Commonwealth Industrial Court, the question

(1) (1905) 2 C.L.R. 593.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

Dixon C.J.

appears to relate only to the two present appeals and so far as that Court was aware it could relate to no others. The reason is that the appeals from the industrial magistrate to the Industrial Commission were instituted before but decided after s. 113 came into operation. In a sense the question is one of the point at which, in the flow of litigation, s. 113 takes effect and applies the policy expressed in its provisions. It may be conceded that as a matter of logic it might have been regarded as taking effect upon all judgments, decrees, orders or sentences in matters arising under the Act or the *Public Service Arbitration Act* which had been pronounced and from which, by 14th August 1956, no appeal had been taken and decided. That would have meant that in the present case the jurisdiction of the Industrial Commission of New South Wales to hear the appeals would have been excluded by sub-s. (4). Such a construction of s. 113, although not inconsistent either with the words in which it is expressed or the policy which it embodies, would have been inconsistent with the principles of interpretation established by the decision of the Privy Council in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1). An alternative construction which satisfies those principles is to treat it as taking effect upon those judgments, decrees, orders or sentences given or made at first instance after 14th August 1956 in matters arising under the *Conciliation and Arbitration Act* or the *Public Service Arbitration Act*. That, of course, excludes the orders of the industrial magistrate in the complaints with which we are concerned. It excludes the orders of the State Industrial Commission made or given on appeal because they are not orders at first instance. The whole argument against this construction is that there are in sub-s. (1) of s. 113 no words confining it to judgments etc. at first instance. That is true but when you read s. 113 in its entirety it is plain that, except by chance at a time of transition, it could not apply or operate otherwise. Why should it operate to cover the singular case of the two orders made or pronounced by the Industrial Commission the jurisdiction of which survived only to proceed with the pending cases because they were decided before sub-s. (1) took effect? To make it include them gives the provision an unexpected operation not consistent with its own general policy and for the transitional cases, if they may be so called, produces two appeals where one only is contemplated by the general policy of s. 113. There is no intention to be extracted from s. 113 of giving an appeal at all costs to every decree, order or sentence of courts which under the previous law

(1) (1905) A.C. 369.

might still during the transition hear and determine an appeal. The judgment of the Commonwealth Industrial Court adopted the view that s. 113 should be construed as not including such a case and that judgment seems to accord with the general intention disclosed by the section and to be consistent with the language in which s. 113 (1) is expressed. For these reasons the application for mandamus should fail.

It is perhaps desirable to point out that under s. 114 (2) it might have been possible to apply for leave to this Court to appeal against the decision of the Commonwealth Industrial Court refusing to entertain the appeals to it and that resort to a prerogative writ was unnecessary. On this subject reference may be made to the decision of the Supreme Court of Victoria in *R.* v. *H. Beecham & Co.*; *Ex parte R. W. Cameron & Co.* (1).

McTIERNAN J. I agree that these orders nisi should be discharged.

Before s. 113 of the *Conciliation and Arbitration Act* 1904-1956 was brought into operation, an order was made in each of these matters on the complaint of the respondent against the applicant. The orders were made by the Chief Industrial Magistrate of New South Wales. Before s. 113 was brought into operation, the applicant appealed under s. 120 of the *Industrial Arbitration Act* 1940-1955 (N.S.W.) from each order to the Industrial Commission of that State. It was competent for that tribunal to hear and determine the appeals: *Collins* v. *Charles Marshall Pty. Ltd.* (2). The Industrial Commission pronounced judgments dismissing both appeals after s. 113 was brought into operation.

The Industrial Commission decided the appeals in its capacity as a " State Court "—it is not a " Supreme Court ". Relying upon s. 113, the applicant appealed to the Commonwealth Industrial Court. That Court decided it had no jurisdiction to hear the appeals. I agree with the decision of the Court. The appeals were brought of course upon the basis that the Industrial Commission was competent to pronounce the judgments which are in question. It would appear from the words of sub-s. (1) of s. 113 that the subsection is literally capable of extending to these judgments. If this is correct, it is only because the judgments were pronounced after s. 113 was brought into operation.

But does s. 113 contemplate that an appeal which the Court can hear and determine under sub-s. (1) may be from a judgment given on appeal by " a State court " from a court of first instance ? It would be impossible to reconcile an affirmative answer to this

(1) (1910) V.L.R. 204.

(2) (1955) 92 C.L.R. 529.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

McTiernan J.

question with sub-s. (4) of s. 113. Consistently with the exclusiveness of the appellate jurisdiction which s. 113 vests in the Commonwealth Industrial Court, it is not possible, in my opinion, to construe the section as extending to an appeal from the judgments which the Industrial Commission pronounced in these matters. The reason is that these judgments were pronounced on appeal. This construction of s. 113 requires that the orders nisi should be discharged. I reserve the question whether if the Commonwealth Industrial Court did not correctly construe s. 113, a mandamus would go in either of these cases.

WILLIAMS J. I agree with the conclusion reached by the Commonwealth Industrial Court. In my opinion the orders nisi for mandamus should be discharged.

WEBB J. I would discharge the orders nisi for mandamus for the reasons given by the Chief Justice.

The language of s. 113 is not so clear that I feel bound to conclude from it that the legislature intended for no apparent reason to provide for successive appeals during a very limited period before and after which successive appeals were and would be denied. It is impossible, I think, to attribute such an arbitrary, if not irrational, purpose to the Parliament in the absence of clear words compelling such a conclusion to be drawn.

I should add that if I thought that the Commonwealth Industrial Court had wrongly declined jurisdiction I would see no reason for not making absolute the orders nisi for mandamus.

FULLAGAR J. I was at first pressed by the reasons given by the Commonwealth Industrial Court for the view that it had no jurisdiction in this matter. After full consideration, however, I have come to the conclusion that that Court has the jurisdiction in question, and that the orders nisi for mandamus should be made absolute.

It is necessary, I think, to set out only sub-ss. (1) and (4) of s. 113 of the *Conciliation and Arbitration Act* 1904-1956. Those sub-sections are as follows:—"(1) The Court has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; or (*b*) the *Public Service Arbitration Act* 1920-1956 . . . (4) The jurisdiction of the Court under sub-section (1) of this section is exclusive of the jurisdiction

of a State court or court of a Territory of the Commonwealth to hear and determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section."

The dates of the material events are as follows. On 17th February 1955 the alleged offences with which the prosecutor company was charged were committed. On 25th October 1955 a complaint was laid, and the order of the industrial magistrate was made on 8th March 1956. On 27th March 1956 notice of appeal to the Industrial Commission was given. On 14th August 1956 the *Conciliation and Arbitration Act* 1956 came into force by virtue of a proclamation. The appeal was heard by the Industrial Commission on 21st November 1956, and judgment dismissing the appeal was given on 19th December 1956. Notice of appeal to the Commonwealth Industrial Court was given on 8th January 1957.

Sub-section (4) of s. 113 took away the right of appeal from the industrial magistrate to the Industrial Commission, which had previously existed. But retrospective effect could not be given to that sub-section, and it did not apply to the appeal from the industrial magistrate to the Industrial Commission which was pending on 14th August 1956: cf. *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1). That appeal accordingly proceeded, and the order dismissing it was made, as has been seen, on 19th December 1956.

The order made by the Industrial Commission on the appeal was, in my opinion, an order of a State court (not being a Supreme Court) made in a matter arising under the *Conciliation and Arbitration Act* within the meaning of sub-s. (1) of s. 113. I am not able to see any escape from that view. I cannot see any real or substantial reason for reading down sub-s. (1) or qualifying its language by any implication or by any reference to probable intention. The general intention obviously was that after the coming into force of the Act there should be one appeal and one only from State Industrial Courts, and that that appeal should be to the Commonwealth Industrial Court. But I cannot find any sufficient reason in this general intention for saying that sub-s. (1) does not mean what it appears to me to mean. The language is what *Isaacs* J. might have called "intractable". In any case, I do not think that any real inconsistency appears between that general intention and a literal reading of sub-s. (1). The appeal to the Industrial Commission was instituted before the Act was proclaimed, and that reading does not mean that after the Act became law there is more than one appeal from any State Industrial Court.

(1) (1905) A.C. 369.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

KITTO J. The question before us depends upon the true construction of s. 113 of the *Conciliation and Arbitration Act* 1904-1956 (Cth.). The section is one of the provisions, inserted in the Act in 1956 as Pt. IV, which create and govern a new federal court called the Commonwealth Industrial Court.

The Court is given original jurisdiction with respect to a variety of matters within the purview of the Act, and s. 113 (1) gives it in addition an appellate jurisdiction, described as a jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under the Act itself or the *Public Service Arbitration Act* 1920-1956 (Cth.).

The words "judgment, decree, order or sentence" are familiar from s. 73 of the Constitution, and it is clear enough that in the context of that section, and in such contexts as are found in the definition of "Judgment" in s. 2 of the *Judiciary Act* 1903 (Cth.) and s. 2 of the *High Court Procedure Act* 1903 (Cth.), the words extend, in accordance with their ordinary English meanings, to the judgments (for brevity I shall use only the one word) given in the exercise either of appellate or of original jurisdiction. Moreover in the very next section after that which we have to construe, s. 114, the same words are used in a context which shows that there, too, they must include an exercise of appellate no less than of original jurisdiction.

There is therefore very strong prima facie reason for construing sub-s. (1) of s. 113 as giving the Commonwealth Industrial Court appellate jurisdiction in respect of every judgment (of the courts referred to) which is made given or pronounced in a matter arising under either of the two Acts mentioned, whether it is so made given or pronounced on an original proceeding or on an appeal. Only one unexpressed limitation is inherent in the terms of the sub-section itself. The judgment must necessarily be one given after the commencement of the section; for no other limit of time can be inferred, and it would be absurd to suppose that the intention is to expose to appeal every judgment of the class described, however old it may be.

The Commonwealth Industrial Court, however, has held in the present case that its jurisdiction under sub-s. (1) is subject to a further restriction, a restriction which precludes it from entertaining an appeal from a judgment of the Industrial Commission of New South Wales, given after the commencement of the section, whereby

an appeal to that commission from a conviction for an offence under the *Conciliation and Arbitration Act* was dismissed. The commission is a State court, and it is not a Supreme Court. Its judgment was pronounced, as surely as was the conviction appealed from, in a matter arising under the Act, namely the matter of the charge which it was the object of the appeal to have dismissed. But the Court nevertheless thought itself bound to decline jurisdiction, holding that sub-s. (1) applies only in respect of judgments of courts of first instance.

The reason assigned for this conclusion is that sub-s. (4) of s. 113 discloses an overriding intention that in no case shall there be more than one appeal from a court of first instance. That sub-section provides that the jurisdiction of the Court under sub-s. (1) is exclusive of the jurisdiction of a State court or court of a Territory to hear and determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section. On its face, this provision does not purport to qualify or affect in any way the operation of sub-s. (1). It leaves that sub-section to have full effect according to its terms. It simply takes the appellate jurisdiction of the Court as conferred and delimited by sub-s. (1), and makes that jurisdiction, whatever it is, exclusive of any corresponding jurisdiction in a court of a State or a Territory. It should be considered with sub-s. (3) which, though differently phrased, makes the jurisdiction of the Court under sub-s. (1) exclusive of the jurisdiction of the High Court; for the two provisions taken together have the effect of channelling to the new Court all appeals of the class which is described by reference to the extent of the jurisdiction conferred by sub-s. (1). A construction which treats such provisions as diminishing the jurisdiction which it is their office to make exclusive, by taking out of it a class of appeals prima facie within it, ought not to be accepted without clear justification.

I do not find in the section any reason for adopting such a restricted construction. On the contrary, it seems to me that the view applied by the Commonwealth Industrial Court in this case misconceives the place and function of sub-s. (4) in the scheme of the section, and mistakenly sees, in what is after all no more than a consequence of the operation of that sub-section in the majority of cases, an indication that throughout s. 113 Parliament has used the traditional collection of nouns, "judgment, decree, order or sentence", in a specially limited sense before turning to use them with their normal meaning in the next section. The answer seems to

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

Kitto J.

me to be that, in so far as it is true that in no case in which a judgment appealable to the Court under sub-s. (1) is pronounced after the commencement of the section can there be more than one appeal, that is not because the crucial words have a special meaning in the section. It is simply because the existence of the Commonwealth Industrial Court's jurisdiction to entertain an appeal from a judgment of the specified kind is made to carry the consequence that no intermediate appeal, and no appeal to the High Court by-passing the Commonwealth Industrial Court, is competent. It should be noticed, however, that the proposition is not completely true. There exists the possibility of an appeal by leave from the Commonwealth Industrial Court to the High Court under s. 114 (2); and the notion that Parliament has set its face against more than one appeal in any given case becomes, when it has to admit an exception such as that, an unsatisfactory basis, to say the least of it, for reading down plain words. The truth seems to me to be that s. 113 contains nothing to suggest that its meaning is controlled by a general intention of keeping judicial proceedings in matters arising under the Acts to an original hearing and one appeal.

In considering the function of sub-s. (4) it is necessary to observe that sub-s. (2) of s. 113 gives an appeal to the new Court as of right in every case within the jurisdiction conferred on that Court by sub-s. (1). A result of making that provision is that all appeals to courts of States and Territories in such cases become superfluous, particularly if the judgments of those courts are in turn appealable as of right to the Commonwealth Industrial Court under sub-s. (1). There is obviously no need for an appeal to a court which is merely intermediate between the primary court and the Commonwealth Industrial Court, when the appellate jurisdiction of the latter may be directly invoked as of right. It may therefore be said that nothing would provide so strong a reason for precluding appeals to courts of States and Territories as would the fact that the jurisdiction conferred on the Commonwealth Industrial Court by sub-s. (1) does extend to appeals from all judgments, appellate and original alike. Accordingly, to understand the words "judgment, decree, order or sentence", both in sub-s. (1) and in sub-s. (4), as including judgments on appeal betokens no failure to recognise fully what it is that sub-s. (4) achieves.

I see nothing in sub-s. (4) to impose such a qualification upon the prima facie meaning of sub-s. (1) that a matter of the very kind with which the new Court is set up specially to deal is to be understood as excluded from its jurisdiction, for no better reason than that it

has been pronounced upon by two State courts and not by only one. An overriding policy there certainly is in s. 113; but it seems to me to be one which reinforces, and not one which detracts from, the natural meaning of the language used. It may be stated with the preface that the exception in sub-s. (1) of the judgment of a Supreme Court is attributable to the fact that the Constitution does not enable the Commonwealth Parliament to create any appellate tribunal over the Supreme Courts of the States. The section yields to that limitation upon power, but subject to that it reveals, I think, a clear intention to give the newly-created Court complete jurisdiction to pronounce, as the ultimate authority (with the exception of the High Court in a case where leave to appeal is given under s. 114 (2)), upon every justiciable matter in the relevant field which is decided by a court of a State or of a Territory after the commencement of the section.

For these reasons I am of opinion that the Commonwealth Industrial Court interpreted its jurisdiction too narrowly when it declined to entertain the prosecutor's appeal; and I would therefore make absolute the orders nisi for mandamus.

TAYLOR J. On 8th March 1956 the prosecutor, upon the complaint of the respondent Molesworth, was convicted by an industrial magistrate, appointed pursuant to s. 126 of the *Industrial Arbitration Act* 1940-1955 (N.S.W.), of two separate breaches of the *Journalists' (Metropolitan Daily Newspapers) Award* 1955, an award made under the authority of the *Conciliation and Arbitration Act* 1904-1955. Such breaches were punishable by virtue of s. 119 of that Act which provides also that the prescribed penalty may be imposed, *inter alia*, by any court of summary jurisdiction constituted by a police, stipendiary or special magistrate, or, by an industrial magistrate appointed under any State Act.

Pursuant to s. 120 of the *Industrial Arbitration Act* the prosecutor, on 27th March 1956, instituted appeals to the Industrial Commission of New South Wales against both convictions. The appeals were heard on 21st November 1956 and on 19th December following they were dismissed. Subsequently, the prosecutor purported to appeal to the Commonwealth Industrial Court from the orders of dismissal made by the Industrial Commission maintaining that it had a right to do so by virtue of s. 113 of the *Conciliation and Arbitration Act*. But holding, as it did, that s. 113 did not confer any right of appeal to it from decisions of the Industrial Commission, the Commonwealth Industrial Court dismissed both appeals.

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

Taylor J.

Section 113 was introduced into the *Conciliation and Arbitration Act* by Act No. 44 of 1956 in substitution for s. 31 of the Act as it stood at the time of the decision in *Collins* v. *Charles Marshall Pty. Ltd.* (1). By the decision in that case, which was given in August 1955, s. 31 was held to be *ultra vires*. The reasons which induced this view are of no importance in the resolution of the questions which arise in the present case but it is of some importance to know that s. 31 was not formally repealed until, consequent upon the decision in *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (2) Pt. IV of the Act was repealed and a new part containing the present s. 113 was enacted. This was accomplished by the *Conciliation and Arbitration Act* 1956 (Act No. 44 of 1956), the relevant portions of which came into operation on 14th August 1956. The new section, when first enacted, appeared as s. 41 but by a process of renumbering, it became s. 113. It will be seen therefore that the prosecutor was convicted and, thereafter, appealed to the Industrial Commission before s. 113 found its way into the federal Act and, further, that the hearing and determination of the appeals to that tribunal took place after that event. The only other observation which need be made at this stage is that the provisions of s. 31 had, theretofore, purported to exclude from the jurisdiction of the Industrial Commission, appeals in specified matters, including those of the character now specified in s. 113, but since the former section had been held to be invalid that tribunal remained invested with jurisdiction to entertain appeals from industrial magistrates sitting in the exercise of federal jurisdiction.

Section 113 of the *Conciliation and Arbitration Act* is in the following terms: "113. (1) The Court has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; or (*b*) the *Public Service Arbitration Act* 1920-1956. (2) It is not necessary to obtain the leave either of the Court or of the court appealed from in respect of an appeal under the last preceding sub-section. (3) An appeal does not lie to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under sub-section (1.) of this section. (4) The jurisdiction of the Court under sub-section (1.) of this section is exclusive of the jurisdiction of a State court or court of a Territory of the Commonwealth to hear and

(1) (1955) 92 C.L.R. 529.

(2) (1956) 94 C.L.R. 254.

determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section." The prosecutor's argument is based upon the language of sub-s. (1) and is simply stated. That sub-section, it is said, speaks prospectively and confers a right of appeal to the Commonwealth Industrial Court from any "judgment, decree, order or sentence of a State court made, given or pronounced" after 14th August 1956 in matters of the character therein specified. The Industrial Commission, the argument proceeds, was such a court and the orders made by that court in dismissing the prosecutor's appeals were made in matters of that description. The argument, however, is far too simple and takes no account of the very important provisions contained in sub-ss. (3) and (4). They are substantive provisions and entitled to consideration when the task of ascertaining the true meaning of the section is undertaken. And when the section is read as a whole it is seen plainly enough that it was intended, at one and the same time, to confer a limited appellate jurisdiction upon the Commonwealth Industrial Court and, *pro tanto*, to exclude the jurisdiction upon appeal of any other court. That is to say, the appeal to the Commonwealth Industrial Court was to be in substitution for any other form of appeal in matters of the character specified, including appeals to this Court. Nevertheless, the prosecutor contends that, fortuitously though it may be, it found itself in a position where it was entitled to pursue its appeal to the Industrial Court and, thereafter, to appeal from the orders of that tribunal to the Commonwealth Industrial Court.

Whether or not the newly enacted section produced this result depended upon whether the expression in sub-s. (1), "an appeal from a judgment, decree, order or sentence of a State court" refers, upon its true construction, to appeals from orders made in the exercise of appellate jurisdiction. The appellant, of course, asserts that it does and, if the sub-section stood by itself, a great deal might be said in favour of this view. But when it is seen that sub-s. (4) operates to exclude the appellate jurisdiction of any State court in matters of the specified character it becomes clear that sub-s. (1) was not intended to confer a right of appeal from appellate courts and that such difficulties as its language might be thought to produce could be encountered only during a brief period of transition, for, upon the section coming into full force and effect, the provisions of sub-s. (1) could not operate to confer a right of appeal from courts other than those of first instance. Read as a whole the section discloses an intention to substitute a form of appeal for existing rights of appeal from courts of first instance; obviously this is what

H. C. OF A. 1957.

THE QUEEN v. SPICER; EX PARTE TRUTH AND SPORTSMAN LTD.

the legislature had in mind, sub-ss. (1) and (4) being intended as complementary provisions, the latter taking away existing rights of appeal from courts of first instance and the former giving another right in substitution therefor. On this view the decision of the Commonwealth Industrial Court was plainly right and, accordingly, the rules nisi should be discharged.

Orders nisi discharged with costs.

Solicitors for the prosecutor, *Herman Fawl & Norton*, Sydney, by *Moule, Hamilton & Derham.*

Solicitor for the respondent Judges, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent Molesworth, *Crichton-Smith, Taylor & Scott*, Sydney by *Maurice Blackburn & Co.*

R. D. B.