Solicitor, for the appellant, *F. Crommelin* by *Ellis & Button*. Solicitors, for the respondents, *J. N. Moffitt*, by *McDonnell & Moffitt*; *The Crown Solicitor for New South Wales*.

C. A. W.

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PHILLIPS v. LYNCH.

[HIGH COURT OF AUSTRALIA.]

AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS, AUSTRALIAN DISTRICT . . . PROSECUTORS, } . APPELLANTS;

AND

THE HABERFIELD PROPRIETARY LIMITED . . . . . DEFENDANTS, } . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 22, 23, 26, 30.

Griffith C.J., O'Connor and Isaacs JJ.

Industrial Arbitration Act 1901 (*N.S.W.*), (*No.* 59 *of* 1901), *sec.* 37—*Jurisdiction of Court of Arbitration—Breach of common rule—Question for determination by Court—Relationship of employer and employé—Element of offence charged—Effect of erroneous decision—Prohibition.*

Although a Court of limited statutory jurisdiction, from which there is no appeal, cannot give itself jurisdiction by an erroneous decision upon a preliminary question upon the answer to which its jurisdiction depends, an erroneous decision upon a point which, however essential to the validity of its order, it is competent to try is not a ground for prohibition.

Sec. 37 of the *Industrial Arbitration Act* 1901 provides that the Arbitration Court may declare that any term of agreement or condition of employment shall be a common rule of an industry, fix the limits of the operation of the rule, and impose penalties for its breach, and that the penalties may be recovered either in the Court of Arbitration by a person entitled to sue, or before a stipendiary or police magistrate in Petty Sessions, subject to an appeal in the latter case to the Arbitration Court instead of to the Supreme Court. There is no appeal from any decision of the Arbitration Court.

In a proceeding before it the Arbitration Court made an award fixing a minimum daily wage for carpenters, and subsequently made the award a

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common rule binding upon all master builders and other persons engaged in the building industry within a certain area. The respondents were summoned before the Arbitration Court, and convicted of having committed a breach of the award in paying certain carpenters less than the minimum wage for certain work. It appeared that the work in question was done under written contracts, and the respondents contended that the Arbitration Court had no jurisdiction over them inasmuch as, upon the proper construction of the contracts, they were not employers, and, therefore, not bound by the common rule, the workmen being independent contractors. It was not disputed that the respondents would have been within the common rule if they were employers.

The Supreme Court having granted a prohibition on the ground that the Arbitration Court had exceeded its jurisdiction :

Held, that one element of the offence with which the respondents were charged was that they had employed the carpenters in question, and that the Arbitration Court was bound to inquire into that as well as the other elements of the offence charged, and, however erroneous their decision on the point might be in law or in fact, prohibition would not lie in respect of it.

The Queen v. *Bolton*, 1 Q.B., 66, and *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C., 417, considered and applied. *Clancy* v. *Butchers' Shop Employés Union*, 1 C.L.R., 181, distinguished.

Decision of the Supreme Court : *Ex parte Haberfield Proprietary Limited*, (1907) 7 S.R. (N.S.W.), 247, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondents were proceeded against by summons before the Court of Arbitration for breach of an award, which had been made a common rule under sec. 37 of the *Industrial Arbitration Act* 1901. At the hearing the respondents took the objection that on the admitted facts they were not employers, and therefore were not bound by the award, and the Court had no jurisdiction to entertain the summons. The Court held that the relationship of employer and employé existed, and convicted the respondents.

On the motion of the respondents the Supreme Court made absolute a rule *nisi* for a prohibition restraining the Arbitration Court and the prosecutors from proceeding upon the conviction : *Ex parte Haberfield Proprietary Limited* (1).

From this decision the present appeal was brought.

(1) (1907) 7 S.R. (N.S.W.), 247.

The facts are sufficiently stated in the judgment.

G. S. Beeby, solicitor, for the appellants. Even if the contract between the respondents and the persons in respect of whom the breach was alleged to have been committed, was not such an employment as at common law would have established the relationship of master and servant, there was an employment within the meaning of the *Industrial Arbitration Act* 1901. The writing did not conclude the matter. There was other evidence from which the Court might have concluded that the relationship of master and servant existed. The Supreme Court misinterpreted the decision in *Clancy* v. *Butchers' Shop Employés Union* (1). That decision was based on the fact that there was no industrial matter involved, and the jurisdiction of the Court was restricted to such matters. But it was shown here that the carpenters were engaged in work in the industry, and that the work was being paid for by the respondents. There was in fact an employment in the industry. [He referred to *Beath, Schiess & Co.* v. *Martin* (2), and the definitions of "industrial matter," "employer," and "employé" in sec. 2 of the Act No. 59 of 1901.] If this was not an employment, then any industry may be taken out of the operation of the Act.

[GRIFFITH C.J.—That does not follow. That is only a sort of bogey.

ISAACS J.—Even if it were a possible consequence, it might nevertheless not be contrary to the Act. Acts of Parliament can sometimes be evaded.]

Even if the Court of Arbitration was wrong on this point it is not a ground for prohibition. It is a matter which it has jurisdiction to decide. If the Court's decisions were subject to an appeal this would perhaps be a matter for appeal, but there is no appeal: sec. 32; and prohibition will not lie unless the Court exceeds its jurisdiction. The existence of the relationship of employer and employé was not a fact upon which the jurisdiction of the Court depended. It was not the subject of an independent or preliminary inquiry, but was one of the elements of the offence charged. The Court had necessarily to decide

(1) 1 C.L.R., 181. (2) 2 C.L.R., 716.

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whether the respondents were employers in order to determine the matter before them. If the question is one without determining which the matter cannot be decided, and the subject matter of the charge is within the Court's jurisdiction, and the defendant is within its territorial jurisdiction, a wrong decision is not a ground for prohibition. Here the question went to the merits of the case. [He referred to sec. 37 of the Act 59 of 1901; *Brittain* v. *Kinnaird* (1); *Thompson* v. *Ingham* (2); *The Queen* v. *Bolton* (3); *Holburd* v. *Burwood Extended Coal Mining Co.* (4); *Ex parte Scandritt* (5); *Joseph* v. *Henry* (6).]

[ISAACS J. referred to *Colonial Bank of Australasia* v. *Willan* (7); *The Queen* v. *Farmer* (8).]

Even if the question of the construction of the contract was one affecting the jurisdiction, the decision of the Court of Arbitration was right, and the prohibition was wrongly granted.

[GRIFFITH C.J.—We are not called upon to express an opinion on that point. We are not a Court of Appeal from the Arbitration Court, and will not decide whether that Court was right unless we are obliged to do so. The general principle is of much greater consequence than the merits of the particular dispute between these parties.]

Knox K.C. and *J. L. Campbell*, for the respondents. The jurisdiction of the Arbitration Court is strictly limited to matters arising between employer and employé. Persons who are not employers are not within the jurisdiction of the Court, and could not be summoned before it. The fact that the respondents are not employers is not the subject of a plea of not guilty, but of a plea to the jurisdiction. Being an employer is not an element of the offence, though it may be necessary for the Court to decide whether a person charged is or is not an employer. By deciding wrongly that he is, it cannot extend its jurisdiction: *Bunbury* v. *Fuller* (9); *Reg.* v. *Yaldwin* (10). There are two stages in the inquiry, (1) whether the defendant is a person

(1) 1 Brod. & B., 432.
(2) 14 Q.B., 710; 19 L.J.Q.B., 189.
(3) 1 Q.B., 66, at p. 72.
(4) 11 N.S.W. L.R., 365.
(5) 15 N.S.W. W.N., 244.
(6) 1 L. M. & P., 388; 19 L.J.Q.B., 369.
(7) L.R. 5 P.C., 417, at p. 442.
(8) (1892) 1 Q.B., 637.
(9) 9 Ex., 111, at p. 140; 23 L.J., Ex., 29.
(10) 9 Q.L.J., 242.

within the Court's jurisdiction, (2) whether he has committed the offence charged. The first is an independent inquiry, similar to the inquiry whether title to land is in dispute in a case before a Court which may not try such question, and if the Court wrongly decides that question and tries the case, prohibition will lie. The question always is whether the Act conferring jurisdiction has given jurisdiction to decide the preliminary questions upon which the jurisdiction to adjudicate depends. There is nothing in the *Arbitration Act* giving such a jurisdiction. If such a power is conferred upon a Court, and the jurisdiction depends merely upon facts as to which there is a conflict, the Court's decision will not be reviewed if there is any evidence to support it; but where it is a matter of law, as here, depending upon the construction of a document, the decision is reviewable by prohibition, and the Court will be restrained from dealing with persons who are in law not amenable to its jurisdiction. There is no difference in principle between limiting the jurisdiction territorially and limiting it to persons of a certain description. [They referred to *Liverpool United Gaslight Company* v. *Everton* (1); *The Queen* v. *Justices of Surrey* (2).]

If the respondents were not employers, they were never subject to the common rule. The fact that the evidence on the point would not come out until the hearing of the case generally does not alter the position. As soon as it appears, the Court is bound to refuse to deal with the case. Cases in which the Court has jurisdiction over the person and in which the only questions that can arise are as to the subject matter do not apply. [They referred to *Colonial Bank of Australasia* v. *Willan* (3); *Thompson* v. *Ingham* (4); *Elston* v. *Rose* (5); *Clancy* v. *Butchers' Shop Employés Union* (6); *Trolly, Draymen and Carters Union of Sydney and Suburbs* v. *Master Carriers Association of New South Wales* (7).]

[Griffith C.J. referred to *The Queen* v. *Special Commissioners of Income Tax* (8).

(1) L.R. 6 C.P., 414.
(2) 6 Q.B.D., 100, at p. 107.
(3) L.R. 5 P.C., 417, at p. 442.
(4) 14 Q.B., 710; 19 L.J.Q.B., 189.
(5) L.R. 4 Q.B., 4, at p. 8.
(6) 1 C.L.R., 181.
(7) 2 C.L.R., 509.
(8) 21 Q.B.D., 313, at p. 319, *per* Lord *Esher* M.R.

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ISAACS J. referred to *Barraclough* v. *Brown* (1), and *The Queen* v. *St. Olave District Board* (2).]

The respondents were neither in law nor in fact employers. The relationship contemplated by the Act as constituting employment is that of master and servant. The workmen in this case were independent contractors. That is a matter of law upon the construction of the contract, and there was no evidence *aliunde* that the work was actually done under different conditions. The fact that the respondents exercised some control over the order of the work does not make the workmen their servants in the legal sense. [They referred to *Hardaker* v. *Idle District Council* (3); *Riley* v. *Warden* (4); *Hardy* v. *Ryle* (5); *Marrow* v. *Flimby and Broughton Moor Coal and Fire-Brick Company Ltd.* (6); secs. 34 and 35 of the *Industrial Arbitration Act* 1901.]

G. S. Beeby, in reply.

Cur. adv. vult.

August 30.

GRIFFITH C.J. This case arises out of a prosecution of the respondent company before the Arbitration Court for an alleged breach of a common rule made on 13th February 1906 relating to the industry of builders. By the order of the Court making the common rule it was directed that the terms and conditions of employment set out in the award of the Court in a dispute between the appellant Society and a firm called Porter & Green should be a common rule of the industry of building, and binding upon all master builders and other persons engaged in the industry of building, and all persons employing carpenters and joiners within a certain area. It was further ordered that any employer bound by the order of the Court who committed a breach of it should be liable to a penalty of £100.

On 28th August 1906 a summons was taken out in the Arbitration Court against the respondent company, calling upon them to show cause why they should not be ordered to pay to the secretary of the appellant society certain sums as penalties for breaches of the award. In substance the prosecution was for

(1) (1897) A.C., 615.
(2) 8 El. & Bl., 529.
(3) (1896) 1 Q.B., 335.
(4) 2 Ex., 59; 18 L.J. Ex., 120.
(5) 9 B. & C., 603.
(6) (1898) 2 Q.B., 588.

breaches of the common rule, four breaches being alleged in respect of four different persons. The proceedings in the Arbitration Court are informal, and the summons did not formally set out the offence, but in substance the charge amounted to this, that the defendants, the present respondents, being persons engaged in the industry of building, employed the persons specified in the summons contrary to the terms of the award. The elements of the alleged offence were that the defendants were persons engaged in the industry of building, and that, being such persons, they had committed breaches of the common rule.

When the case came before the Arbitration Court the objection was taken by the defendants that the case was not within the jurisdiction of the Court, because the relationship of employer and employé did not subsist between the defendants to the summons and the persons in respect of whom the breach was alleged to have been committed. We have been favoured with the judgment delivered by the learned president, from which it appears that he directed his attention mainly to the question whether such a relationship had subsisted or not, because, if it did, the breaches were not disputed. The nature of the relationship between the respondents and the persons named in the summons was expressed in written contracts, and the question discussed in the Arbitration Court was whether under the terms of those contracts the relationship of employer and employé subsisted. The learned president apparently thought that that was substantially the same question as whether the relationship of master and servant subsisted; and I am strongly disposed to think that the correct view. It was necessary for the Arbitration Court to inquire into the question whether this relationship did or did not subsist, and the Court came to the conclusion that it did, and found that the defendants had committed the breach alleged, and fined them. The respondents applied to the Supreme Court for a prohibition on the ground that the Court of Arbitration ought to have held that they had no jurisdiction, that upon the evidence admissible the relationship of employer and employé did not subsist, and therefore that the defendants were not guilty of any breach of the common rule. The Supreme Court after argument made the rule absolute for a prohibition. They were of opinion that the

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case was not within the jurisdiction of the Court, because, as they thought, it was a case only of ordinary contract, by which I understand the learned Judges to mean a contract of a different kind from that establishing the relationship of employer and employé. On that point they thought that the conclusion of the Arbitration Court was wrong, and that that Court consequently had no jurisdiction. But in my judgment the question whether the conclusion of the Court was wrong on that point, and the question whether it had jurisdiction to hear the charge, are quite different questions.

It has been held by this Court on more than one occasion that the jurisdiction of the Arbitration Court is limited, and that if it exceeds its jurisdiction it may be restrained by prohibition from the Supreme Court. But those decisions have all been decisions as to the subject matter of the jurisdiction. The jurisdiction of the Arbitration Court to decide between employer and employé and to make common rules governing the relations between them is limited in the way indicated in those cases. This Court has held that the Arbitration Court cannot, under the guise of making an award in a matter within its jurisdiction, deal with something that is not an industrial matter. Nor can they make an award unless there is a dispute between persons standing to one another in the relationship of employer and employé. It is necessary however, to remember that the jurisdiction of the Arbitration Court under the Act is not limited to making awards or common rules. The jurisdiction of the Court is conferred by sec. 37, and incidentally by other sections. Section 37 relates particularly to the common rule. Under it the Court has jurisdiction to do eight different things. Amongst them are to declare that any term of agreement or condition of employment shall be a common rule of an industry, and to fix the limits of its operation, and impose penalties for its breach, and so on. But the second part of the section provides that all fines and penalties for any breach of an award may be sued for and recovered either in the Court by a person entitled to sue or before a stipendiary or police magistrate sitting as a Court of Petty Sessions, with a proviso that, if the proceeding for the recovery of the fine is taken before a stipendiary or police magistrate sitting as a Court of Petty

Sessions, the appeal shall be to the Arbitration Court instead of to the Supreme Court as in ordinary cases. The jurisdiction conferred by the Act is therefore twofold. There is, first, an arbitral jurisdiction, to determine disputes between employer and employé for the purpose of laying down the terms upon which the industry is to be carried on, and, secondly, a punitive or correctional jurisdiction, conferred upon it in common with stipendiary or police magistrates.

This Court has held that the arbitral jurisdiction can only be exercised with respect to matters which are actually within the limits of the jurisdiction conferred by the Act; but it has never determined that when exercising the punitive jurisdiction the Arbitration Court is bound by the limits which define the arbitral jurisdiction. Of course in that case also the Arbitration Court must keep within its jurisdiction. It has, for instance, no jurisdiction to summon before it a person who is not within New South Wales. But, in considering the extent of a punitive jurisdiction of this sort, very different considerations apply from those applicable to the consideration of the arbitral jurisdiction of the Court.

The rules as to the jurisdiction of inferior Courts or Courts of limited jurisdiction and the extent to which they will be restrained by the superior Courts are well established. I will refer only to two of the authorities on that subject. The first is *The Queen* v. *Bolton* (1) which was decided by the Court of Queen's Bench in 1841, and has been cited many times since and always with approval, has been very often applied, and never dissented from. Its authority is recognized by the Court of Appeal in England, by the Privy Council, and also, I think, by the House of Lords. In that case Lord *Denman* C.J. delivered the judgment of the Court, and laid down so clearly the principles applicable to these cases that I will read at length the material parts of the judgment. He said (2):—"Two points were made in support of the order; the first, that, the proceedings all being regular on the face of them, and disclosing a case within the jurisdiction of the magistrates, this Court could not look at affidavits for the purpose of impeaching their decision; the second, that, even if those affidavits were

(1) 1 Q.B., 66. (2) 1 Q.B., 66, at p. 71.

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looked at, the case would be found to be one of conflicting evidence, in which there was much to support the conclusion to which the magistrates had come; and that this Court would not disturb that conclusion, even if it might have been disposed to have decided differently had the matter originally come before it.

"The first of these is a point of very much importance, because of very general application; but the principle upon which it turns is very simple: the difficulty is always found in applying it. The case to be supposed is one like the present, in which the legislature has trusted the original, it may be (as here) the final, jurisdiction *on the merits* to the magistrates below, in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law.

"Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed; but, as the inquiry is open, *ex concessis*, to see whether the case was within the jurisdiction of the magistrates, it is contended that affidavits are receivable for the purpose of showing that they acted without jurisdiction; and this is, no doubt, true, taken literally: the magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses: in the one it is true; in the other, on sound principle and on the best considered authority, it will be found untrue. Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the Statute gives him jurisdiction, his finding the other party guilty by his conviction in the very terms of the Statute would not give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charges being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has

been presented to the magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. But, as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable."

I pause here to point out that in the present case there is no doubt that the charge made against the present respondents was a charge which it was apparently within the jurisdiction of the Arbitration Court to determine. It alleged a breach of a common rule, and that common rule, being an order laid down by a Court having statutory authority to do so, had the effect of the law of the land, so far as regards the matter dealt with by it, in the same way as a by-law of a municipal authority, when promulgated in a proclamation by the Governor in Council.

Lord *Denman* C.J. went on:—"But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that, if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the con-

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clusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.

"We will cite only two authorities in support of this reasoning. The former, that of *Brittain* v. *Kinnaird* (1), and the admirable judgment of *Richardson* J. (2) are too well known to make it necessary to state them at length. There, in the case of a conviction under the *Bum-boat Act*, it was asked, shall the magistrate, by calling a seventy-four-gun ship a boat, give himself jurisdiction and preclude inquiry? The learned Judge gave the answer:—'Whether the vessel were a boat or no, was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the *fact*, which the magistrate has to decide, is that which constitutes the jurisdiction'." He quoted then another case in the Common Pleas to the same effect: *Cave* v. *Mountain* (3). In conclusion he said this:—"It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

The only other case I think it necessary to mention is *The Queen* v. *Special Commissioners of Income Tax* (4) which has been often cited in this Court. Lord *Esher* M.R., with whom *Lindley* L.J. entirely agreed, after pointing out that there may be cases in which a tribunal has not jurisdiction to determine whether the state of facts exists necessary to give it jurisdiction, said (5):—"The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal

(1) 1 Brod. & B., 432.
(2) 1 Brod. & B., 432, at p. 442.
(3) 1 Man. & G., 257.
(4) 21 Q.B.D., 313.
(5) 21 Q.B.D., 313, at p. 319.

cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Under which class of cases then does the jurisdiction of the Arbitration Court, or the police magistrate, to inquire into a charge of a breach of the common rule, fall?

In the case of a charge of this sort all that it is necessary for the prosecutor to prove is that the defendant is a person of the class engaged in the industry to which the common rule applies, and that he has committed the particular breach alleged. In answer to that charge the defendant may set up various defences. It is not necessary to mention every possible defence, but I will point out four. (1) He may set up that he is not within the operation of the rule at all, never having been engaged in the industry. (2) He may contend that, though he is within the operation of the common rule, he did not make the alleged contract of service, in fact or in law, that is he may say that, though made in his name, it was not made with his authority. Or (3) he may say that the alleged contract was not a contract of service, and therefore there was no breach of the award. Or (4) he may set up that, assuming he is within the common rule, he did not commit any breach of it, that he paid all the wages required by the award. It is clear that in all these cases the Court must have jurisdiction to inquire into the facts. But it is said that, unless a man is in fact and in law an employer, the Court has no jurisdiction over him. In the second of the cases I have put, it clearly must have jurisdiction to inquire whether the defendant in fact and in law made any, and, if any, what, contract. This may involve questions of construction of the rule and the Court must have jurisdiction to inquire into that as well as into the other elements of the offence. The same principle must apply if any of the other suggested defences are set up. It is impossible to limit the authority of the Court to inquire into any of these matters. The functions of the Court being to inquire whether the

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person charged has broken the law, it has of necessity jurisdiction to determine any questions of fact or law on which the guilt or innocence of the defendant depends, and, if no appeal is given from its decision, no Court can review it. In the present case it is not disputed that no appeal lies from the Arbitration Court; and, therefore, if the case is within its jurisdiction, no matter how erroneous its decision may be, there is no remedy. If the legislature chooses to set up a Court of that kind it is perfectly free to do so. Legislatures have very often done so. In the present case it is provided by the Act that if the proceedings are taken before a magistrate the appeal is to the Arbitration Court. When the Act was passed the Arbitration Court was presided over by a Judge of the Supreme Court, so that the only difference made in that respect was that before the Act was passed there was an appeal from the magistrate in all cases to any Judge of the Supreme Court, whose decision was final, and after the Act was passed the appeal in these cases was to a Court presided over by a particular Judge of the Supreme Court, and the decision of that Court was final. There is, therefore, nothing suspicious in the finality of the decision of the Court if it sits as a Court of first instance.

I am of opinion that this case cannot be taken out of the ordinary rule that the duty of the Court is to examine the charge in order to see whether it discloses a matter that is within its jurisdiction, and, if it does, to proceed to determine it. If it does proceed to determine the matter, and determines it wrongly, there is no remedy. If the legislature desires to provide a remedy it is open to it to do so. As the law stands at present the decision of the Arbitration Court, being on a matter within its jurisdiction, is not examinable by the Supreme Court.

It may be right to add, in view of the opinion expressed by the learned president of the Arbitration Court on the question which he thought it necessary to decide, and of the general importance of the matter, that I am at present disposed to the opinion that the conclusion at which he arrived was wrong, and there was no contract between the parties creating the relationship of employer and employé. That was, however, a question for the Arbitration Court to determine, and this Court cannot review its decision.

No point was raised before us as to the person to whom the penalty is payable. It may be that the common rule is defective in that respect. But, no objection having been taken as to that point, we express no opinion upon it.

I think that the appeal must be allowed.

O'CONNOR J. The Supreme Court, after an inquiry into the evidence and documents, determined that the Arbitration Court had erroneously decided that the relation between the respondent company and the carpenters, whose cases were considered, was that of employer and employé within the meaning of the *Industrial Arbitration Act* 1901. Upon that ground they held that that Court had exceeded its jurisdiction and granted a prohibition. On behalf of the appellants, the objection was taken that the Supreme Court could not lawfully enter upon that inquiry. In the view that I take of the objection, it becomes unnecessary for this Court to determine whether the Supreme Court arrived at a correct conclusion upon the matter which it actually decided, though if it were necessary to do so, I am of opinion that their conclusion was correct. I base my judgment, however, solely on the ground that the Supreme Court had no jurisdiction to inquire whether on the matters mentioned the Arbitration Court had, or had not, come to a right conclusion.

The Court constituted under the *Industrial Arbitration Act* is a Court of limited jurisdiction. Its powers extend only to dealing with disputes on "industrial matters" within the meaning of the Act. To constitute such a dispute there must exist the relationship of employer and employé between the disputant employer or the Union which represents him and some member or members of the disputant Union of employés. That has been established by *Clancy* v. *Butchers' Shop Employés Union* (1). The Court is endowed with very wide powers for the making of awards in settlement of industrial disputes, for the fixing of penalties to enforce their observance, and for the punishment of breaches by the infliction of penalties. The observance of awards may also be enforced by order of a stipendiary or police magistrate. In respect of that part of their jurisdiction, therefore, the

(1) 1 C.L.R., 181.

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powers of the Arbitration Court and of the stipendiary and police magistrate are co-extensive; the Supreme Court has no wider jurisdiction in reviewing an award of the Arbitration Court inflicting penalties for breach of an award than it has in reviewing a conviction of a stipendiary or police magistrate inflicting penalties for breach of the same award.

On behalf of the appellants sec. 32 of the Act was to a certain extent relied on. It enacts amongst other things that "no award, order, or proceeding of the Court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of Judicature on any account whatsoever." But this Court in *Clancy's Case* (1), following the English decisions on similar provisions, held that the section must be construed as not extending to cases in which a Court with limited jurisdiction has exceeded its jurisdiction. Notwithstanding that section, therefore, the question still remains whether the Arbitration Court has exceeded its jurisdiction in such a way as to entitle the Supreme Court to interfere.

It is important to consider the form in which the question arises. The original award, dated 15th December 1905, settling a dispute between the Carpenters and Joiners Union and a firm of employers, fixed a minimum daily rate of pay for carpenters. By order of the Court, dated 13th February 1906, the award was made a common rule of the building trade within certain geographical limits, and its terms were thereby made binding on all persons engaged in the industry of building within the area limited. A summons was issued against the respondent company, which was engaged in building within that area, for breach of the award in paying certain carpenters less than the minimum rate. On that summons the Arbitration Court, having heard the evidence, found that the breach complained of had been committed, and made an award adjudging that the respondent company should pay certain penalties. It is in respect of the award inflicting these penalties that the Supreme Court has made the order now under appeal.

The original award, the common rule, the summons and the

(1) 1 C.L.R., 181.

award thereon admittedly disclose no want of jurisdiction. But it is contended that the Arbitration Court, having found, on evidence from which that inference could not legally be drawn, that the relation of employer and employé between the respondent company and its carpenters did exist, has exceeded its jurisdiction, and its award, based on that finding, is open to prohibition.

The law is well settled that superior Courts will not interfere by way of prohibition with the decisions of inferior Courts of limited jurisdiction unless want of jurisdiction is clearly established. But as is pointed out by *Sir James Colvile*, delivering the judgment of the Privy Council in the *Colonial Bank of Australasia* v. *Willan* (1), it is necessary before applying that principle to have a clear apprehension of what is meant by the term "want of jurisdiction." He then proceeds:—"There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide.

"Accordingly, the authorities, of which *Reg.* v. *Bolton* (2) and

(1) L.R. 5 P.C., 417, at p. 442. (2) 1 Q.B., 66.

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Reg. v. *St. Olave's District Board* (1), may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found."

It was urged by Mr. *Knox* in the course of his argument that the question whether the relation of employer and employé existed was a matter "extrinsic to the adjudication impeached," and stood upon the same footing as those questions which may be raised in the County Courts regarding the residence of a defendant, or the existence of a *bonâ fide* dispute as to title to land. In such cases no doubt a County Court could not by a wrong decision on such a question give itself jurisdiction. On such matters, which are extrinsic to the adjudication impeached, the decision of the inferior Court is always open to inquiry.

In support of that contention the respondents' counsel argued that the jurisdiction of the Arbitration Court was restricted by the Act to one class of persons—those persons between whom the relation of employer and employé existed—and that it was necessary to establish as a collateral, extrinsic, or preliminary fact that the disputants came within that class before the Court could have jurisdiction over them. I can see in the Act no foundation for that contention. The jurisdiction of the Court is general over every person in New South Wales as to whom is established before the Court that state of facts which the Statute has authorized it to deal with. There is indeed nothing to distinguish in principle the facts to be established before the Arbitration Court has jurisdiction to make its order from the facts which had to be established in *R.* v. *Bolton* (2); *Brittain* v. *Kinnaird* (3); and *R.* v. *St. Olave's District Board* (1). In *R.* v. *Bolton* (2) the decision under consideration was a conviction by magistrates, but the principle laid down by Lord *Denman* C.J. in his judgment is equally applicable to the conviction of the Arbitration Court (4). "But," he says, "where a charge has been

(1) 8 El. & Bl., 529.
(2) 1 Q.B., 66.
(3) 1 Brod. & B., 432.
(4) 1 Q.B., 66, at p. 73.

well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

To apply these principles to the matter before us—the Court has jurisdiction in disputes as to industrial matters within the meaning of the Act where the relation of employer and employé is involved—in the hearing of the dispute which it is empowered to settle it must necessarily determine whether that relation does or does not exist, and it is empowered to decide every question of fact or law necessary for that determination. Its determination of that question may be right or may be erroneous. If its error is shown on the face of its proceedings as in *Clancy's Case* (1), the superior Court will have power to grant a prohibition. But if the error is not shown on the face of its proceedings, there is no way by which the correctness of the determination can on a motion for prohibition be questioned. In the proceedings before the Court the original award was made binding only on employers and employés. The common rule similarly in its terms extended only to employers and employés—the summons by reference

(1) 1 C.L.R., 181.

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embodied the award. The matter for determination by the Court was, first, whether there existed between the respondent company and the carpenters the relation of employer and employé necessary to bring them within the terms of the common rule; second, whether there had been a breach of the award.

It was clearly within the jurisdiction of the Court to enter upon that inquiry, and, having determined that the relation of employer and employé did exist, the order inflicting penalties was founded on that determination. It discloses no want of jurisdiction on the face of it. Under the circumstances the decision of the Court, whether right or wrong in fact or in law, is conclusive, and beyond reach of inquiry by the Supreme Court or any other Court.

In my opinion, therefore, the Supreme Court had no jurisdiction to make the order appealed against, and the appeal must be allowed.

ISAACS J. Prohibition at common law to restrain an inferior Court from proceeding in respect of its order rests upon the assumption that the Court had no jurisdiction whatever to make the order. If it had jurisdiction to entertain and determine the application in which the order is made, error, either of fact or law, will not justify prohibition. The question, therefore, is whether the Arbitration Court had jurisdiction to entertain and determine, one way or the other, the application in which the order of the 14th November 1906 was made. It is said for the respondents that no such jurisdiction existed, because the relation between the respondents on the one hand and Roberts and Fry on the other was not that of employers and employés, and that consequently the respondents were not subject to the common rule. It was argued that the Supreme Court had power to review the finding of the Arbitration Court with regard to that relation, because that was a collateral or preliminary matter, and having arrived at the conclusion that the Arbitration Court was wrong in that respect, the Supreme Court was right in issuing the prohibition. Reliance was placed upon the well known rule in *Bunbury* v. *Fuller* (1):—"That no Court of limited jurisdiction can give

(1) 9 Ex., 111, at p. 140.

itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court."

This rule is beyond question, but everything depends upon ascertaining in any particular case whether the matter in contention is collateral or preliminary, or is part of the subject matter, which, if true, is within the Court's jurisdiction.

In the *Colonial Bank of Australasia* v. *Willan* (1) it is pointed out that conditions of jurisdiction which depend upon facts or a fact to be adjudicated upon in the course of an inquiry differ from other classes of conditions of jurisdiction. Their Lordships say, as to the class referred to:—"But an objection that the Judge erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide."

What, then, is the subject matter which, in such an application as the Arbitration Court had before it, that tribunal is empowered and required by law to determine? The application was in respect of an alleged breach by the respondents of a common rule in the building industry. The order directed that the common rule should be binding upon certain classes of persons within a designated area. The effect of the common rule and of sec. 37 (2) of the Act is that all persons comprised within these classes are bound by law to observe the obligations declared by the common rule, and in case of breach are liable to the prescribed penalties. The individuals who fall within those classes may vary from day to day, and whether a specified individual answers

(1) L.R. 5 P.C., 417, at p. 443.

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to the general description at any given moment is a question of fact, and one perhaps depending upon circumstances which the Arbitration Court from its special constitution is better fitted to determine than the ordinary Court of law. But the determination of that fact is absolutely essential to the ascertainment of whether a breach of the common rule has or has not been committed by the individual charged; and unless the Court finds that he is an employer, and that the person alleged to have been underpaid is his employé, within the meaning of the Act, there could be no breach of a common rule to pay the minimum wage. The question of whether the defendants fall within the specified class is not an element which is merely essential to jurisdiction but it is essential to an adverse adjudication; because it is an ingredient in the breach alleged. It is therefore not a preliminary matter, nor a collateral point within the rule of *Bunbury* v. *Fuller* (1), but is part of the subject matter, and necessarily comes within the purview of the Court, which cannot possibly arrive at a decision against the defendants without determining this point. The Arbitration Court has to judge of this in the course of the case, just as much as of the amount of remuneration paid. It was in the present instance dealing with a class of questions plainly within its jurisdiction; it was competent and bound to commence the inquiry, and to proceed to ascertain the facts, including the relations of the respondents to the men; there was no point at which it was bound or authorized to stop short of a final adjudication on the truth or otherwise of the charge laid; there was evidence upon which the Court was as a tribunal entitled to rest, and did rest its conclusions of fact and law, whether those conclusions were accurate or not; and consequently it cannot be said to have acted without jurisdiction. The reasoning of the Privy Council in the *Colonial Bank of Australasia* v. *Willan* (2), entirely supports the appellants' contention.

This case resembles in principle *The Queen* v. *Dayman* (3) where the magistrate had no power to make an order for paving expenses except in the case of a "new street." The question whether the street was a new street or not was therefore one of

(1) 9 Ex., 111.

(2) L.R. 5 P.C., 417.

(3) 7 El. & Bl., 672, at p. 678.

the issues he had to try. He held it was not a new street and refused to make an order. The Court of Queen's Bench by a majority discharged the rule for a mandamus to compel him to hear and adjudicate. *Crompton* J. said that the magistrate had already heard and determined, and the learned Judge observed :— "It is not a case in which the existence of a fact determines whether the inferior tribunal had jurisdiction or not, as when title to land comes into controversy in a County Court. Had this Act said that, as soon as there was a dispute as to whether the place was a new street, the jurisdiction should cease, it might give rise to different considerations. But in every cause that comes before any Court there are matters of law and fact, and matters of mixed law and fact, which the prosecutor must establish, or else he fails. On such matters, under this Act, the magistrate finally decides. If he were to step wholly out of his jurisdiction, then, though the certiorari is taken away, we could bring up and quash his order."

Every word of that quotation applies to the present case. In *R.* v. *Nunneley* (1) *Crompton* J. again differentiates the cases where, if a particular circumstance occurs, the jurisdiction is entirely gone, from those where the fact which gives jurisdiction is itself an ingredient in the judgment which is to be given if there be jurisdiction.

The case of *The Queen* v. *St. Olave's District Board* (2) was based on the same grounds, and appears to me to be an authority covering the present case. The Arbitration Court here had as much jurisdiction to determine the question as to whether Roberts was an employé of the respondents, as in that case the Metropolitan Board or, as *Coleridge* J. thought, the District Board, had to decide that Defree was an officer.

As the Arbitration Court possessed power to decide this controverted point, as part of the matter in dispute, jurisdiction was established, and prohibition cannot issue.

I may add that, so far as I am concerned, having regard to the whole of the evidence, I am by no means convinced that the decision of the Arbitration Court as to the real relationship of the respondents to the workmen was wrong.

(1) El. B. & E., 861. (2) 8 El. & Bl., 529.

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Appeal allowed. Order appealed from discharged. Rule nisi for prohibition discharged with costs. Respondents to pay the costs of the appeal.

Solicitors, for the appellants, *Brown & Beeby.*
Solicitors, for the respondents, *Dawson, Waldron & Glover.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MOY . . . . . APPELLANT;

AND

BRISCOE & COMPANY LIMITED . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 26, 27.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Bankruptcy Act 1898 (*N.S.W.*), (*No.* 25 *of* 1898), *secs.* 133, 137—*Supreme Court and Circuit Courts Act* 1900 (*N.S.W.*), (*No.* 35 *of* 1900), *sec.* 15—*Vacancy in office of Judge in Bankruptcy—Delegation of powers of Judge to Registrar in Bankruptcy.*

Act of bankruptcy—Notice of intention to suspend payment of debts—Bankruptcy Act 1898 (*N.S.W.*), (*No.* 25 *of* 1898), *sec.* 4.

The *Bankruptcy Act* 1898, sec. 133, provides that the bankruptcy jurisdiction of the Supreme Court shall be exercised by the Judge of that Court duly appointed under the title of Judge in Bankruptcy. The *Supreme Court and Circuit Courts Act* 1900, sec. 15, provides that where under any Act any jurisdiction, power or authority of the Supreme Court is to be exercised by any one Judge, any other Judge may for any reasonable cause exercise such jurisdiction, power or authority in all respects as the Judge designated might have exercised it.

During a short interval which elapsed between the resignation of the titular Judge in Bankruptcy and the appointment of his successor, one of the other Judges of the Supreme Court purported to exercise the power of delegation