

abrogate to itself the powers of the Legislature. It cannot make any valid provision which directly conflicts with its own or any other statute. This is nothing more than to say it can do nothing unlawful. Was it, then, unlawful for the Court to say "immediately any change is made by legislation the award shall cease"? That is to say: The provisions of this award shall not continue in force for the period for which it was made if before such expiration any provision inconsistent with the award is made by any Act. But section 74 of the Industrial Conciliation and Arbitration Act Amendment Act, 1908, which was in force at the time of the making of this award, provides as follows:—

"(1.) The provisions of an award or industrial agreement shall continue in force until the expiration of the period for which it was made, notwithstanding that before such expiration any provision inconsistent with the award or industrial agreement is made by any Act passed after the commencement of this Act, unless in that Act the contrary is expressly provided.

"(2.) On the expiration of the said period the award or industrial agreement shall, during its further subsistence, be deemed to be modified in accordance with the law then in force."

This section was no doubt enacted to provide for much the same thing as the Arbitration Court has in view in inserting clause 14 in the award; but while the Act prevented the operation of statutory modifications during the currency of the award only, clause 14 is unlimited, and if effective would prevent the continuance of the award at all after the statutory changes take effect. Thus, while the Act says, "The provisions of the award shall continue in force for the period for which it was made, and during its further subsistence shall be deemed to be modified in accordance with the law then in force," the award says that during its further subsistence it shall be in effect no award—it shall be the framework which waits for a picture to frame—it shall cease to operate as an award altogether.

No doubt clause 14, in view of section 90 (d) of the consolidated Act, section 74 of the Industrial Conciliation and Arbitration Amendment Act, 1908, and of section 11 of the Shops and Offices Amendment Act, 1910, can have no effect till the expiry of the specified period of the award, because the legislative changes are suspended till that time, and therefore it may be said that the matter is not of moment, as the parties can in any event at such period proceed to obtain another award. There is, however, in my opinion, a direct conflict between section 74 and clause 14. I think it is an attempt on the part of the Arbitration Court to circumvent the operation of a statutory provision. The Act says the award shall subsist for a period after the expiration of its "currency"; the award says it shall not.

I am therefore of opinion that clause 14 has no legal effect. It is repugnant to the statutory provisions, and in any event attempts to declare by award that the parties to the award shall be bound by private contract only. I think this is contrary to the spirit of the Industrial Conciliation and Arbitration Acts, and that there is no jurisdiction in the Arbitration Court to make such a provision. I see no reason why an award should not be good in part and bad in part, and I do not think that the whole award is vitiated by clause 14, but that the award should be read as if clause 14 were a nullity.

The further question remains as to what remedy (if any) is open in the event of the Arbitration Court deciding that clause 14 is valid and now governs the conditions of work.

It has been decided in the case of *Blackball Miners v. the Judge of the Court of Arbitration and Others* (27 N.Z. L.R. 905) that, however erroneous in fact and in law the decisions of the Court of Arbitration might be, so long as it purported to be acting in pursuance of the Act creating it, and confined itself to the subject-matter of the Act, the effect of section 96 of the Act of 1905, analogous to section 96 of the Industrial Conciliation and Arbitration Act, 1908, was to place it absolutely beyond the control of or interference by the Supreme Court. In the circumstances of that case the Court decided that as a matter of fact the Court of Arbitration had acted within its jurisdiction, and the references to section 96 of the Act of 1905 were for the most part *obiter dicta*. On the other hand, Mr. Justice Edwards, in a dissenting judgment, held that, notwithstanding section 96, the Supreme Court still had the power to issue certiorari to bring up the proceedings of an inferior Court, and to quash the adjudication upon the ground of a manifest want of jurisdiction in the tribunal which made it. And although it is true that in such a case a Judge having general jurisdiction over the matter found a fact which, though essential to his jurisdiction, he was competent to try his adjudication upon the merits cannot be questioned upon certiorari, it is also true that if the jurisdiction depends either on the character of the 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, these are matters which are extrinsic to the jurisdiction impeached; they are matters which may be inquired into by superior Courts, and if upon that inquiry it is found that the adjudication is without jurisdiction it will be quashed. And he held further that an inferior Court cannot, by an erroneous interpretation of the statute upon which its jurisdiction to enter upon inquiry depends, clothe itself with a jurisdiction which it does not possess.

There is another case in which certiorari can always be granted, and that is when the defect of jurisdiction appears on the face of the proceedings: *Ex parte Bradlaugh* (39 B.D. 509), *Cotton v. Hawkins* (15 N.Z. L.R. 496, 5 Cl.), and see Privy Council decision in the *Colonial Bank v. Millar* (L.R. 5 P.C. 417).

I am of opinion that the view taken by Mr. Justice Edwards on these heads is correct. Doubtless the other members of the Court considered section 96 went a good deal further than this. The Chief Justice and Mr. Justice Williams did not decide the *Blackball Miners'* case on their view of section 96, but the Chief Justice expressed an opinion that section 96 absolutely prohibited any interference. It is probable, therefore, the Court of Appeal as at present constituted would follow the *Blackball Miners'* decision so far as to say that the circumstances of this case are not distinguishable. Still, in my opinion the ruling of the Court of Arbitration in clause 14 of the award would be impeachable on two grounds—(a) That the nature of the subject-matter of clause 14 is outside the scope and ambit of the Court of Arbitration, and that there is therefore a manifest want of jurisdiction; (b) that the defect of jurisdiction apparent in clause 14 is a defect appearing on the face of the proceedings.

My opinion may therefore be summarized as follows:—

- (a.) If clause 14 be held to be within the jurisdiction of the Court of Arbitration, its only possible effect is to determine the award and set matters at large.
- (b.) In the circumstances of the case, and upon the same assumption, the effect of the clause was to determine the award on the 2nd day of August, 1912, by reason of the coming into operation on that date of the Shops and Offices Amendment Act, 1910.
- (c.) The Court of Arbitration had no jurisdiction to declare clause 14 to be part of the award, and on any proceedings based upon that clause certiorari would be obtainable from the Supreme Court.

As to the method of bringing the question here raised before the Court of Appeal, the promptest way would be that of getting the Judge of the Arbitration Court to state a case for the opinion of the Court of Appeal. (See section 59 of the Industrial Conciliation and Arbitration Amendment Act, 1906). This section refers, it will be seen, to "any matter before the Court," and it is unlikely that the Judge will treat any past proceedings as "a matter before the Court." Proceedings, however, could be taken for an enforcement on the assumption that the award is, by virtue of the statute, subsisting, and that clause 14 has no effect; and on these proceedings His Honour would then in all probability state a case for the opinion of the Court of Appeal, or, failing his doing that, recourse might be had to a writ of certiorari.

Wellington, 30th September, 1912.

J. G. FINDLAY.

We were not in a financial position strong enough to face lengthy and expensive Appeal Court litigation over the question. It was really a question as to whether the Court or Parliament should be the supreme authority, and was, we submitted, a case for the Department to take up. The Department, however, held otherwise. It had been advised different to Sir John's opinion. The consequence has been that for over a year now we have been without an award. It is an incredible position. We are a set of unions that have been loyal to the arbitration system. None