[HIGH COURT OF AUSTRALIA.]

MORGAN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

RYLANDS BROTHERS (AUSTRALIA) LIMITED RESPONDENT.
PLAINTIFF,

THE AUSTRALIAN WORKERS' UNION . . APPELLANTS;
DEFENDANTS,

AND

RYLANDS BROTHERS (AUSTRALIA) LIMITED RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 9, 10, 22.

Isaacs A.C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Industrial Arbitration (N.S.W.)—Conciliation Committee—Validity of proceeding—Suit to impeach validity—Jurisdiction of Supreme Court—De facto award of Committee—Chairman voting as member of Committee—Industrial Arbitration (Amendment) Act 1926 (*N.S.W.*) (*No.* 14 *of* 1926), *secs.* 8, 9 (5).

Sec. 8 of the *Industrial Arbitration (Amendment) Act* 1926 (N.S.W.) provides by sub-sec. 1 for the establishment of conciliation committees for any industries or callings; by sub-sec. 3 that each committee shall consist of an equal number of representatives of employers and employees respectively and a chairman; and by sub-sec. 14 that "the validity of any proceeding or decision of a committee or of a chairman of a committee shall not be challenged except as provided by this Act." Sec. 9 (5) provides that "from any order, determination, or award of a committee . . . an appeal shall lie in the prescribed manner, to the commission," that is, the Industrial Commission established under the Act.

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Where upon an application for the variation of an industrial agreement the two employers' representatives voted against an award allowing the variation and the two employees' representatives voted in favour of such award and the chairman thereupon gave his vote in favour of such award and thereafter duly promulgated the award as being the award of the committee,

Held, that the Supreme Court had no jurisdiction to entertain a suit for a declaration that the award was a nullity, even if the chairman had no legal power to vote.

R. v. *Hibble*; *Ex parte Broken Hill Pty. Co.*, (1920) 28 C.L.R. 456, distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Rylands Brothers (Australia) Ltd.* v. *Morgan*, (1927) 27 S.R. (N.S.W.) 161, reversed.

APPEAL from the Supreme Court of New South Wales.

Rylands Brothers (Australia) Ltd. carried on business at Newcastle as wire manufacturers and merchants and employed about 1,200 employees, almost all of whom were members of the Australian Workers' Union and of whom about 312 were engaged on piece-work. On 23rd December 1925 the Company and the Union entered into an industrial agreement, within the meaning of the *Industrial Arbitration Act* 1912 (N.S.W.) as amended, which fixed the rates of wages and piece-work rates for all employees of the Company on the basis of a week of 48 hours until 20th December 1927. On 11th February 1926 the Company and the Union entered into a further industrial agreement, which varied the earlier agreement by reducing the hours of work from 48 to 44 per week and by providing that the daily and hourly rates of pay should be increased proportionately so as to enable employees of the Company paid at daily or hourly rates to receive for 44 hours work the same remuneration as was prescribed by the earlier agreement for 48 hours work. No provision, however, was made for a proportionate increase of piece-work rates.

On 14th April 1926 the Union lodged an application in the Court of Industrial Arbitration of New South Wales for a variation of those two agreements by increasing all piece-work rates by one-eleventh. The *Industrial Arbitration (Amendment) Act* 1926 came into operation on 15th April 1926. On 23rd August 1926 a conciliation committee was constituted under sec. 8 of the Act of 1926

consisting of two representatives of the Company, namely, J. K. MacDougall and M. Howarth, and two representatives of the employees of the Company, namely, A. C. Anderson and Roy Conroy; and William J. T. Morgan was appointed chairman. On 3rd September 1926 the application above mentioned came before the Conciliation Committee for consideration. The members of the Committee, other than the chairman, being equally divided in opinion, the chairman purported to vote in accordance with the opinion of Anderson and Conroy in favour of increasing the prescribed piece-work rates by adding one-eleventh thereto as from 1st June 1926. There had been no agreement by the members of the Committee to accept the decision of the chairman nor had he been required to refer the question at issue to the Industrial Commission established under the Act of 1926. On the same day Morgan, as such chairman, signed what purported to be an award of the Conciliation Committee varying the industrial agreements by directing that the piece-work rates fixed by the agreement of 23rd December 1925 be increased by adding one-eleventh thereto respectively. Morgan forwarded this award to the Industrial Registrar, who caused it to be published in the Government *Gazette* on 10th September 1926.

On 15th September 1926 the Company instituted a suit in the Supreme Court of New South Wales in its equitable jurisdiction against Morgan, Conroy, Anderson, the Union and the Attorney-General for New South Wales, claiming, amongst other things, (1) a declaration that the alleged award was not an award of the Conciliation Committee, but was illegal, null and void and was not binding on the plaintiff; (2) an injunction restraining the Union, its officers, servants and members, and all other employees of the plaintiff from asserting or claiming that the alleged award was a good, valid or subsisting award binding upon the plaintiff and from attempting to enforce it against the plaintiff. A motion to continue an *ex parte* interlocutory injunction, which came on for hearing before *Long Innes* J., was, by consent, turned into a motion for a decree, the hearing of the motion being treated as the trial of the suit. The learned Judge held that under the provisions of secs. 8 and 9 of the *Industrial Arbitration (Amendment) Act* 1926

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the chairman of a conciliation committee had power to vote at meetings of the committee of which he was chairman and therefore the award in question was a valid award of the Committee, and he accordingly made a decree dismissing the suit. On appeal by the plaintiff the Full Court, by a majority (*Ferguson* and *Campbell* JJ., *Street* C.J. dissenting), reversed the decision of *Long Innes* J. The majority held that under secs. 8 and 9 of the Act of 1926 the chairman of a conciliation committee had no power to vote at meetings of the committee of which he was chairman; that the alleged award was not an award of the Conciliation Committee; and that, as there was not an award of the Committee, sec. 8 (14) of the Act of 1926 did not operate to deprive the Supreme Court of jurisdiction to entertain the suit. The Court made an order allowing the appeal, declaring that the alleged award was not an award of the Conciliation Committee, and granting an injunction in the terms asked for: *Rylands Brothers (Australia) Ltd.* v. *Morgan* (1).

From that decision Morgan, Conroy and Anderson and the Australian Workers' Union appealed to the High Court, and the two appeals were heard together.

Flannery K.C. (with him *Cantor*), for the appellants Morgan Conroy and Anderson. The Supreme Court had no jurisdiction to entertain the suit, for sec. 8 (14) of the *Industrial Arbitration (Amendment) Act* 1926 (N.S.W.) deprived it of any jurisdiction to deal with the validity of any proceeding of a conciliation committee and sec. 9 (5) gives an appeal to the Industrial Commission only. The Legislature has given to the Industrial Commission all appeals from a conciliation committee and from any proceedings to enforce an award of a committee (see also secs. 49, 50, 55 and 61 of the *Industrial Arbitration Act* 1912 (N.S.W.)). The fullest meaning should be given to sec. 8 (14) of the Act of 1926 in order to prevent any appeal other than that provided for, and that section should be held to apply to any *de facto* award of a committee (*Minister for Labour and Industry (N.S.W.)* v. *Mutual Life and Citizens' Assurance Co.* (2)). *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (3),

(1) (1927) 27 S.R. (N.S.W.) 161. (2) (1922) 30 C.L.R. 488, at pp. 492, 494.
(3) (1920) 28 C.L.R. 456.

does not assist, for it was assumed that there was jurisdiction to entertain the matter notwithstanding the provisions of sec. 28 of the *Industrial Peace Act* 1920.

Browne K.C. and *De Baum*, for the appellant the Australian Workers' Union, adopted the arguments of the other appellants.

E. M. Mitchell K.C. (with him *Ferguson*), for the respondent. The alleged award is not an award of the Conciliation Committee. It is merely a decision by persons not authorized to act as a committee, and not an erroneous decision by persons authorized to make an award (see *General Assembly of Free Church of Scotland* v. *Lord Overtoun* (1)). In *R.* v. *Hibble* (2) all the members of the Court were of opinion that, notwithstanding the provisions of sec. 28 of the *Industrial Peace Act* 1920, any Court might question the validity of what was said in that case to be an award, because it was not an award by persons authorized to make an award. The chairman is not a member of a conciliation committee and has no power to vote as a member (see secs. 5 and 36 of the *Industrial Arbitration Act* 1912 and secs. 8 (7) and 21 of the *Industrial Arbitration (Amendment) Act* 1926). He can vote only where there is an equal division of the members and they agree to accept his decision (sec. 9 (6) of the Act of 1926).

[GAVAN DUFFY J. referred to *Troy* v. *Wrigglesworth* (3).]

In that case there undoubtedly was an order of a Court of Petty Sessions although that Court was not constituted in the manner required by sec. 39 of the *Judiciary Act*. The Court will go behind the form of the award and inquire whether it was in law an award. Merely by signing a document as an award of the committee the chairman cannot make that which was not an award of the committee an award of the committee.

[HIGGINS J. referred to *Hughes* v. *Buckland* (4).]

If on the proper interpretation of the Acts the chairman is not entitled to vote, his belief that he is entitled to vote cannot render

(1) (1904) A.C. 515, at p. 702.
(2) (1920) 28 C.L.R. 456.
(3) (1919) 26 C.L.R. 305.
(4) (1846) 15 M. & W. 346.

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his casting his vote an act done under the Acts. [Counsel also referred to *Baxter* v. *New South Wales Clickers' Association* (1).]

Cur. adv. vult.

The following written judgments were delivered :—

ISAACS A.C.J. AND POWERS J. On these appeals several questions have been stated for consideration. But if the first question be determined in favour of the appellants, the others are not only unnecessary but are beyond the competence of the Supreme Court or this Court to determine. The primary question is : Had the Supreme Court of New South Wales jurisdiction to determine the validity of the wire-netting award of 3rd September 1926 ? The respondent contends, and the majority of the Supreme Court has held, that that Court possessed the jurisdiction. *Street* C.J. held the opposite opinion, and we think his view is correct. We assume, without deciding, that, but for sub-sec. 14 of sec. 8 of the Act No. 14 of 1926, the Supreme Court would have had plenary jurisdiction to determine the validity of the award. The question is whether that sub-section, as applied to the award, deprived the Court of that jurisdiction. It is in these terms : " The validity of any proceeding or decision of a committee or of a chairman of a committee shall not be challenged except as provided by this Act." The respondent's contention is that because there was no affirmative agreement of a majority of the representative members of the Committee to accept the decision of the chairman, as mentioned in sub-sec. 6 of sec. 9, the chairman voted without any statutory authority. The consequence of that is said to be that his vote is a nullity, and that, as without it there could be no majority for the award, there was, therefore, no proceeding of the Committee, since the sub-section says " the opinion of the majority shall prevail." We cannot accede to that argument. Since the determination of the " validity " of any " proceeding " or " decision of a committee " is reserved by the sub-section for the mode provided by the Act, it necessarily follows that " proceeding or decision " there means a proceeding or decision *de facto*, whatever its legal *status* may be. The chairman is unquestionably a member of the Committee, and

(1) (1909) 10 C.L.R. 114, at pp. 131, 162.

his vote properly added to the votes of two other members would result in a decision of the Committee. However we regard the matter in point of law, it cannot be denied that in point of fact a majority of the Committee arrived at a decision as to the industrial matters dealt with in the award. Nor can it be denied that, as "the opinion of the majority shall prevail," the decision so arrived at by the majority, if unchallenged, represents the decision of the Committee in point of fact.

The distinction between this case and *Hibble's Case* (1) is vital. In this case the award, as published, purports to be that of the Committee, and on examination of the circumstances, it was so in fact, as stated. In *Hibble's Case* the award purported to be, and on examination of the facts was found to be, that of the chairman only, the rest of the tribunal being inert.

In this highly important matter, touching the administration of a statute which in great part governs the industrial relations of the whole State, we think we ought not to leave the matter with the bare statement that the decision of the Committee is one in fact, and therefore immune from challenge in the Supreme Court. That might lead to a misapprehension of our meaning. We must not be understood as holding that such a conclusion would end the matter in every case (see *Baxter's Case* (2)). To say that "proceeding or decision" of a committee in sub-sec. 14 of sec. 8 means a proceeding or decision in fact, is an incomplete interpretation. The phrase means a proceeding or decision in fact with respect to "any industrial matter in the industry for which" the committee is established (sec. 9 (1)). If in any case some "proceeding or decision" of a committee were challenged as exceeding its permitted scope, we should not consider that sub-sec. 14 of sec. 8 was satisfied merely because there was in fact a proceeding or decision of a committee which purported or assumed to act under the statute. We should not, without virtually amending the sub-section, feel at liberty to consider the mental attitude of the Committee, but the nature and quality of the act done. In searching for a legal test which should guide us—for our own unguided personal *ipse dixit* would be wrong—we could not, as at present advised, adopt any general term that led

(1) (1920) 28 C.L.R. 456.

(2) (1909) 10 C.L.R., at p. 162.

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to no finality, and itself needed for its explication some legal standard. In short, we should have to consider whether, following and adopting the method of reasoning in *Slattery* v. *Naylor* (1), the line of demarcation of the jurisdiction of the Supreme Court was not this: *Was* the error, if any, committed by the Committee, so manifest a departure from the authority of the statute, that reasonable men acting in good faith could not believe it to be within the scope of that authority? Unless that be the legal discrimen, one of two results must follow. Either the Supreme Court may always interpose for any excess of jurisdiction by the committee as to subject matter, or it may never interpose, whatever the committee may in fact award, however it may exceed the most obvious bounds of the statute. For, however extravagant a "proceeding or decision" of the committee may be, it is still a proceeding or decision *in fact*, and no reasoning in the world can obliterate it as an existing fact. Fraud, arbitrariness or motive could not deprive it of its actual existence. These might justify a competent tribunal in declaring it of no effect in law, but they would neither erase the fact nor form the test of competency.

The limit of the words "proceeding or decision," if limit there be, must be found in the subject matter of the proceeding or decision, that is, what sort of proceeding or decision the Legislature had in mind. That limit, if limit there be, must of necessity be one or other of those we have predicated. There is here no challenge on the ground of subject matter, and therefore nothing to qualify the primary effect of the mere fact of the award being that of the Committee. Therefore, in the circumstances, we say no more as to the line of demarcation than we have said.

The appeals should, in our opinion, be allowed, the order of the Supreme Full Court be discharged, and the judgment of *Long Innes* J. restored.

HIGGINS J. I concur in the opinion that this appeal must be allowed, the order of the Full Supreme Court discharged, and the judgment of *Long Innes* J. dismissing the suit restored; but on the ground stated by the Chief Justice of New South Wales.

(1) (1888) 13 App. Cas. 446, at pp. 452-453.

The facts have been fully stated in the reasons for judgment of *Long Innes* J. An application was made by the Union on 3rd September 1926 to the Conciliation Committee constituted under the *Industrial Arbitration (Amendment) Act* 1926, for an increase by one-eleventh of all piece-work rates prescribed by the industrial agreement, so as to accord with the increase of the time-work rates. The two employers' representatives voted No; the two employees' representatives voted Aye; and Mr. Morgan, the chairman, voted Aye. Morgan thus treated himself as being one of those entitled to vote. He therefore signed, in one form, as chairman, what purports to be an award of the Committee increasing the rate. But the plaintiff urges that Morgan had no right to vote under the circumstances. I shall assume that he had not a vote, yet by sec. 8 (14) of the Act it is provided: "The validity of any proceeding or decision of a committee or of a chairman of a committee shall not be challenged except as provided by this Act"; and under sec. 9 (5) an appeal lies to the "Industrial Commission" established by the Act from any order of a committee. No one disputes that the Legislature of New South Wales has full power to remove disputes, even as to a question of law, from the competence of the ordinary Courts, and to make the industrial machinery which it creates self-sufficient; and the question as to the validity of a proceeding of a committee is such a question of law. The question, could the chairman vote with the four others, involves a question as to the validity of the proceeding; and as this was a proceeding in fact of the Committee, the validity cannot be challenged except as provided by the Act. The only way to give effect to this provision as to testing the *validity* of a proceeding is to treat the word "proceeding" as meaning a proceeding *in fact*, the validity of which is contested. It is no answer to say that, because the proceeding has not in law been validly conducted, the mode of testing validity does not apply. The clause must be given some effect; and it would have no effect if it applied only to proceedings validly conducted. We must so construe the clause *ut res magis valeat quam pereat* (and see *Maxwell on Statutes*, 3rd ed., p. 324).

The distinction between this case and *Hibble's Case* (1) has been clearly shown by *Street* C.J.

(1) (1920) 28 C.L.R. 456.

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Gavan Duffy J. Rich J. Starke J.

If a case should arise in which it is proved that there was only a pretence of acting as a committee, other considerations may arise. But it is not here disputed that the Committee, by using its supposed majority, acted bona fide in pursuance of a ruling of the Industrial Commission.

GAVAN DUFFY, RICH AND STARKE JJ. The Supreme Court of New South Wales made an order declaring that an alleged award of the Wire Netting Conciliation Committee is not an award of the said Committee but is illegal, null and void; and from that decision there is an appeal to this Court. It is said that the order of the Supreme Court is itself of no effect because of the provisions of sec. 8 (14) of the New South Wales statute—Act No. 14, 1926—which is as follows: "The validity of any proceeding or decision of a committee or of a chairman of a committee shall not be challenged except as provided by this Act." The words of the sub-section suggest that a proceeding of a committee may exist as such without having any validity, and the respondent frankly admits that, if such a proceeding exists here, the Supreme Court could not challenge its validity or restrain its enforcement; but on its behalf it is said that the award is not a proceeding of the Committee because it is not the act of the Committee but of two members of the Committee and its chairman who were not authorized to exercise the powers of the Committee.

In every case the question whether an act is a proceeding of the committee within the meaning of the sub-section must be a question of fact, though the question of its validity may be a question of law. In this case a committee duly constituted met for the purpose of considering an application for the variation of an industrial agreement, a matter within its jurisdiction. Everything proceeded in due form until the members of the Committee were equally divided—two against two—as to the terms of the proposed award. The chairman assumed the right of deciding the matter by casting his vote, and the subsequent proceedings were conducted by the chairman and two members on the hypothesis that they were entitled to exercise the powers of the Committee, and on that hypothesis the alleged award was adopted, signed by the chairman

and gazetted. If this hypothesis is erroneous the proceeding may be invalid in law, but it is none the less in fact a proceeding of the Committee—that is, an act of the Committee—within the meaning of the sub-section, because it was an act done as an act of the Committee and in the supposed exercise of powers entrusted to it.

In our opinion the Supreme Court had no jurisdiction to challenge the validity of the proceeding of the Committee, and these appeals must be allowed.

Appeals allowed. Order appealed from discharged. Decree of Long Innes J. restored.

Solicitors for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales; *J. B. Moffatt.*

Solicitors for the respondent, *A. A. Rankin & Griffiths*, Newcastle, by *Minter, Simpson & Co.*

B. L.