[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN IRON & STEEL LIMITED . APPELLANT;

AND

DOBB AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1958.

SYDNEY, *April* 1, 2;

MELBOURNE, *May* 16,

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

Industrial Arbitration—Conciliation and arbitration—Industrial dispute—Industrial matter—Coal-mine—Employee—Deputy—Ill-health—Change of duties—Request by employee—Employment as surface labourer—Improvement in health—Application for reinstatement to former duties as deputy—Control, management and direction of mine—Employment of employee—Responsibility—Manager—Competency—Certificate—Employee industrial association—Local Coal Authority—Employee—Fitness as deputy—Reinstatement—Award or order—Prohibition—Coal Industry Act 1946-1951 (*N.S.W.*), *ss.* 4, 37, 37A, 39, 40, 42, 43, 43A, 44—*Coal Industry Act* 1946-1956 (*Cth.*), *ss.* 37, 37A—*Coal Mines Regulation Act* 1912-1953 (*N.S.W.*), *ss.* 4, 5, 5A, 6—*Judiciary Act* 1903-1955, *s.* 38 (*e*).

Under the *Coal Industry Act* 1946-1951 (N.S.W.) a Local Coal Authority is invested with power subject to certain exceptions to settle any local industrial dispute or matter and to settle any dispute as to any local industrial matter likely to affect the amicable relations of employers in the industry and their employees.

The *Coal Mines Regulation Act* 1912-1953 (N.S.W.) provides by s. 4 that every mine shall be under the direction of a qualified manager, by s. 4A that such manager shall not be under the technical direction of any superior, and by s. 5 that the manager in every mine shall exercise daily supervision. Section 5A provides that every manager shall appoint in writing a competent person as mine deputy.

Hunt, a former deputy who had been transferred at his own request to work on the surface applied to be restored to the position of deputy; after his request was refused the trade union to which he belonged sought to bring before the Local Coal Authority the question whether he should be restored. His employer the appellant obtained an order nisi from the Supreme Court of New South Wales for a writ of prohibition directed to, *inter alios*, the first-named respondent acting as the Local Coal Authority. The Full Court

discharged the order nisi and the employer appealed to the High Court against that decision.

Held, by *Dixon* C.J., *McTiernan*, *Webb* and *Fullagar* JJ., *Taylor* J. dissenting, that an industrial dispute within the terms of the *Coal Industry Act* existed, and by *Dixon* C.J., *McTiernan* and *Webb* JJ., *Fullagar* and *Taylor* JJ. dissenting, that the operation of the provisions of that Act gave power to a Local Coal Authority to deal with that dispute and were not excluded by the provisions of s. 5A of the *Coal Mines Regulation Act*.

The effect of the *Coal Industry Act* 1946-1956 (Cth.) referred to by *Dixon* C.J. and *Fullagar* J.

Decision of the Supreme Court of New South Wales (Full Court); *Ex parte Australian Iron & Steel Ltd.; Re John Dobb* (1958) S.R. (N.S.W.) 306; 75 W.N. 338, affirmed.

APPEAL, by special leave, from the Supreme Court of New South Wales.

An application dated 18th October 1957, for a rule nisi for a writ of prohibition was made by Australian Iron & Steel Ltd. to the Supreme Court of New South Wales (*Walsh* J.) to restrain John Dobb and Illawarra Deputies' and Shotfirers' Association from proceeding on an application for an order for the reinstatement of Arthur William Hunt, a member of the association, to his former position of deputy of Nebo Colliery on the grounds: (a) that the Local Coal Authority for the Southern District appointed under the *Coal Industry Act* 1946-1951 (N.S.W.), has no jurisdiction to make an award, order or determination for the reinstatement of Arthur William Hunt to his former position as deputy at Nebo Colliery; (b) that an award, order or determination for the reinstatement of Hunt to his said former position would not be an award, order or determination in settlement of a dispute as to an industrial matter; and (c) that having regard to the provisions of the *Coal Mines Regulation Act* 1912-1953 as to the duties and functions of a manager of a colliery and the method of appointment as a deputy the *Coal Industry Act* 1946-1951 (N.S.W.) does not empower a Local Coal Authority to make an award, order or determination requiring a colliery proprietor to employ a particular person as a deputy.

The application to make the rule absolute came on for hearing before the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.), which, *Owen* J. dissenting, discharged the rule: *Ex parte Australian Iron & Steel Ltd.; Re John Dobb* (1).

(1) (1958) S.R. (N.S.W.) 306; 75 W.N. 338.

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From this decision the applicant by special leave appealed to the High Court.

The relevant facts and statutory provisions are sufficiently set forth in the judgments of the Court hereunder.

B. P. Macfarlan Q.C. (with him *R. W. Fox*), for the appellant. Regard should be had to the *Coal Industry Act* 1946-1956 (Cth.), particularly ss. 4, 17, 36-38A, 39-43A, 44, 50, and the *Coal Mines Regulation Act* 1912-1953 (N.S.W.), particularly ss. 4, 5, 5A, 6, 54. The power conferred by par. (a) of s. 41 of the *Coal Industry Act* is the only applicable power in the case of the Local Coal Authority ; and the exercise of that power must relate to an industrial matter; A reinstatement from one grade to another in the same employment is not a reinstatement in employment, nor an industrial matter. The operation of Pt. I of the *Coal Mines Regulation Act*, in which ss. 4 and 5A appear, prevents the Local Coal Authority from settling the dispute by ordering the reinstatement of Hunt in the position of a deputy. This Court held in *Bank Officials' Association (South Australian Branch)* v. *Savings Bank of South Australia* (1) that where in circumstances of this kind an earlier special situation is not caught or dealt with by a later general situation, then the tribunal under the later Act is deemed to be deprived of jurisdiction ; and prohibition to the tribunal in the second case is the proper remedy. The general powers contained in the *Coal Industry Act* being such that they cannot apply to ordering the appointment of a deputy in a mine because of the provisions of the *Coal Mines Regulation Act*, then the Local Coal Authority's jurisdiction is to that extent restricted ; the proper remedy then is a prohibition to the Local Coal Authority. The jurisdiction in any relevant respect of the Local Coal Authority is simply to settle a dispute as to a coal industrial matter. That refers one back to the definition of industrial matters. Paragraph (k) of s. 4 is the only defined " industrial matter " relevant here. That paragraph properly construed does not relate to a change of position or change of grade in an employment but simply to a reinstatement in an employment of a person who has been employed but has been dismissed. At all relevant times Hunt was employed by the company. Hunt ceased to be a deputy because he no longer wished to be one. The mere reinstatement is not an industrial matter ; there must be a duty to reinstate ; it is an essential ingredient. [He referred to *Magner* v. *Gohns* (2) ;

(1) (1923) 32 C.L.R. 276.

(2) (1916) N.Z.L.R. 529, at pp. 532, 549, 550.

Australian Tramways Employes' Association v. *Prahran and Malvern Tramways Trust* (1) and *Butt* v. *Frazer* (2).]

[McTiernan J. referred to *Reg.* v. *The Members of the Railways Appeals Board and the Commissioner for Railways (N.S.W.)*; *Ex parte Davis* (3).]

The presence of the word " duty " in par. (k) is important. It is not only the idea of reinstatement, either in employment, or in another post from which that person has been removed, but the jurisdiction is dependent, as the words say, upon the existence of a duty. It would be a duty prescribed by law, i.e., resulting from an award, or from the operation of a direct law, and, in this setting, might cover the case of an obligation arising *ex contractu*. Whatever meaning it has it does not extend to the situation where an employee either voluntarily leaves a particular position to go into another position in the employer's service, or where the employee voluntarily leaves the service altogether of the employer. [He referred to *In re Municipal Employees, Greater Newcastle (Salaried Division) Award; Re Doberer* (4).]

J. R. Kerr Q.C. (with him *J. H. Wootten*), for the respondent Dobb. An objective of the *Coal Mines Regulation Act* is to ensure that because of safety problems in the mine there will always be someone who is designated and appointed to do particular things and that there will be someone who is nominated by the law to be the one to designate or appoint from among the employees a person or persons to attend to these matters. The appointment or nomination will not necessarily constitute the operative legal arrangement which would bring into existence as between the manager and his employer his employment relationship. The notion of employment is something different from the notion of appointment; that is to be seen in s. 5A (2) (e) of the *Coal Mines Regulation Act*: see rr. 4 (b), 5, 10 (a), 22, 25, 35 (a), 45. All the people there referred to are in the same position as a deputy. When the Act is requiring appointments or designations or nominations it is proceeding upon the assumption that, apart altogether from what may be the contractual arrangements, or the contracts of service as regulated by awards, that there will be over and above that a whole system of designations and appointments and nominations from among the employees of persons to carry out particular statutory duties. It is submitted that none of these appointments is really an appointment to employment; the relationship of employment is an

(1) (1913) 17 C.L.R. 680.
(2) (1929) N.Z.L.R. 636, at p. 642.
(3) (1957) 96 C.L.R. 429, at p. 451.
(4) (1949) A.R. (N.S.W.) 686; 17 L.G.R. 169.

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entirely different concept. So it is with the deputy. It is common knowledge in the coal industry that there are many deputies in a mine and throughout the industry, the terms of their employment being governed by another award. The reinstatement is reinstatement in employment, and it is open for the employer to employ a person as a deputy, but it is not open for that deputy to carry out the statutory duties unless he is appointed in writing by the manager. It is entirely a question of whether Hunt should have a status and the wages attached to that status. He contracts to perform the duties and the employer binds itself by contract to pay him the wages for a deputy. It would not be unlawful for the owner of a mine to employ a person as a deputy and have that person irrespective of any approval or appointment by the manager to perform the statutory duties under s. 5A. [He referred to *Wilsons & Clyde Coal Co. Ltd.* v. *English* (1).] The question of jurisdiction does not depend upon the manager's attitude. If the appellant's submission be correct then in such a case the mere absence of the appointment in writing would, as a matter of jurisdiction, prevent the tribunal from inquiring and ordering reinstatement in employment—the mere absence of it, for whatever motives. Reinstatement to employment can take place even though for reasons that the owner cannot control, his manager is not willing to give the necessary statutory prerequisite performance. It would be within the ambit of the dispute to deal with this matter in a number of ways: (i) to re-appoint him to his employment as a deputy to perform such of the duties of deputy as he is asked by the manager to perform in the mine, and that would be within jurisdiction; (ii) it would still be within ambit to appoint him, to reinstate him to the employment with the employer at the salary of the deputy and with the privileges and rights, so far as salary and remuneration are concerned, of the deputy; (iii) to remunerate him for whatever employment he was doing at the level, so far as remuneration and conditions of service are concerned, of the deputy for his present employment; and (iv) a similar approach would be open to the tribunal.

[FULLAGAR J. referred to *R.* v. *Melbourne and Metropolitan Tramways Appeal Board*; *Ex parte Melbourne and Metropolitan Tramways Board* (2).]

Such an approach is open to the tribunal; it demonstrates that reinstatement in employment is an entirely different and separate thing from appointment in writing. This point arising from s. 5A does not go to prohibition at all. The jurisdiction of the tribunal

(1) (1938) A.C. 57.

(2) (1948) V.L.R. 15.

is to settle the dispute. The only point here, it is conceded, is that there is a dispute as to whether Hunt should be re-employed in his former position. It is not a matter of jurisdiction : the Local Coal Authority has a power to settle a dispute if there is a dispute about re-employment as a deputy. There can be reinstatement to the employment and it can either be conditioned upon the writing being given or it can be left open, but Hunt then would not be able to perform the duties which would satisfy the statute unless he has the right. If an employer had an obligation on him to appoint in writing he could be directed by the tribunal to reinstate and he would then be bound to obey that award and the only way he could obey it would be to appoint in writing. The manager in this case is in precisely the same position. He is the statutory agent of the employer, and, if necessary, can be made a party himself and can be directed to reinstate. The tribunal may or may not go wrong, but the matter is not prohibitable merely because there are requirements of the general law as to qualification, even if this were a qualification. [He referred to *In re Government Railways and Tramways (Officers) Conciliation Committee ; Ex parte Winsor* (1) and *In re Government Railways and Tramways (Officers) Conciliation Committee* ; *Re Bissell* (2).] There is not any basis for considering par. (k) of the definition in s. 4 of the *Coal Industry Act* 1946-1951 to be of any different character from the other sub-divisions. [He referred to *Bank of New South Wales* v. *United Bank Officers' Association and the Court of Industrial Arbitration* (3) and *R. v. Wallis* (4).]

G. T. A. Sullivan, for the respondent Illawarra Deputies' and Shotfirers' Association. This respondent adopts the arguments submitted on behalf of the other respondent as an alternative, if need be, to the submissions made on behalf of this respondent. It is a major difficulty in this case that prohibition is sought before there has been any very detailed ascertainment of the facts. The onus of showing that the proceedings are outside jurisdiction is on the applicant and if it fails to prove that, then prohibition will not lie. All parties in the court below proceeded on the footing that the *Coal Mines Regulation Act* was just as much in full force and effect as the joint legislation under the *Coal Industry Act*. That is so because there is a construction of the *Coal Mines Regulation Act* which is completely consistent with the *Coal Industry Acts* and, therefore, the *Coal Mines Regulation Act* remains in full force and

(1) (1929) A.R. (N.S.W.) 235.
(2) (1930) A.R. (N.S.W.) 221.
(3) (1921) 21 S.R. (N.S.W.) 593, at pp. 609, 610 ; 38 W.N. 232 ; (1921) A.R. 138, at pp. 146, 147.
(4) (1949) 78 C.L.R. 529, at p. 540.

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effect. If there is an inconsistency the law is still as laid down in *Dean and Chapter of Ely* v. *Bliss* (1). *Bank Officials' Association (South Australian Branch)* v. *Savings Bank of South Australia* (2) presents an entirely different legal situation from the joint legislation here, namely, the *Coal Industry Acts* and the *Coal Mines Regulation Act*. These two Acts can only by the utmost straining be said to deal with the same subject matter. One deals with the regulation, with particular reference to safety in New South Wales coal mines; the other deals with industrial relations in the coal-mining industry. Under the *Coal Industry Act* (*N.S.W.*) the power and duty of the Local Coal Authority is to settle disputes. The matter to be decided under s. 44 (1) is the settlement of a dispute, between the employer and the employee, or the association on behalf of the employee, about the reinstatement of Hunt as a deputy. That gives jurisdiction to the Local Coal Authority. Once he has jurisdiction it is not taken away by another statute dealing with safety matters. In a conflict between the two statutes the later one will prevail. The mine manager, if directed by the employer, should employ because he is a servant or agent of the company, and the company cannot shelter behind a section of the Act which deals with an entirely different topic. The later statute empowers the tribunal to direct the employer to make an order which binds the employer and all its servants and agents including the mine manager. The word " suitable " as used by the manager has nothing to do with Hunt's appointment under the Act, and the word " competent " is something he does not decide. The ascertainment of the competency of a person is delegated to a tribunal other than the mine manager: see s. 6 (2), 9. The statutes should be approached to discover a construction of them which allows both to operate fully. [He referred to *In re Colliery Deputies &c. (North) Conciliation Committee* (3).] The only question is: Do the provisions of the *Coal Mines Regulation Act* go to jurisdiction? The answer is in the negative. The appeal should be dismissed on the ground that the prohibition does not lie in this case: (a) because the whole question under the *Coal Mines Regulation Act* does not go to jurisdiction; and (b) because the Local Coal Authority is exercising jurisdiction conferred on it by the State Act.

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

Cur. adv. vult.

(1) (1842) 5 Beav. 574, at p. 582 [49 E.R. 700, at pp. 703, 704.]

(2) (1923) 32 C.L.R. 276.

(3) (1931) 30 A.R. (N.S.W.) 359.

The following written judgments were delivered :—

DIXON C.J. By the order under appeal the Supreme Court of New South Wales (*Street* C.J. and *Herron* J., *Owen* J. dissenting) discharged an order nisi for a writ of prohibition directed against the respondent, Mr. John Dobb, as a Local Coal Authority acting under the *Coal Industry Act* 1946-1951 (N.S.W.) and against Illawarra Deputies' and Shotfirers' Association, a trade union registered under the *Trade Union Act* 1881-1936 (N.S.W.), as amended : *Ex parte Australian Iron & Steel Ltd.* ; *Re John Dobb* (1), The appellant, Australian Iron & Steel Ltd., sought a prerogative writ of prohibition to prohibit proceedings by the Local Coal Authority. The order nisi appears to treat Mr. Dobb as himself the Local Coal Authority under s. 43 of the *Coal Industry Act* 1946 as amended. But as the matter does not seem to affect members of the Australian Coal and Shale Employees' Federation it is not clear why his capacity is not that of a Chairman of a Local Coal Authority under s. 43A. The proceedings in question were taken by the respondent Illawarra Deputies' and Shotfirers' Association before the Local Coal Authority in respect of a member of that organisation named Arthur William Hunt. Arthur William Hunt is employed by the appellant company as a shiftman performing the duties of a surface labourer at Nebo Colliery. He had formerly been employed as a deputy at that colliery and the question which the respondent association sought to bring before the Local Authority concerned his restoration to that capacity. The decision of the appeal depends ultimately upon matters of law, but it is desirable to state the material facts giving rise to the question before the Local Coal Authority. Hunt entered the employment of the appellant company on 18th November 1946 and he was then employed as a deputy. The *Coal Mines Regulation Act* 1912-1953 (N.SW.), s. 4 (1) provides that every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every such mine shall nominate himself or some other person to be the manager of such mine, and shall send to the inspector of the district written notice of the name and address of the nominee. A person is not qualified to be manager of a mine unless he is a person for the time being registered as the holder of a first-class certificate of competency or a similar qualification : s. 4 (2) and s. 4 (4). In every mine daily personal supervision must be exercised either by the manager or by an under-manager, nominated in writing by the owner or agent of the mine : s. 5 (1). It is then provided by s. 5A (1) that

(1) (1958) S.R. (N.S.W.) 306 ; 75 W.N. 338.

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in every mine the manager shall appoint in writing a competent person as deputy, who shall make the inspections and carry out the duties necessary for examining for the presence of gas, ascertaining the sufficiency of ventilation, state of roof and sides, which duties shall be designated his statutory duties, supervising the general duties of shot-firers, and all other matters relative to the general safety of the mine. Sub-section (2) of s. 5A then provides for the qualifications of a deputy or a shot-firer. Section 6 provides for the certificates of competency and methods of obtaining them. It was in accordance with these provisions that Hunt, being a qualified person, was employed as a deputy. He remained in that position apparently until June 1956. In 1954, however, he attended a pulmonary clinic and in consequence of the advice he there received he applied to the appellant company to be transferred to work in which he would not be exposed to dust or to fumes. At that time the manager of the colliery refused to make such a transfer but in 1956, after Hunt had received further medical advice, he again applied to be transferred from his position as a deputy. He had been advised to take twelve months away from his existing duties. On 25th June 1956 he was, according to his wish, transferred to work as a surface labourer. According to the appellant company that employment was given to him at his own request. Apparently in October 1956 he applied to the Workers' Compensation Commission for a medical examination and on 16th October 1956 the medical board issued a certificate declaring him fit. Thereupon Hunt applied to the management of the colliery to be returned to his position as deputy but his application was refused. Some time later the Medical Bureau of the Joint Coal Board examined Hunt and perhaps in consequence of this the appellant company arranged for still another examination. On 25th January 1957 Dr. Epps made an examination and ultimately expressed the view that Hunt should not be employed underground. The medical officers of the Joint Coal Board on 11th February 1957 told the manager of the Nebo Colliery that Hunt should have an immediate medical board so that the question of his fitness might be determined. It does not appear whether this was done or not. But in March 1957 the respondent association made a written application to the Local Coal Authority that he should now hear and determine what was described as " the previous application made on 15th February 1957 concerning the employment of Mr. A. Hunt to his previous position of deputy ". The hearing took place on 19th March and 8th April 1957. It did not result in any final determination by the Local Coal Authority. A number of recommendations was

made. Mr. Dobb expressed the opinion that the action of the management could not on the material available be deemed to be either harsh, unjust or oppressive, warranting interference by an industrial authority. However, he said that should the conflict of medical opinion be overcome and should Mr. Hunt be declared physically fit for employment as a deputy, he as the Local Coal Authority was of opinion that the management should so employ him and this he, Mr. Dobb, strongly recommended. The secretary of the respondent association had already given to Hunt a certificate to the effect that by permission of the association he had the right to retain his seniority for the period of time granted by the management of the Nebo Colliery to him for the purpose of working outside the mine owing to his health. But on 8th October 1957 the secretary of the association made a fresh application to the Local Coal Authority. In the letter by which the application was made the secretary referred to a conference that had been held on that day and stated that the failure to reach a settlement was in effect because of the refusal of the management to accept a statement of Hunt's fitness from a medical officer of the Joint Coal Board. The letter proceeded to say, " the Board of Management of the above Association feels that Mr. A. Hunt has been harshly treated by the Management of Nebo Colliery, for a matter which only originated in his own concern for his health. On behalf of the above Association I make application for an order for the reinstatement of Mr. Hunt to his former position of deputy at Nebo Colliery." Mr. Dobb, the Local Coal Authority, notified the superintendent of the company that the association had applied through its secretary for the reinstatement of Hunt. Thereupon on 18th October 1957 the appellant company sought and obtained from the Supreme Court an order nisi for a writ of prohibition directed to Mr. Dobb and the Illawarra Deputies' and Shotfirers' Association calling on them to show cause why they should not be restrained from proceeding on the respondent association's application for an order for the reinstatement of Arthur William Hunt to his former position of deputy of the Nebo Colliery. In substance the grounds were that the Local Coal Authority had no jurisdiction to make an award or order for reinstatement, and that it would not be an award order or determination in settlement of a dispute as to an industrial matter and that having regard to the provisions of the *Coal Mines Regulation Act* 1912-1953 as to the duties and functions of a manager of a colliery and the method of appointing a deputy, a Local Coal Authority acting under the *Coal Industry Act* 1946-1951 is not

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empowered to make an award order or determination requiring a colliery proprietor to employ a particular person as deputy.

Before discussing the question whether the provisions of the *Coal Industry Act* of the State of New South Wales suffice to authorise Mr. Dobb to proceed with the hearing and determination of the matter of Hunt's reinstatement or re-employment as deputy, it is proper to refer to one complication which exists. The State Act and the *Coal Industry Act* 1946-1956 of the Commonwealth are corresponding enactments of the two legislatures setting up joint or combined authorities by the concurrent exercise of their respective constitutional powers. This is not the occasion to inquire into the extent constitutionally to which such a legislative conflation may succeed. But it does raise the question whether Mr. Dobb is endowed legislatively with dual personality. For s. 38 (*e*) of the *Judiciary Act* 1903-1955 provides that the jurisdiction of the High Court shall be exclusive of that of the courts of the States in matters in which a writ of prohibition is sought against an officer of the Commonwealth. For the purposes of ss. 37 and 37A of the Commonwealth Act (which correspond with ss. 43 and 43A of the State Act) Mr. Dobb is certainly a federal officer. The basis of the writ of prohibition sought from the Supreme Court is the assertion that he possesses no power, State or federal, to hear and determine the application for the restoration of Hunt as deputy. True it is that Mr. Dobb appears to claim only State power. But is he any the less a federal officer for that? It may be said that in truth he is a federal officer claiming to exercise a single power deriving so far as may be from State and federal sources. But the majority of the Supreme Court considered that State law operated to invest Mr. Dobb with power to proceed and that for that reason no prohibition could go. That view of the matter puts out of question the somewhat metaphysical problem of the State or federal character of Mr. Dobb's office upon which under s. 38 (*e*) of the *Judiciary Act* 1903-1955 the jurisdiction of the Supreme Court to direct a writ of prohibition to him must depend. Nor do I find it necessary to pursue the question. For I have arrived at the same conclusion as the majority of the Supreme Court, namely that it is within the power of the Local Coal Authority to hear and determine the application with reference to Hunt. There are two aspects of the question whether the Local Coal Authority obtains under the State Act power to entertain the application with reference to Hunt. The first aspect may be regarded as positive. Does the positive power given by the statute extend far enough to cover a matter of such a description? The other may be treated as negative.

Does the *Coal Mines Regulation Act* invest the mine manager with a statutory power of such a nature that the prima facie competence of the Local Coal Authority to deal with the matter is displaced? That is to say does the power of the mine manager remain uncontrollable by the Local Coal Authority? It is convenient to deal with these aspects separately.

The prima facie power of the Local Coal Authority is derived from s. 43, s. 43A (where members of the federation are not affected) and s. 44. Section 45, by reference, makes certain powers of the Coal Industry Tribunal applicable to the Local Coal Authority. When the question is one of those covered by s. 44 (1) powers contained in ss. 39, 40 and 42 of the Act become applicable. The effect of these provisions may be summed up by saying that a Local Coal Authority is invested with power to settle any local industrial dispute or matter, and to settle any dispute as to any local industrial matter likely to affect the amicable relations of employers in the industry and their employees, that is to say provided that the dispute is not pending before the Coal Industry Tribunal. The expressions employed, as might be expected, are defined: see s. 4. An industrial dispute by definition includes a threatened, impending or probable dispute and a situation which is likely to give rise to a dispute. The dispute must be as to industrial matters. "Industrial matters" is an expression subject to a definition of the kind which has become familiar in statutes of this description. The general part of the definition makes the expression mean all matters pertaining to the relations of employers and employees in the coal mining industry. There follows a long catalogue of subjects specifically mentioned and introduced by the words "without limiting the generality of the foregoing". Perhaps the material paragraphs are those which refer to matters or things affecting or relating to work done or to be done; the mode, terms and conditions of employment; the right to dismiss or refuse to employ, or the duty to reinstate in employment, a particular person or class of persons; and a shop, factory or industry dispute including any matter which may be a contributory cause of such a dispute. The definition ends with another general statement, namely that the expression "industrial matters" includes all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole.

The powers conferred by these provisions appear to me to suffice to cover the application for the restoration of Hunt to his status of deputy. There is enough evidence of there being a dispute in

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fact as to this matter to make it right to say that that element at least is not lacking. The dispute seems to be between the respondent association and the appellant company although it may arise out of or may depend upon the action of the manager. But that cannot affect the jurisdiction to deal with it. The ground upon which the appellant company relies in substance for denying that the Local Coal Authority possesses any prima facie jurisdiction or control over the matter is based on the subject matter of the dispute. The argument is that the subject does not fall within any of the descriptions, general or particular, contained in the definition of " industrial matters ". This argument, in my opinion, cannot be sustained. The wide words with which the definition begins— " matters relating to the relations of employers and employees "— suffice to cover it. I take them to include a matter relating to a single employee where an organisation of employees is disputing about it. In the particular paragraph which includes the words " the duty to reinstate in any employment a particular person or class of persons ", the word " duty " is not confined to an existing antecedent legal duty. That would be an absurd interpretation. The expression refers to a question whether it is not obligatory or incumbent industrially upon the party to reinstate a particular person or class of persons in employment. " Reinstate in employment ", no doubt, is not a very apt description of the restoration to a superior grade of a man already employed, but it is capable of covering such a matter and it seems obvious that in principle the intention of the legislature must extend to such a case. As it is a meaning of which the expression is susceptible it might accordingly so be construed. In short a matter of dispute such as that now in question seems clearly enough to fall within the general sense of the definition of " industrial matters ".

It is necessary now to turn to the second aspect of the question of the power of the Local Coal Authority. That aspect concerns the meaning of the provisions of Div. 1 of Pt. I of the *Coal Mines Regulation Act* and the effect upon them of the *Coal Industry Act*. This Division is headed: " Mines Regulation. Certificated managers, under-managers and winding-engine drivers." The Division begins with s. 4, the effect of which, as already stated, is to require that every mine shall be under a qualified manager holding an appropriate certificate of competency. Section 4A is directed to ensuring that the manager shall not be under the technical direction of any superior. Section 5 requires that daily personal supervision should be exercised in every mine either by the manager or the under-manager and provides for the qualifications

of an under-manager and his appointment by the owner. Section 5A which deals with the office of deputy, that is to say the office held by Hunt, provides that every mine-manager shall appoint in writing a competent person as deputy. It proceeds to state the duties of the deputy. These have already been referred to. The contention is that the general industrial powers in relation to coal mines invested in the Coal Industry Tribunal and in Local Coal Authorities by the *Coal Industry Act* 1946-1951 cannot operate in relation to the appointment by the manager of a deputy. The argument is that s. 5A (1) invests the manager with a statutory power belonging to him as a person designated in respect of that office and that his discretion to select and appoint a competent person as deputy cannot be influenced or controlled by any industrial tribunal appointed under the *Coal Industry Act*. The purpose of Div. 1 of Pt. I of the *Coal Mines Regulation Act* appears clearly enough to be to make it impossible for mine owners to entrust any but competent persons with the duties of management and the like and to ensure that it is the manager, and not the mine owner or some superior officer chosen by the mine owner who appoints a deputy. There is nothing in the Division to suggest any policy in relation to the regulation of industrial disputes. The *Coal Industry Act* includes among its purposes as appearing from the preamble the regulation and improvement of the coal industry. Part VII of that Act, which is directed to industrial matters, is concerned to set up, with the aid of the parallel federal enactment, special industrial authorities to exercise full powers of dealing with industrial relations arising in the coal industry. In construing Pt. VII of the *Coal Industry Act* in which ss. 39, 40, 43, 43A and 44 occur, one has the whole background of industrial legislation, State and Commonwealth, dealing with disputes between labour and management. There is no *a priori* reason for supposing that the powers conferred by the provisions of Pt. VII are not extensive enough to enable the tribunals to entertain questions concerning the actions of the manager of a coal mine even where his appointment and authority are regulated by the *Coal Mines Regulation Act*. The language of the provisions of the sections referred to in the *Coal Industry Act* naturally includes the kind of question which must arise from an exercise of the manager's authority. It is true that in a sense, but a rather qualified sense, the *Coal Industry Act* is a general enactment. But it deals with the coal industry and deals with it in relation to matters which must touch or even arise out of subjects dealt with by Div. 1 of Pt. I of the *Coal Mines Regulation Act*. It appears to me to be most improbable that the legislature intended

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to restrict the operation of the provisions giving authority to the Coal Industry Tribunal or the Local Coal Authorities so that the discretion of the mine manager is paramount over the powers of industrial arbitration. There is nothing in the form, language or framework of the enactments that requires such an interpretation and I think that it ought not to be adopted.

For these reasons I think that the decision of the majority of the Supreme Court was right and the appeal should be dismissed.

McTIERNAN J. I agree in the judgment and reasons of the Chief Justice.

WEBB J. I have had the advantage of reading the judgment of his Honour the Chief Justice. I agree in his Honour's reasons and conclusion and have nothing to add.

FULLAGAR J. In this case I feel no doubt that an industrial dispute within the meaning of the *Coal Industry Act* 1946-1951 (N.S.W.) exists between the appellant company and the respondent organisation. The subject matter of the dispute is whether Arthur William Hunt should be reinstated to his former position of deputy at the Nebo Colliery. That matter is, in my opinion, an industrial matter. I am not sure that it falls within the terms of any of the lettered paragraphs of the definition of "industrial matters" in s. 4 of the Act. In particular, I doubt whether it falls within the terms of par. (k) of that definition. But it seems to me to fall clearly enough within the general introductory words of the definition. The plural must here include the singular, and the matter pertains to the relations of an employer and one of its employees. It follows that in relation thereto the Local Coal Authority has prima facie the jurisdiction given to it by s. 44 (1) of the Act.

I have felt more doubt as to the other question argued, which relates to the effect of s. 5A (1) of the *Coal Mines Regulation Act* 1912-1953 (N.S.W.). In the end, however, I find myself in agreement with the dissenting judgment of *Owen* J. in the Supreme Court. The consequence may or may not have been intended by Parliament but I do not find that consequence surprising. I think that the history of s. 5A, which is set out in the judgment of *Owen* J., is of some importance, although I think that I should have taken the same view without it.

The deputy, when appointed, becomes no doubt the employee of the owner, but it is the manager who must make the appointment, and he must make it in writing. He is a person designated by

statute to exercise a power and to perform a duty, and in exercising the power and performing the duty he is required to exercise an independent judgment. The person appointed must be "competent"—that is to say, competent in the opinion of the manager. A candidate for appointment is not eligible under the Act unless he is competent in the opinion of the manager. Here we have before us an affidavit by Mr. R. M. Smith, the manager of the Nebo Colliery, in which he says:—"I do not consider that Arthur William Hunt is suitable or competent to be appointed as a deputy at Nebo Colliery". It appears to me that it would be plainly inconsistent with s. 5A (1) that Mr. Smith should be ordered to appoint as deputy a person whom he considers to be neither suitable nor competent.

No doubt the principle of statutory construction which is here involved is that which is expressed in the maxim *generalia specialibus non derogant*. For present purposes there could not, I should think, be any doubt as to which is the "general" statute, and which is the "special" statute. In the *Coal Industry Act* we have a statute which gives an extremely wide general power of "settling" by award or order an extremely wide variety of industrial disputes. Included as a very small *species* of the very large *genus* of disputes which may be so settled are disputes as to whether a particular person ought to be appointed to a particular position in the employment of an employer. The case of the appointment of a deputy in a coal mine is one case within that very small species, and with regard to that one case we find in the *Coal Mines Regulation Act* a provision to which full effect is not given if the discretion which it confers is exercisable by somebody other than the person designated. Construing the two enactments together, we are bound, as it seems to me, to say that the former is "general" and the latter "special", and to treat the latter as creating an exception to the former.

There is another point to be noted. For its binding force an order of a Local Coal Authority depends on s. 42 of the *Coal Industry Act*. That section provides that an award or order "shall be binding on the parties". The manager, who must make the appointment under s. 5A (1) of the *Coal Mines Regulation Act*, is not an employer. He is not—and, so far as I can see, cannot be made—a party to the dispute. It seems to me that for this reason alone no order binding on the manager can be made by the authority.

For the rest, I am content to repeat that I agree with the judgment of *Owen* J. In my opinion this appeal should be allowed, and a writ of prohibition should issue. The order nisi asks that the writ should be directed to Mr. Dobb, but it seems to me that it should be directed not to Mr. Dobb only but to the Local Coal Authority,

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which, since the matter does not affect the Australian Coal & Shale Employees' Federation, should be constituted as required by s. 43A of the *Coal Industry Act*.

One other matter should be mentioned. The *Coal Industry Act* (N.S.W.) was passed in pursuance of an agreement between the Commonwealth and the State of New South Wales for joint legislative action to the intent that the constitutional powers of each might be exercised to the fullest extent. The Commonwealth counterpart is found in the *Coal Industry Act* 1946 (Cth.). Since the foundation of the jurisdiction claimed by the Local Coal Authority in this case must be found in State law, I do not think that any question arises under s. 38 (*e*) of the *Judiciary Act* of the Commonwealth.

TAYLOR J. The respondent, John Dobb, is a Local Coal Authority and is said to have been so appointed pursuant to s. 43 of the *Coal Industry Act* 1946-1951 (N.S.W.). But the proceedings in relation to which prohibition is sought appear to be of the character described in s. 43A of that Act, that is to say, the authority was asked to exercise its powers " in relation to a dispute or matter not affecting members of the Australian Coal and Shale Employees' Federation ". Consequently, whether it was called upon to exercise its powers pursuant to s. 43A, or pursuant to the complementary provisions of s. 37A of the *Coal Industry Act* of the Commonwealth, it seems that it could be appropriately constituted only by a chairman, being a person appointed to be a Local Coal Authority, and two or three other members representative of employers and the same number of other members representative of employees, respectively, selected by the chairman. No doubt Mr. Dobb was the appropriate chairman but the order nisi for prohibition should have been addressed to the members of the authority and not merely to the chairman. The omission to join all the constituent members of the authority creates some difficulty in the way of the appellant but since it was not mentioned during argument and a majority of the Court is of opinion that the appeal should be dismissed for other reasons, it is unnecessary to refer to it further. In the circumstances I merely propose to state as briefly as I may the reasons which have led me to conclude that the authority had no power to deal with the application before it.

The relevant provisions of the *Coal Industry Act* 1946-1951 and of the *Coal Mines Regulation Act* 1912-1953 (N.S.W.) have already been set out and it is unnecessary that they should again be fully restated. Nevertheless, it is, in my view, important to emphasise

the very special nature of the duty created by s. 5A (1) of the latter Act. The history of the section was traced in the Supreme Court by *Owen* J. in the course of his dissenting judgment and I agree with him " that the only person who can appoint a deputy is the mine manager and that that is a responsibility which he must discharge by exercising his own personal discretion and judgment " (1). Indeed, I doubt, if the contrary was seriously suggested in argument before us. But my conclusion does not depend upon the view that the relevant provisions of the Act should be regarded as a special code and, therefore, not subservient nor amenable to orders of the Local Coal Authority made under the general provisions of the *Coal Industry Act*. Rather, it depends upon the importance which these special provisions assume upon an inquiry whether the facts disclose the existence of an industrial dispute capable of investing the Authority, pursuant to s. 44 (1) (a) of the Act, with power to make the order which the respondent organisation seeks. I do not, however, mean to say that I disagree with the conclusion of *Owen* J. but, rather, that the considerations which led to his conclusion appear to me to raise difficulties at an earlier stage of the case.

Once it is accepted that the function or duty of appointing a deputy or deputies is committed by statute to the mine manager alone it must follow that in the discharge of that duty he may not be constrained by his employer. It may be true that the appointment of a deputy will establish a particular industrial relationship between the deputy and his employer but the decision to appoint a particular person or to refuse to appoint that person is for the mine manager alone.

It is in such circumstances that an order for " reinstatement " is sought. There is said to be a dispute between Hunt and the appellant company concerning the duty of the appellant company to " reinstate " him, or, more generally, a dispute between him and the appellant as to a matter pertaining to their relations as employer and employee. But if the sole duty and responsibility of appointing deputies rests upon the mine manager it is difficult to see how a dispute could arise between the appellant and Hunt as to whether the appellant should " reinstate " him as a deputy. At the most the dispute would be as to whether the mine manager should, in the exercise of his statutory duty, re-appoint him. One may, perhaps, ask whether the Authority could, in settlement of any such dispute, direct the appellant to reinstate Hunt in the sense of re-appointing him as deputy. The answer must, it seems to me, be

(1) (1958) S.R. (N.S.W.), at p. 319; 75 W.N., at p. 347.

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in the negative for by statute the appellant is deprived of the power to make such an appointment. Again, it may be asked whether the mine manager may be ordered to make the appointment. Again the answer must be in the negative for he is not a party to the proceedings and was not a party to any industrial dispute in the sense in which that expression is used in the Act.

The facts concerning the origin of the so-called dispute are in some respects obscure but it does appear that Hunt's dispute was with the mine manager and was concerned with his refusal to exercise his statutory authority to re-appoint Hunt. It is said that " all discussions took place between the two persons mainly concerned, namely, the manager Mr. L. Pearce and the deputy, Mr. A. Hunt " and, it seems to me, the correct inference from the facts is that the appellant itself was not directly concerned. Whether Hunt should or should not be re-appointed was the personal responsibility of the mine manager and the dispute gave rise to a situation in which the appellant could make no decision and in which its assent to or rejection of Hunt's claim or demand was completely irrelevant (cf. *Reg.* v. *Portus*; *Ex parte Australian Air Pilots' Association* (1) and *Reg.* v. *Graziers' Association of New South Wales*; *Ex parte Australian Workers' Union* (2)). No doubt it was for this reason that the discussions referred to took place between Hunt and the mine manager.

The correct conclusion is, I think, that an examination of the facts discloses that at no time before application was made to the Local Coal Authority did any dispute arise between the appellant and Hunt, or any other person or organisation on his behalf. But it is said that when notice of the application which was made by the respondent organisation to the authority was given to the appellant it became involved in a dispute capable of invoking the statutory powers of the authority. Notice of the application, which was given by the authority to the appellant, intimated merely that an application had been made " for an order for the reinstatement of Mr. A. Hunt to his former position of deputy at Nebo Colliery ". But it seems apparent that the application, following as it did upon the preceding discussions, was not an application concerned with the " duty " of the appellant to reinstate him but, rather, with the question of whether or not the mine manager should re-appoint him. In my view such an application could not give rise to an industrial dispute within the meaning of s. 4 of the *Coal Industry Act*. It was not, in any true sense, a dispute as to a matter pertaining to the

(1) (1953) 90 C.L.R. 320.

(2) (1956) 96 C.L.R. 317, at pp. 323. 332.

relations of Hunt and the appellant as employer and employee and it was not a dispute concerning the "duty" of the appellant to reinstate Hunt.

For these reasons I am of opinion that the authority has no power to make the order sought and that, if the application had been in proper form, the appropriate course would have been to make the order absolute.

Appeal dismissed with costs.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*

Solicitor for the first-named respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the second-named respondent, *Maguire & McInerny*, Wollongong, by their agents *Maddocks, Cohen & Maguire.*

J. B.