HIGH COURT OF AUSTRALIA

In Re Ex Parte McLean.

(Isaacs C.J., Rich, Starke and Dixon JJ.)

6 June 1930

Isaacs C.J. and Starke J.

On 6th November 1929 *Hammond* A.J. granted an order nisi for a common law writ of prohibition to restrain further proceeding upon a conviction of James McLean by the respondent, George Sydney Goldie, a Police Magistrate.

McLean was prosecuted under State law by Frederick Firth, his former employer, the offence being thus described in the information: "That on the nineteenth day of September 1929 one J. McLean a shearer being a servant as defined by the Masters and Servants Act 1902 having contracted with Frederick Firth to perform for him as such servant a certain work to wit shearing at Lockslea near Warren and having commenced such work did neglect to fulfil such contract." At the hearing before the Police Magistrate, the applicant's solicitor asked for particulars as to what was relied on as constituting the offence, and he was informed that they were these: "In injuring the sheep and failing to notify the employer that he had injured them, in leaving the employment without permission, and in shearing the sheep badly and leaving two inches of wool on them." It was objected that the Court had no jurisdiction since the State Act was inconsistent with relevant Commonwealth legislation. The Magistrate overruled the objection and convicted the present applicant, who was fined £2, with costs 8s., and professional costs £3 3s., witnesses' expenses £1 16s., in default of payment within twenty-one days, twenty-one days' imprisonment with hard labour.

The order nisi was returned before the Supreme Court on 19th February 1930, but that Court, considering the matter one within sec. 40A of the *Judiciary Act*, proceeded no further, and directed the Prothonotary to forward the papers to the Registrar of this Court.

The case seems to fall rather within the overlapping legislation met by sec. 109 of the *Constitution* than within that of passing the frontier line of power. But for precaution sake learned counsel on both sides assented, by application of one and consent of the other, to the removal of the cause into this Court under sec. 40 of the *Judiciary Act*. The Court reserved its decision as to that step, and heard argument on the main question of the prohibition. In the circumstances, it is expedient to make an order removing the cause under sec. 40.

The conviction of McLean, it will be seen, was for "neglect to fulfil" his contract, the neglect consisting of (1) injury to sheep, (2) failure to notify the employer of such injury, (3) leaving without permission, and (4) badly shearing sheep. The conviction and punishment was for all four causes so far as appears, and these are inseparable. So that even if, as argued by Mr. *Windeyer*, the third item of "neglect" were within the State jurisdiction, it would not save the matter from prohibition, since the other items are clearly outside that jurisdiction. But, in truth, the third item is no less covered by sec. 109 than the other three. The contract itself was one prescribed by Federal law and not by State law. That is, by an award of the Commonwealth Court of Conciliation and Arbitration, which was at all material times in force, beginning 15th September 1927, it was

prescribed (clause 2) that, as to shearing, before any member of the Australian Workers' Union (of which McLean was a member) should be employed, a written agreement in the form of schedule A should be signed by the member and by his employer. The agreement which the applicant was punished for neglect to fulfil was in accordance with the requirement of schedule A of the award. Clause 32 of the award is as follows: "The employers bound by the award and their servants and agents respectively shall observe and perform the conditions of the award, and of the agreements in schedule A thereof." Clause 33 prescribes: "The Union and its members shall observe and perform the conditions of this award and of the agreements in schedule A thereof." The contract entered into is headed "Shearer's Agreement. In accordance with the award of the Commonwealth Court of Conciliation and Arbitration dated 14th September 1927."

It is to be noted *in limine* that not only the obligation to *make* the agreement, but the obligation to *observe* it, is prescribed by the award. The award itself is, of course, not law, it is a *factum* merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award. When those provisions are examined, it is seen that they deal completely with the area of industrial relations covered by them. The intention is clear that the requirement of a contract, its form and its obligations, and the consequences of its breach, shall be governed by the Commonwealth law. If that is so, it necessarily follows that any alteration of the Commonwealth provisions of adjustment by State law, whatever be the scope or purpose of that law, must be inconsistent with the enactment of the Federal law.

In *Cowburn's Case*[1] is stated the reasoning for that conclusion, and we will now refer to those statements without repeating them. In short, the very same conduct by the same persons is dealt with in conflicting terms by the Commonwealth and State Acts. A Court, seeing that, has no authority to inquire further, or to seek to ascertain the scope or bearing of the State Act. It must simply apply sec. 109 of the *Constitution*, which declares the invalidity *pro tanto* of the State Act. In Canada, where no section corresponding to sec. 109 of the *Constitution* exists, but where, by reason of exclusive fields of legislation, conflicts may arise between the national and the provincial legislation, the Privy Council have enunciated a rule which in practical effect corresponds with sec. 109 of the *Australian Constitution*. In *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*[2] Lord *Herschell* L.C. said that a Dominion bankruptcy law regulating voluntary assignments would exclude provincial legislation on the same subject under the power to make laws in relation to property and civil rights in the Province. Similarly, in *Tennant v. Union Bank of Canada*[3]. And again in *Grand Trunk Railway of Canada v. Attorney-General of Canada*[4], where Lord *Dunedin* says the true question is whether the Dominion legislation is within its powers. If it is, it matters not that the provincial legislation which conflicts is in relation to a different class of legislation which is within the State legislative power.

In the present circumstances, the conviction was not authorized by any valid law, and the order for prohibition should be made absolute.

Rich J.

I have read the judgment of my brother *Dixon* and agree with it. The *Commonwealth Conciliation and Arbitration Act* confers upon the tribunal a power, and the award embodies the exercise of that power. Just as in the case of powers and authorities in other branches of the law it reposes in the donee of the power a particular discretion in this case to ascertain and determine what shall be a proper industrial relationship in respect to matters in dispute. And as in the case of other powers the

efficacy and legal result of the exercise of the discretion is derived wholly from the instrument creating the power to which the exercise is referred and attributed. In the law of real property "the title is derived immediately from the authority, and from the person by whom that authority was delegated" (*Preston's Essay* on *Abstracts of Title*, 2nd ed., vol. *ii.*, p. 257). Upon this reasoning it appears to be a necessary conclusion that if the Act means, as I think we have already held it does mean, to confer upon the tribunal an authority to determine what shall be the exclusive rights and duties of the disputants in respect of matters in dispute, then any State law is inconsistent with the Act which creates that power when the power is exercised if that State law deals with the same subject matter and purports to prescribe rights and duties of the same order.

Although I have reached this conclusion, the view that a law of a State which punishes a particular dereliction of duty becomes ineffectual because an award imposes the same or a similar duty strikes me as a very extreme result of the interpretation of the *Commonwealth Conciliation and Arbitration Act* which we have adopted in this Court.

As no offence was committed against State law by the applicant, the order nisi for prohibition must be made absolute.

Dixon J.

The applicant was employed by the respondent as a shearer. Both were bound by an award of the Commonwealth Court of Conciliation and Arbitration. That award provided that, before a person to whom it applied was employed in shearing, a written agreement should be signed by him and his employer embodying terms and conditions which were set forth in a schedule. The award further provided that employees to whom it applied should observe and perform the conditions of the award and of the agreement. The applicant and the respondent signed a written agreement in the form thus prescribed.

During the course of shearing the respondent complained that the applicant was shearing the sheep improperly, and was injuring them, and told him that if he would not shear as he ought "he had better put his machine in." The applicant ceased shearing, and the respondent laid an information against him under sec. 4 of the *New South Wales Masters and Servants Act 1902* for that being a servant as defined by that Act, having contracted to perform for the respondent as such servant certain work, to wit, shearing, and having commenced such work he did neglect to fulfil such contract. Upon this information the applicant was convicted. Sec. 4, under which he was convicted, is as follows: "Any servant who contracts with any person to serve him for any time or in any manner, or to perform for him as such servant a certain work at a certain price, and does not enter into his service or commence his work according to his contract, such contract being in writing and signed by the parties thereto, or any servant having entered into such service or commenced such work who absents himself therefrom, without reasonable cause, before the term of his contract has expired or before the work contracted for is completed, whether such contract is in writing or not, or neglects to fulfil the same, or is guilty of any other misconduct or ill behaviour in the execution thereof, shall be liable to a penalty not exceeding ten pounds or in lieu thereof, at the discretion of the convicting justices, shall forfeit the whole or such part of the wages then due, as the justices shall think fit."

The applicant appealed against his conviction to the Supreme Court of New South Wales by way of statutory prohibition upon grounds which were intended to raise the question whether this provision had any valid operation in the case of the applicant inasmuch as his neglect to fulfil his contract

would amount to a breach of the Federal award punishable under the *Commonwealth Conciliation and Arbitration Act 1904-1928*. Upon the return of the order nisi for statutory prohibition the Supreme Court considered that the matter involved a question as to the limits *inter se* of the constitutional powers of the State and Commonwealth which, by reason of sec. 38A of the *Judiciary Act 1903-1927*, they had no jurisdiction to entertain or determine, and in pursuance of sec. 40A they proceeded no further in the cause which was treated as removed to this Court.

The question raised is whether a State law is inconsistent with a Commonwealth law and therefore invalid by reason of sec 109 of the *Constitution*. This is not a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State. But the question turns upon sec. 109 of the *Constitution*, and for this reason the matter is a cause arising under the Constitution or involving its interpretation, which may be removed into this Court pursuant to sec. 40 of the *Judiciary Act 1903-1927*. An application was made on the part of the applicant that the cause should be so removed and, in the special circumstances attending this litigation, the application is to be granted. The question of substance was fully argued before us and, the cause having been removed, there is no reason why it should not be determined at once without further argument.

Sec. 44 of the *Commonwealth Conciliation and Arbitration Act 1904-1928* penalizes any breach or non-observance of an award, and, inasmuch as the award in this case commanded performance of the applicant's contract, his neglect to fulfil it would constitute an offence under this provision. The same acts or omissions were therefore made subject to the penal sanctions of the Federal enactment and the somewhat different penal sanctions of the State enactment.

When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer*[5]). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter. But in the present case, conduct which the State law prescribes, namely, the performance of contracts of service, is a matter with which the Commonwealth Parliament has not itself attempted to deal. Although neglect by a shearer to perform such a contract constitutes an offence against Federal law, this does not arise from any statement by the Federal Legislature of what the law shall be upon that subject. The conduct which the Federal statute penalizes is the breach of industrial awards. There is no collision between an intention to deal exclusively with disobedience of awards and a law for the punishment of breach of contract. The Federal instrument, which prescribes performance of the shearers' contract of service, is the award of the Commonwealth Court of Conciliation and Arbitration. But unlawful as it is to depart from the course which such an instrument describes and requires, the instrument itself is, nevertheless, not "a law of the Commonwealth" within the meaning of those words in sec. 109. Sec. 109 cannot, therefore, operate directly upon it so as to render a State law invalid because it is inconsistent with the intentions which the arbitrator expresses in the award. But these considerations do not end the matter. They do establish that if State law is superseded it must be upon the ground

that the State law thereupon becomes inconsistent with the meaning and effect of the *Commonwealth Conciliation and Arbitration Act* itself. But the provisions of that Act itself, which establish awards made under its authority, may have a meaning and effect consistently with which State law could not further affect a matter for which such an award completely provides. If the Act means not only to give the determinations of the arbitrator binding force between the disputants but to enable him to prescribe completely or exhaustively what upon any subject in dispute shall be their industrial relations, then sec. 109 would operate to give paramountcy to these provisions of the statute, unless they were *ultra vires*, and they in turn would give to the award an exclusive operation which might appear equivalent almost to paramountcy.

Close consideration of the reasons given by *Isaacs*, *Rich* and *Starke* JJ. in *Clyde Engineering Co. Ltd. v. Cowburn*[6] shows that the view upon which they acted in that case and applied afterwards in *H. V. McKay Pty. Ltd. v. Hunt*[7] was substantially that the Constitution empowered the Parliament to give and that Parliament had given the award this exclusive authority. The view there taken, when analyzed, appears to consist of the following steps, namely: (i.) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorize awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law; (ii.) the *Commonwealth Conciliation and Arbitration Act* confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded; (iii.) sec. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation.

The distinction between this doctrine and one which gives to sec. 109 a direct application to Federal awards is probably not confined to the mode of reasoning by which the conclusion is reached. It may well be that the distinction extends to the results produced. If a Federal statute forbids a particular act or omission and means to state what shall be the law upon that specific matter, any State law which dealt with the same act or omission would become inoperative, and it would probably be of no importance whether each Legislature was directing its attention to the same general topic or had dealt with the same act or omission in the process of legislating upon two entirely different subjects. For instance, sec. 4 of the *New South Wales Masters and Servants Act*, assuming it otherwise to apply to him, would doubtless be superseded in relation to an officer governed by the Commonwealth *Census and Statistics Act 1905-1920* who wilfully neglected to fulfil the duties of his office, because sec. 22 of that Act penalizes such conduct although in the process of dealing with a very different subject. On the other hand, the *Commonwealth Conciliation and Arbitration Act* in giving force and effect to awards necessarily confines their exclusive authority to the regulation of industrial relations and, moreover, to the regulation of industrial relations which are in dispute. It may perhaps follow from this rule that, while the arbitrator can make his award the exclusive measure of industrial rights and duties between the disputants, the laws of a State which do not regulate industry at all are not inconsistent with the exclusive authority which the Commonwealth statute gives to the award merely because they deal with specific conduct which, as between the disputants, is dealt with by the award. For example, if the award in this case expressly forbad shearers to injure sheep when shearing, it would not be a necessary consequence that a shearer who unlawfully and maliciously wounded a sheep he was shearing could not be prosecuted under the State criminal law for unlawfully and maliciously wounding an animal. It is not, however, necessary to determine whether this distinction in the application of the doctrine is valid. It may be assumed that provisions of State law which prohibit acts or omissions irrespective

of the relation of employer and employed, and without regard to any other industrial relation or matter, are not superseded under sec. 109 merely because it happens that in their industrial aspect the same acts or omissions by parties to a dispute are forbidden by Federal award and by this means made punishable under the Federal statute. But, in this case, the State law, sec. 4 of the *Masters and Servants Act 1902*, deals directly with the relation of employer and employed, and in virtue of that industrial relation makes penal the very default which the Federal law punishes somewhat differently in the regulation of the same relation.

The case, therefore, is not one in which conduct made punishable by State law on grounds which do not affect industrial relations is forbidden by an award as a regulation of industry, and thus brought also within the penalties of the *Commonwealth Conciliation and Arbitration Act*.

It may be objected that the present case does not fall within the doctrine which ascribes such efficacy to an award because the Federal tribunal has not made an award in disregard of State law but, so far as material, has in effect forbidden the very neglect to perform a contract of service which State law punishes; and that it does not fall within the description of inconsistency illustrated by *Hume v. Palmer*[8] because there the respective Legislatures had each directed its attention to the same subject and both had themselves prescribed the rule upon it, while here the Commonwealth Parliament directed its attention to disobedience of awards and the State Legislature dealt only with the breach of contracts. But the substance of what the Federal award did in this case was to command performance of the prescribed contract as an industrial duty proper to be imposed and enforced by Federal law according to the sanctions which it provides, while the State law required performance of the same contract as an industrial duty proper to be imposed and enforced by its authority and according to its sanctions. According to the doctrine deduced from the judgments of the majority of the Court in the cases of *Clyde Engineering Co. v. Cowburn*[9] and *H. V. McKay Pty. Ltd. v. Hunt*[10], the *Commonwealth Conciliation and Arbitration Act* gives full and complete efficacy and exclusive authority to this regulation of the Federal tribunal, and sec. 109 makes this statute prevail.

In these conditions, in so far as it affects persons bound by the award, sec. 4 of the *Masters and Servants Act 1902* is inconsistent with the provisions of the Federal statute and, by virtue of sec. 109 of the *Constitution*, the latter must prevail, and the former to the extent of the inconsistency is invalid. Accordingly no offence was committed against State law by the applicant, and the order nisi for prohibition must be made absolute.

Rule nisi made absolute.

Solicitor for the applicant, A. C. Roberts.

Solicitors for the respondents, McLachlan, Westgarth & Co.

[1] (1926) 37 C.L.R., at pp. 489 et seqq., 524.

[2] (1894) A.C. 189.

[3] (1894) A.C. 31, at p. 47.

[4] (1907) A.C. 65, at p. 68.

[5] [1926] HCA 50; (1926) 38 C.L.R. 441.

[6] [1926] HCA 6; (1926) 37 C.L.R. 466.

[7] [1926] HCA 36; (1926) 38 C.L.R. 308.

[8] [1926] HCA 50; (1926) 38 C.L.R. 441.

[9] [1926] HCA 6; (1926) 37 C.L.R. 466.

[10] [1926] HCA 36; (1926) 38 C.L.R. 308.

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