[HIGH COURT OF AUSTRALIA.]

CUTHBERTSON . . . . . APPELLANT;

AND

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF HOBART . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1921.

MELBOURNE, *Oct.* 5, 6.

SYDNEY, *Nov.* 24.

Knox C.J., Higgins and Starke JJ.

Wages Board—Power to appoint—Validity of determination—"Trade"—"Occupation or calling"—Clerks to municipal councils—Wages Boards Act 1910 (*Tas.*) (1 *Geo. V. No.* 62), *secs.* 1, 4, 5, 7, 9, 10, 20, 30, 31B, 33, 52, 64—*Wages Boards Act* 1913 (*Tas.*) (4 *Geo. V. No.* 46), *sec.* 4—*Wages Boards Act* 1917 (*Tas.*) (7 *Geo. V. No.* 63), *sec.* 5—*Wages Boards Act* 1920 (*Tas.*) (11 *Geo. V. No.* 51), *secs.* 5, 9, 10, 62—*Factories Act* 1910 (*Tas.*) (1 *Geo. V. No.* 57), *secs.* 17, 62.

Practice—High Court—Appeal from Supreme Court of State—Special leave—To whom granted—Person who might be party to proceedings in State Court—Judiciary Act 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 35.

By sec. 52 of the *Wages Boards Act* 1910 (Tas.) it is provided that a person desiring to challenge or dispute a determination of a wages board for the illegality thereof may apply to the Supreme Court for a rule calling upon the board to show cause why such determination should not be quashed, and that no determination of a board shall be in any other manner challenged or disputed for the illegality thereof. By sec. 5 of the *Wages Boards Act* 1920 (Tas.) the *Wages Boards Act* 1910 is repealed; by sec. 9 all wages boards appointed under the Act of 1910 are abolished; and by sec. 10 it is provided that "(1) Every determination of a wages board appointed under the *Wages Boards Act* 1910, and in existence at the commencement of this Act shall continue in full force and effect until it is abolished by the Governor by proclamation . . . Provided, however, that upon the coming into force of any determination of a wages board under this Act all persons to whom such determination is applicable shall cease to be affected by any determination of a wages board appointed under the *Wages Boards Act* 1910, and shall thenceforth be subject to the determination made under this Act and applicable to such persons."

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., that a person entitled to the benefit of such a determination might properly be made a party to proceedings instituted after the Act of 1920 had come into operation, to quash the determination, and, therefore, the Supreme Court having quashed the determination, that special leave might be granted to such a person to appeal from the decision of the Supreme Court.

The *Wages Boards Act* 1910 provides, by sec. 4, that the word "trade" includes, unless inconsistent with the context, any "process, business, occupation, or calling"; and, by sec. 5, that the Governor shall appoint wages boards "(I.) in respect of the preparation and manufacture of clothing and wearing apparel: and (II.) for any other trades or any groups or parts in respect whereof both Houses of Parliament pass a resolution approving such appointment." In the *Wages Boards Act* 1913, sec. 4, the Legislature enacted provisions which the Court held contemplated determinations binding bodies such as municipalities.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., upon the context of the Acts as a whole, that the Governor had power to appoint a board to determine the lowest rates which might be paid to persons employed as secretaries, clerks, &c., by the municipal councils of Hobart and Launceston and any municipal councils working under the *Local Government Act* 1906, or marine boards working under the *Marine Boards Act* 1889 or any special Acts regulating the constitution or operations of any marine board.

Per Higgins J.: Where, after the passing of the *Wages Boards Act* 1920, the Supreme Court made absolute a rule *nisi* to quash the determination of a wages board appointed under the *Wages Boards Act* 1910, the rule *nisi* not having been served on the board under sec. 52 of that Act and the board not having appeared on the hearing, the order absolute was invalid.

Decision of the Supreme Court of Tasmania reversed.

APPEAL from the Supreme Court of Tasmania.

A rule *nisi* calling upon the Municipal and Marine Board Clerks' Wages Board to show cause why its determination should not be quashed for illegality was made absolute by the Full Court.

Special leave to appeal from that decision was granted by the High Court to Harry Cecil Cuthbertson, a paymaster employed by and in the service of the Hobart City Council, who claimed to be entitled to the benefit of the determination in question.

The material facts are fully stated in the judgments hereunder.

Owen Dixon (with him *Tait*), for the appellant.

Bryant K.C. and *Robert Menzies*, for the respondents. The special leave to appeal should be rescinded, for it should not have been

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

granted to the appellant as he was not and could not be a party to the proceedings in the Supreme Court (*In re Youngs*; *Doggett* v. *Revett* (1); *The Millwall* (2)). Although by sec. 9 of the *Wages Boards Act* 1920 all wages boards appointed under the *Wages Boards Act* 1910 were abolished, under sec. 10 they remained in existence for the purpose of proceedings under sec. 52 of the Act of 1910 to quash their determinations. The Municipal and Marine Board Clerks' Wages Board was therefore properly made party to the rule *nisi*, and could have appeared in the proceedings.

[KNOX C.J. referred to *Crawcour* v. *Salter* (3).

[STARKE J. referred to *In re Council of East Loddon Shire*; *Ex parte Cheyne* (4); *R.* v. *Cheyne* (5).

[*Owen Dixon* referred to *In re Cheyne*; *Ex parte Shire of East Loddon* (6); *In re Hambrough's Estate*; *Hambrough* v. *Hambrough* (7).]

Even if the Supreme Court of Tasmania wrongly exercised its discretion in not directing the rule *nisi* to be served on the appellant or some other person entitled to the benefit of the determination, that is not a ground for granting special leave to the appellant to appeal. [Counsel also referred to *Connolly* v. *Macartney* (8).]

PER CURIAM. The objection is overruled. The reasons will be given later.

Owen Dixon. The Supreme Court had no jurisdiction to make an order quashing a determination of a board appointed under the *Wages Boards Act* 1910. With the repeal of the Act of 1910 by the *Wages Boards Act* 1920 and the enactment of sec. 62 of the latter Act, all power to interfere with determinations of boards appointed under the Act of 1910 ceased. This view is supported by the fact that, since those boards have been abolished by sec. 9 of the Act of 1920, there is no person upon whom a rule *nisi* to quash a determination under sec. 52 of the Act of 1910 could be served.

(1) (1885) 30 Ch. D., 421, at p. 425.
(2) (1905) P., 155.
(3) (1882) 30 W.R., 329.
(4) (1898) 24 V.L.R., 703, at p. 704; (1899) 24 V.L.R., 900, at p. 902; 20 A.L.T., 270.
(5) (1900) A.C., 622.
(6) (1899) 27 V.L.R., 143 (*n*); 21 A.L.T., 53, 71.
(7) (1909) 2 Ch., 620, at p. 626.
(8) (1908) 7 C.L.R., 48.

The effect of sec. 10 of the Act of 1920 was to give validity to all existing determinations until they should be abolished by a proclamation of the Governor or superseded by a determination of a board appointed under the Act of 1920. Sec. 10 removed determinations made under the Act of 1910 from the jurisdiction of the Supreme Court, and permitted the Governor to get rid of them. The determination in this case was validly made. The fact that the *Wages Boards Act* 1910 is to be read with the *Factories Act* 1910 does not cut down the class of persons to whom the former Act applies.

Bryant K.C. and *Robert Menzies*. The effect of sec. 10 of the *Wages Boards Act* 1920 is to keep in existence the jurisdiction of the Supreme Court to quash for illegality a determination of a wages board made under the Act of 1910 (see *R.* v. *Justices of Surrey* (1)). The words " every determination " in sec. 10 of the Act of 1920 mean " every valid determination." If a determination had been made which a board had no power to make, then it might be quashed as provided in sec. 52 notwithstanding the provisions of the Act of 1920. Assuming this view to be correct, the Governor had no authority under the Act of 1910 to appoint this particular wages board. The effect of reading the *Wages Boards Act* 1910 with the *Factories Act* 1910 is that in the definition of " trade " in sec. 4 of the former Act the words " process, business, occupation or calling " should be construed as " process, business, occupation or calling carried on in a factory." Those words also refer to the process, business, occupation or calling of the employer, and not of the employee. [Counsel referred to secs. 7, 9 (3), (4), 20, 22, 26, 28 (6), 30, 33.]

[STARKE J. referred to *Billingham* v. *New Zealand Loan and Mercantile Agency Co.* (2) ; *In re Commercial Clerks' Board* (3).]

The operations of a municipal council cannot be said to be a process, a trade, a business, an occupation or a calling.

Keating, for the Attorney-General of Tasmania, who by direction of the Court had been served with notice of the appeal. The Legislature by the *Wages Boards Act* 1920 established an entirely new

(1) (1869) L.R. 5 Q.B., 87.
(2) (1914) V.L.R., 321 ; 35 A.L.T., 187.
(3) (1913) 19 A.L.R., 142.

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

code of law as to wages boards, and, having by sec. 9 abolished the wages boards appointed under the Act of 1910, it intended by sec. 10 to maintain the *status quo* of all determinations under the latter Act, subject to their being got rid of by proclamation of the Governor, by quashing under sec. 52 of the Act of 1910 or by being superseded by a new determination.

Owen Dixon, in reply.

Cur. adv. vult.

Nov. 24.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. On 18th December 1919 the Governor of Tasmania, purporting to act under the powers conferred on him by the Tasmanian *Wages Boards Act* 1910, appointed a wages board called the "Municipal and Marine Board Clerks' Wages Board" to determine the lowest rates which might be paid to persons employed as secretaries, clerks, accountants, time-keepers, cashiers, typists, stenographers, book-keepers and inspectors, by the municipal councils of Hobart and Launceston and any municipal councils working under the *Local Government Act* 1906, or marine boards working under the *Marine Boards Act* 1889 or any special Acts regulating the constitution or operations of any marine board. On 17th July 1920 this Board made its determination which was duly published in the Tasmanian *Government Gazette* on 16th August 1920. In September 1920 the Supreme Court of Tasmania in Full Court decided that the *Wages Boards Act* 1910 did not authorize the appointment of a board to fix the wages to be paid to clerks employed in banks, insurance offices, or solicitors' offices, and quashed a determination purporting to do so. In January 1921 the *Wages Boards Act* 1920, which had been passed in the month of December 1920, came into force. This Act repealed the *Wages Boards Act* 1910. Secs. 9 and 10 of the Act of 1920 are in the following words :—"9. All wages boards appointed under the *Wages Boards Act* 1910 are hereby abolished, and all resolutions of Parliament approving of the appointment of wages boards under that Act are hereby rescinded. 10—(1) Every determination of a wages board appointed under the *Wages Boards Act* 1910, and in existence at the

commencement of this Act shall continue in full force and effect until it is abolished by the Governor by proclamation, and in the meantime the like rights and privileges shall be acquired, and may be enforced, and the like duties, obligations and liabilities shall be incurred, and the like penalty or punishment may be imposed or inflicted, and the like proceedings may be taken or continued by, upon, or against any person affected by such determination as would or could have been acquired, enforced, incurred, imposed, inflicted, taken, or continued by, upon, or against any such person if this Act had not been passed : Provided, however, that upon the coming into force of any determination of a wages board under this Act all persons to whom such determination is applicable shall cease to be affected by any determination of a wages board appointed under the *Wages Boards Act* 1910 and shall thenceforth be subject to the determination made under this Act and applicable to such persons."

On 21st March 1921 a motion was made to the Supreme Court on behalf of the present respondents, the Mayor, Aldermen and Citizens of the City of Hobart, under sec. 52 of the *Wages Boards Act* 1910, for a rule calling on the Municipal and Marine Board Clerks' Board to show cause why its determination should not be quashed for illegality. Notice of this motion was addressed to the Chairman of the Municipal and Marine Board Clerks' Wages Board. It was served on the Chief Inspector of Factories on behalf of the Board and upon Messrs. Finlay, Watchhorn & Clark, the solicitors for the Hobart Municipal Officers' Association, of which the appellant Cuthbertson was a member. The Supreme Court granted a rule calling upon the Municipal and Marine Board Clerks' Wages Board to show cause why its determination should not be quashed for illegality. The rule *nisi* was served on the Chief Inspector of Factories on behalf of the Board and also upon Messrs. Finlay, Watchhorn & Clark, the solicitors for the before mentioned Association.

On 4th April 1921 the present appellant filed a plaint in the Supreme Court of Tasmania against the present respondents, claiming payment of wages at the rate fixed by the said determination, and this plaint stands adjourned pending the determination of the proceedings now before this Court.

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

Knox C.J. Starke J.

The motion to make absolute the rule *nisi* to quash the determination was first made on 12th April 1921. On the motion being made, the Solicitor-General for Tasmania informed the Court that he appeared for the Government of Tasmania and the Industrial Department of Tasmania. The Court pointed out that neither the Government of Tasmania nor the Industrial Department were named in the rule *nisi*; and the Solicitor-General then stated that he appeared for the Clerks' Board, and that he did not oppose the motion because the case was concluded, as he thought, by the decision of the Court in the case of the determination relating to bankers, insurance companies and solicitors' clerks. Mr. *Inglis Clark*, solicitor, of the firm of Messrs. Finlay, Watchhorn & Clark, then informed the Court that he represented employees of the Hobart Council who were entitled to the benefit of the clerks' determination if it was valid, and he asked that, under the circumstances, he be heard to oppose the motion; but this request was refused. He then requested the Court to hear him as *amicus curiæ*; but this request was also refused. The Court, however, adjourned the further hearing of the motion to enable the matter to be brought before the Clerks' Board. The further hearing of the motion came on before the Court on 19th April 1921 in the presence of counsel for the Mayor, Aldermen and Citizens of the City of Hobart and the Solicitor-General for the State of Tasmania. The Solicitor-General drew the attention of the Court to the fact that the said Board had been abolished by the *Wages Boards Act* 1920. Mr. *Inglis Clark* was present in Court, and was called upon by the Court to submit the contentions of the Hobart Municipal Officers' Association. The Court did not hear arguments on the questions at length, but adjourned the matter to a later day.

The matter came on for further hearing on 27th May 1921, when counsel for the Mayor, Aldermen and Citizens of the City of Hobart moved that the rule *nisi* be made absolute. The Solicitor-General for Tasmania stated that he appeared for the Government of Tasmania, and that "the members of the old board" did not oppose the motion. Mr. *Inglis Clark* was then called upon as *amicus curiæ*, and pointed out that the determination sought to be quashed had been rescinded before the rule *nisi* was granted, and that another

determination dated the 17th day of July 1920 was in operation. Counsel for the Mayor, Aldermen and Citizens of the City of Hobart then applied for leave to amend the rule *nisi*, and the Court made the amendment sought. Argument then took place, and the Court reserved its decision. On 3rd June 1921 the rule *nisi* was made absolute, and the determination was wholly quashed upon all the grounds set forth in the rule *nisi*. These grounds were "(1) that the provisions of the *Wages Boards Acts* 1910 to 1917 do not extend to the groups of employees of the Hobart City Council mentioned in the said determination ; (2) that the resolution of the two Houses of Parliament on the 10th and 12th days respectively of December 1919 approving of the appointment of a wages board in respect of the callings specified therein and the appointment of a board thereunder and the making of the determination were wholly *ultra vires* ; (3) that the said resolutions do not apply to and the said determination does not deal with trades or groups of trades within the meaning of sec. 5 of the *Wages Boards Act* 1910."

It is worthy of notice that the rule absolute recites that it was made upon hearing counsel for the Mayor, Aldermen and Citizens of the City of Hobart, the Solicitor-General of counsel for the Chief Inspector of Factories, and Mr. Andrew Inglis Clark as *amicus curiæ* in the absence of any competent representative of the Municipal and Marine Board Clerks' Wages Board, which had purported to make the determination of 17th July 1920 and which was thereafter abolished by statute.

On 14th June 1921 the appellant applied for and obtained special leave to appeal to this Court against the order quashing the determination.

On the appeal coming on for hearing, Mr. *Bryant*, for the respondents, raised the preliminary objection that the appellant was not a party to the proceedings in the Supreme Court, and that it was not competent for the Court to give him special leave to appeal to, or to admit him as an appellant in, this Court. The objection was overruled, and the Court intimated that the reasons for its decision would be given upon judgment in the appeal. The objection is really based upon want of interest on the part of the appellant in the matter in litigation. In point of fact the appellant was directly

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

KNOX C.J. STARKE J.

interested in upholding the determination, for if it were valid he was entitled to the benefits accruing thereunder. And in point of form he was substantially, if not technically, a party to the proceedings below. The notice of motion for the rule *nisi* was served by the respondents upon the solicitors for the Association of which the appellant was a member, and the solicitor for the Association was heard in the Court below. It is true that he was heard as *amicus curiæ* because the Court apparently thought that it could not allow the individuals whom he represented to appear or be heard in the proceedings. It was quite within the competence of the Supreme Court, in our opinion, to have allowed persons whose rights or privileges under the determination were or were likely to be affected by the decision of the Court to appear in proceedings touching the validity of the determination, and indeed to have directed that they be served with notice of those proceedings (see *R.* v. *Stawell Corporation* (1); *Cheyne's Case* (2)).

The *Wages Boards Act* 1910, in providing for a rule calling upon a board appointed under that Act to show cause why its determination should not be quashed, does not prohibit the Court from allowing other interested parties to appear, and, if necessary, to be heard upon the question. We must not be taken as laying down that these parties are entitled as of right to be heard. Ordinarily the board would sufficiently represent their interests, and the question of admitting other parties must rest in the sound discretion of the Court. But in the present case justice demanded that the appellant and his class should be heard. The Solicitor-General, who appeared for the Chief Inspector of Factories, felt himself unable, owing to a prior decision of the Court, to uphold the determination, and the Board was unrepresented. No injustice was really done, however; for substantially the appellant was heard. The Court permitted Mr. *Inglis Clark* to address it as *amicus curiæ*. This only shows that the Court was of opinion that somehow or other the appellant and his class should be heard. But for a technical difficulty which oppressed the Court we feel no doubt that it would have directed service of the rule *nisi* upon some body or person representing the

(1) (1897) 23 V.L.R., 94.
(2) (1898) 24 V.L.R., at p. 704; (1899) 24 V.L.R., at p. 902; (1899) 27 V.L.R., 143 (*n*); (1900) A.C., 622.

appellant and his class, and would have permitted them to appear and be heard when Mr. *Inglis Clark* made application to that effect.

Under the practice which exists in England "parties to" an action and all persons served with notice of judgment may appeal without leave. But a person not a party to the proceedings cannot appeal from an order or judgment except by leave of the Court (see *Yearly Practice* 1913, p. 904). Leave to appeal is given as a rule if the person applying though not a party to the proceedings might properly have been one. "The test is, could or could not the applicant by possibility be made a party to the action by service" (*Crawcour* v. *Salter* (1); *In re Youngs*; *Doggett* v. *Revett* (2)). The appellate jurisdiction of the High Court is not identical with that of the Court of Appeal in England, but we see no reason to doubt the jurisdiction of this Court to act in accordance with that practice, or the expediency of doing so, in relation to appeals from the Supreme Courts of the States. We have already indicated that, in our opinion, the rule *nisi* to quash the determination might well have been directed to or ordered to be served upon the appellant or some member of his class. If this had been done the appellant or that member of his class would have been sufficiently a party to the proceedings for the purposes of appeal. It was therefore competent for the Court to give special leave to appeal to the appellant, and the appeal is rightly before us.

Turning now to the substance of the appeal, Mr. *Dixon* put forward the following contentions: (1) that by sec. 10 of the *Wages Boards Act* of 1920 the determination now in question was given the force of law until it should be abolished by the Governor by proclamation or until superseded by a determination of a wages board appointed under the Act of 1920; (2) that the Act of 1910 being repealed by the Act of 1920, the Supreme Court had no jurisdiction under sec. 52 of the former Act to quash the determination; (3) that the order quashing the determination was bad because the rule *nisi* had never been served upon the Board; (4) that the appointment of the Clerks' Board and its determination were within the powers conferred by the *Wages Boards Act* of 1910.

(1) (1882) 30 W.R., 329. (2) (1885) 30 Ch. D., 421.

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

Knox C.J. Starke J.

It is unnecessary for us to consider more than the fourth contention, which is by far the most important to the parties, for we are of opinion that the learned Judges of the Supreme Court were in error in holding that the determination was illegal because it was beyond the power and authority of the Governor of Tasmania to appoint such a board.

Unfortunately the reasons of the learned Judges do not seem to have been committed to writing. But we have the reasons as reported in the Hobart *Mercury* newspaper at the time of the decision of the case known as the *Bank Clerks' Case* and of this case, and we are assured that these reports are substantially correct. The reason given is that the *Wages Boards Act* 1910 was an addition to the system of legislation begun by the *Factories Act* 1910, and that the power to appoint wages boards must be confined to persons employed in factories or shops within the meaning of the *Factories Act*, and we suppose to "outworkers" coming within its purview (see *Factories Act*, sec. 17). The conclusion is rested on the following considerations: (1) the *Wages Boards Act* 1910 is to be read as one with the *Factories Act*, which is referred to as the Principal Act (sec. 1); (2) the general arrangement of the *Wages Boards Act* 1910 and provisions such as secs. 7 and 20; (3) the provisions of sec. 62 of the *Factories Act* relating to conveniences for employees.

The *Wages Boards Act* 1910, by sec. 5, provides that the Governor shall appoint wages boards (1) in respect of the preparation and manufacture of clothing and wearing apparel; (2) for any other trades or any groups or parts in respect whereof both Houses of Parliament pass a resolution approving such appointment. "Trade" by sec. 4 includes, unless inconsistent with the context, any process, business, occupation or calling. There is nothing here to suggest that the power is limited to businesses or callings carried on in factories or shops within the meaning of the *Factories Act*. The power is conferred in the widest terms—wages boards shall be appointed in respect of the clothing trade and for *any other* trade in respect whereof Parliament approves.

In the State of Victoria it is interesting to note that under wages boards provisions, contained in the Victorian Factories Acts 1905 to 1912, which are very similar to those in force in Tasmania,

Cussen J. of the Supreme Court of that State never doubted the validity of the appointment of a board to determine the lowest rate to be paid to any persons (with some exceptions) employed in connection with some trade or business as a clerk, &c. Rates of wages were fixed under this appointment not only for clerks in shops and factories, but for clerks in wool and grain offices and stores, and also for wharf and other clerks (*In re Commercial Clerks' Board* (1)).

But we must deal with the specific reasons assigned by the learned Judges of the Supreme Court of Tasmania for their conclusions :—

(1) The *Wages Boards Act* is to be read as one with the *Factories Act*—it is part of the same scheme.—It may be admitted that the general scheme of both Acts is to benefit the conditions of employees both as to working conditions and as to wages, but we fail to follow how this imposes any limit upon the large and clear words of sec. 5. Moreover, there is good reason for reading the one Act with the other. Thus administrative officers such as inspectors under the *Factories Act* are used for administrative purposes under the *Wages Boards Act* (see secs. 4 and 33). Possibly there are other provisions in the *Factories Act* which will also be of use in carrying the *Wages Boards Act* into operation.

(2) The general arrangement of the *Wages Boards Act*, particularly secs. 7 and 20.—We have examined the Act, but see nothing in its arrangement to support the opinion of the learned Judges. The provisions of secs. 7 and 20, and more particularly those of sec. 9, do raise difficulties, but there is no more difficulty in applying the provisions of those sections to a trade or business carried on outside a shop or factory than to a trade or business carried on inside a shop or factory. The difficulties are of a different order to those suggested by the learned Judges, and we shall deal with them later.

(3) Lastly, the provision of sec. 62 of the *Factories Act* was relied upon by the learned Judges as supporting their conclusions. We think there must be some mistake in the newspaper reports. The provision relates to conveniences for employees in shops, offices, warehouses, or buildings other than factories, which had been dealt with in sec. 30. We are unable to follow the statement that sec. 62

(1) (1913) 19 A.L.R., 142.

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

KNOX C.J. STARKE J.

makes it clear that ordinary offices where clerks are employed are not within the *Factories Act*. All that can be asserted is that they are not factories. The *Factories Act* deals with factories in one section, and shops &c. (other than factories) in another section. The one class of place is as to the matters dealt with in those sections as much within the *Factories Act* as the other. The opinion of the learned Judges in the *Bank Clerks' Case* that the *Wages Boards Act* 1910 did not authorize the appointment of a board to fix the rate of wages payable to clerks employed in the business carried on by banking or insurance companies or by solicitors was therefore based upon an erroneous construction of the Act, and cannot be supported. The principle of that case was applied to the determination under consideration in the present case and the learned Judges, acting in accordance with their former decision, quashed it.

But this case requires some further consideration, for municipal councils and marine boards are not in the same position as banking and insurance companies. Thus the ordinary function of a municipal council is to administer the law relating to local government, and that of a marine board the law relating to ports and harbours and to some extent shipping. In modern times municipal councils have also been authorized to carry on commercial enterprises such as tramways, electric lighting and so forth; but their main objective is local government. And it is at this point that secs. 7, 9 and 20 and amendments thereto create difficulties which we previously remarked were of a different order to those entertained by the learned Judges of the Supreme Court. Thus, sec. 5 of the *Wages Boards Act* 1910 enables a board to be appointed for any trade or any groups or parts. Trade, as we have seen, includes any process, business, occupation or calling. Standing alone, these words enable a board to be appointed based either upon the business of the employer or the handicraft of the employee. But when we turn to the constitution of the board we find that it must consist of representatives of employers and employees. Those of the employers shall be *bonâ fide* and actual employers, in the trade or group or part for which the board is to be appointed, who have had at least twelve months' actual experience in such trade or group or part acquired within the five years immediately preceding the

appointment, or managing experts with like experience. And those of employees shall be *bonâ fide* and actual employees in such trade with like experience (see Act of 1910, sec. 9 ; Act of 1917, sec. 5). Consequently, if a board is appointed in respect of a craft, trade, calling or occupation of an employee, it must be in relation to employment in some trade, business, calling or occupation performed, carried on or engaged in by their employers. The Acts of 1910 to 1917 would not, we think, warrant a board for domestic servants: they have an occupation or calling, but it could not be said that their employment is in any trade, business, occupation or calling performed, carried on or engaged in by their employers.

Can, then, the employees of a municipal council or of a marine board, as to purely governmental functions exercised by these bodies, be said to be employed in the trade, business, calling or occupation of the municipal council or marine board ? According to the ordinary use and meaning of words we doubt it, but the Tasmanian Acts may indicate a contrary intention. There are two sections which throw some light on the question—one a provision relating to the appropriation of penalties (Act of 1910, sec. 64), the other a provision in sec. 4 of the Act of 1913 (4 Geo. V. No. 46) relating to municipal employees of the Hobart and Launceston Municipal Councils. It is sec. 31B, and we cite the section in full :— " (1) No determination of a board shall apply to the employees of the Hobart and Launceston Municipal Councils, who have entered or may enter into an agreement with their employees for a fixed term, and during the term of such agreement or of any further agreement ; provided the remuneration paid by any such Municipal Council to any employee, and the conditions of employment, shall not be objected to by a wages board which shall have made a determination for similar work to that in which such employee is engaged. (2) Sections 31A and 31B shall apply to determinations of a board, whether made before or after the commencement of this Act, but shall take effect as from the commencement of this Act." The section appropriating penalties is rather opposed to the view that the Act applies to municipal councils, but the other section contemplates that councils may be subject to determinations under the Act. If so, then the words " occupation or calling " must cover

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

Knox C.J. Starke J.

a wider area than that in ordinary use, and cover the functions, work and undertakings carried out by public bodies.

The Legislature has attributed the meaning which it attaches to words of large, but in some directions of doubtful, import. It is permissible for a Court of interpretation to act upon this clue, and to give effect to the intention of the Legislature as gathered from its words. Consequently, we conclude that the appointment of the Municipal and Marine Board Clerks' Wages Board was warranted by the *Wages Boards Acts* 1910 to 1917, and its determination was, in our opinion, within its power, and is operative until abolished by the Governor of Tasmania by proclamation pursuant to sec. 10 of the Act of 1920.

It is satisfactory to note that the difficulties arising under the Acts of 1910 to 1917 as to local governing authorities are swept away by the Act now in force and cannot further embarrass the Courts of Tasmania (see *Wages Boards Act* 1920 (11 Geo. 5. No. 51), sec. 6—the definition of "trade"; sec. 13—the proviso; and note sec. 74 as to appropriation of penalties). We have ventured to add this observation in order to accentuate the fact that our present decision is upon repealed Acts containing special and peculiar provisions.

The appeal must be allowed.

HIGGINS J. I am of opinion that the special leave to appeal was rightly granted to Cuthbertson against the order of the Supreme Court of Tasmania making absolute the rule *nisi* to quash the determination. He was not a party to the order; but he might properly have been made a party by the direction of the Court. The Court had not before it the Board or the Municipal Employees' Association, or any one interested in upholding the determination; and the Court had inherent power to direct that the rule *nisi* be served on Cuthbertson or on some other employees concerned, or on the Association (*In re Youngs* (1); *Crawcour* v. *Salter* (2)). As paymaster of the city, Cuthbertson was interested under the determination, and entitled, if the determination were valid, to receive the difference between the wages determined and the wages

(1) (1885) 30 Ch. D., 421.

(2) (1882) 30 W.R., 329.

actually paid to him. He had on 4th April brought an action for this difference, and other actions by other employees were stayed in order that his should be a test action.

The Supreme Court quashed the determination on the ground that it applied to persons who were not employees in a factory or factories. The determination in question fixed wages and conditions for secretaries, clerks, &c., employed by municipal councils or marine boards.

The *Wages Boards Act* 1910 (sec. 1) is incorporated with and to be read as one with the *Factories Act* 1910; but it does not follow that the *Wages Boards Act* does not apply to employees who are not in factories. Part IV. of the *Factories Act* deals with "sanitation in factories"; sec. 30, which is in Part IV., provides (*inter alia*) for sufficient privies in factories; sec. 62 provides for sufficient privies in shops, offices, warehouses or buildings other than a factory. Similarly, the *Wages Boards Act* deals with employees whether in a factory or not—employees in any "process, business, occupation, or calling." The words of the *Wages Boards Act* put no such restrictions on its scope, for its special purposes, as are put by the *Factories Act* on its provisions for its purposes.

The question, then, becomes narrowed to this: Can the employees of a municipal council or of a marine board be the objects of a determination under the *Wages Boards Act* 1910? The Wages Board in question was appointed, in pursuance of resolutions of both Houses, in respect of persons employed as secretaries, clerks, &c., by the municipal councils and marine boards. My chief difficulty has been as to the definition of "trade" under the Act of 1910: does a municipality or a marine board carry on a "trade"? In sec. 4 "trade" is defined as including (not confined to) "any process, business, occupation, or calling"; and there are indications throughout the Act that Parliament meant the process, business, occupation or calling (perhaps, function or work) of the employers affected rather than of the employees affected (secs. 7, 9 (3) and (4), 11, 30, 43). But a board may be appointed to fix conditions of employment in respect even of a part of the "trade" (if it is a "trade") of carrying on municipal operations, or the "trade" (if it is a "trade") of carrying on marine board operations (secs.

H. C. OF A. 1921.

CUTHBERTSON v. HOBART CORPORATION.

Higgins J.

4, 9 and *passim*); and this Board was appointed for that part of the "trade" which involves the employment and work of secretaries, clerks, &c. It is urged, however, that a municipal council is not engaged in a "process" or a "business" or an "occupation" or a "calling," and that the appointment of the Wages Board was therefore null and void from the beginning. The argument is not negligible, although, according to the *Oxford Dictionary*, these words have a very wide and flexible meaning; and, in particular, "occupation" includes "the being occupied or employed with, or engaged in something; that in which one is engaged; . . . a particular action or course of action in which one is engaged, esp. habitually or statedly; . . . the exercising (of any business or office)." But the Legislature itself is the final exponent of its own intention—it is its own best interpreter; and in sec. 31B of the Act of 1910 (a section inserted by an amendment of 1913), there is a provision which clearly shows that the Tasmanian Legislature contemplated determinations binding such bodies as municipalities: "No determination of a board shall apply to the employees of the Hobart and Launceston Municipal Councils, who have entered or may enter into an agreement with their employees for a fixed term, and during the term of such agreement or of any further agreement"; &c. This provision expressly applies to determinations made before or after the commencement of the Act, but it takes effect as from the commencement of the Act. It removes any doubt that might otherwise linger as to the scope of the words "process, business, occupation, or calling." I am of opinion, therefore, that the Wages Board was duly constituted under the Act of 1910.

The order to quash the determination is, I think, bad on another ground. The rule *nisi* was not served on the Board; and there is no power to quash the award unless the Board has an opportunity to be heard. Under sec. 52 of the Act of 1910 there can be no quashing of a determination unless there be "a rule calling upon the Board to show cause," and, although the rule *nisi* purports to call on the Board to show cause, it was never brought to the notice of the Board. The language of the section is technical; and it is part of the long standing practice as laid down in *Chitty's Archbold*,

12th ed., p. 1582, that "a copy of the rule *nisi* must be served on the party against whom it has been obtained." Others interested may, no doubt, be served at the discretion of the Court, but it is essential that the Board be served at all events; and, as the Board is not a corporation, it would seem that each member must be served unless the members put in a joint appearance (*Ex parte Dansey* (1)). On the face of the order absolute here—the formal order—it is actually stated that there was no appearance for the Board; there is no recital of any affidavit of service on the Board; and in fact the order was not served on the Board. I do not ignore the evidence that at one of the adjournments of the application for the rule absolute, the Solicitor-General offered to appear for "the Government of Tasmania and the Industrial Department," and that when he was not allowed so to appear he said he "appeared for the Board." But in the formal rule absolute the Solicitor-General is stated to appear for the Chief Inspector of Factories only—who is not an official of the Board, and who is not even officially concerned to support determinations.

For these reasons, I concur in the opinion that the appeal should be allowed, and the rule absolute set aside.

Appeal allowed. Order appealed from set aside. Rule nisi discharged with costs against the Mayor, &c., of the City of Hobart. The Mayor, &c., of the City of Hobart to pay costs of appeal.

Solicitors for the appellant, *Finlay, Watchorn & Clark*, Hobart, by *Nunn, Smith & Jeffreson.*

Solicitor for the respondents, *Russell Young.*

Solicitor for the Attorney-General of Tasmania, *A. Banks-Smith*, Crown Solicitor for Tasmania.

B. L.

(1) (1905) 22 N.S.W.W.N., 51.