

ployers, allowing a dispensation in certain cases from the general rule. It was as if I gave a direction that all lads who passed a certain examination at a university were to be excepted from the rule. In such a case, there would obviously be no delegation of discretion; the direction would be mine, and the discretion exercised would be mine. Under the Act, the Court of Arbitration has power—sec. 38 (b)—“To make any order or award or give any direction “in pursuance of the hearing or determination;” and —sec. 38 (u)—“Generally to give all such directions “and do all such things as it deems necessary or “expedient in the premises.” The direction contained in my proposed clause is, that any decision of a question arising out of the award, if given by a Board of Reference, voluntarily constituted by both parties, should be binding on the parties by virtue of my award; as if a committee, empowered to settle the conditions of racing, were to prescribe that the decision of the judges is to be final. The truth is that the duty of the Court “to settle a dispute” resembles far more the duty of a Court of Chancery to “settle a scheme” for the conduct of a charity, than the duty of a Court of common law in an action for debt or damages. The Court of Arbitration does not award payment for violation of existing or past rights, but prescribes a system of relationship for the future. It has never been suggested, so far as I know, that a Court of Chancery, in committing to a board of trustees of a charity the function of selecting boys for a school, or inmates for a benevolent institution, is thereby delegating its powers. The doubt which occasioned Question 6 was occasioned by the language of the majority of the Court in the *Boot Trade Case* as to delegation of authority to a Board of Reference—see 16 A.L.R. 373. I did not think it was delegation; but, if it is—and the Full Court held it to be a delegation—how can Parliament when creating a tribunal in pursuance of its power under the Constitution, enable the tribunal to delegate any authority to another body? As I have said, this question has not been argued. My duty is to express my opinion in the affirmative, as to Question 6; except that the words “or respecting any other matter of their industrial relations” must be excised. I inserted these words in the proposed award—words which are often, and wisely, put in agreements and State awards—merely in the hope of eliciting the opinion of the Full Court on the whole subject, and of finding the precise limits of my power.

I do not think that the express power to “appoint” a Board for all Australia, now contained in sec. 40A, operates to withdraw such powers as were already contained in the original Act, under provisions which have not been repealed.

Questions answered accordingly.

[Solicitor—For respondents, Derham and Derham.]
S. K. H.

FULL COURT—(Griffith, C.J.,
Barton and O'Connor, JJ.)
(Melbourne.)

June 7.

THE KING v. NICHOLLS.

Contempt of Court—Criticism of Judge of High Court when sitting as President of Arbitration Court—Imputation of partiality—Libellous statements—Publication calculated to obstruct or interfere with the course of justice or due administration of the law.

It is not a contempt of the High Court to criticise the actions of one of its members, while sitting as President of the Arbitration Court, so long as such criticism is not calculated to obstruct or interfere with the course of justice in the High Court, or the due administration of the law by that Court, even though the matter complained of may be libellous in its nature.

Semble.—It is not necessarily a contempt of Court to make an imputation of partiality against a Judge, and in some cases public comment upon the partial utterances of a Judge may be justifiable.

MOTION.

This was an application on behalf of the Attorney-General of the Commonwealth for the committal to prison of Henry Richard Nicholls, for his contempt of the High Court of Australia, or in the alternative for his contempt of the Commonwealth Court of Conciliation and Arbitration, in that the respondent, being the editor of a newspaper called the *Mercury*, printed and published at 87 Macquarie Street, Hobart, Tasmania, printed and published, or caused to be printed and published, of the Honourable Henry Bournes Higgins, in his capacity as a Judge of the High Court of Australia, or in the alternative of him in his capacity as President of the Commonwealth Court of Conciliation and Arbitration, in the issue of the said *Mercury* of Friday, April 7, 1911, the words following:

A MODEST JUDGE.

Mr. Justice Higgins is, we believe, what is called a political judge, that is, he was appointed because he had well served a political party. He, moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship. In the course of the hearing of a case in the Arbitration Court, one of the counsel described the Broken Hill Labour organisation as “the most tyrannical” that he had known, and he added, “moreover, they are encouraged by their union and the Government of this country.” Whereupon, Mr. Justice Higgins was shocked, and is reported to have said severely—“You are not entitled to speak severely of those above us.” Whether he meant that the union or the Government “is above us” is said to be somewhat uncertain, because as the unions are supposed to rule the Government, it is held that they must be regarded as the supreme power, and must not be lightly spoken of, no matter what kind of language they may use themselves. On the other hand, it is argued that he must have meant the Labour Ministry, because the charge of encouragement seems to have been levelled at it openly in

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Court for the first time, and everyone knows that the unions do encourage all sorts of strange things. Assuming, as we may assume, we think, that he meant the Ministry, we find ourselves impelled to remark on the fact that a judge, a superior judge too, should admit that even a Ministry or a Government is superior to him in the exercise of his judicial functions. As we and most persons understand the matter, a judge on the bench in the exercise of his judicial functions has no superior, and if a Government has done wrong in a public manner there is no reason why the fact should not be stated, and it might even form a reason for a special decision in a case. In fact, it is conceivable that the action of a Minister might be a reason for a special decision, and certainly, of special remarks, not only by counsel, but by the judge, too. Mr. Justice Higgins thinks not, and has no resemblance to the judge who did not hesitate to deal with a Prince of Wales in an exemplary manner, and who has had universal applause ever since. The time may not be far distant, we suppose, when we shall not be allowed to speak ill of the caucus, for that is above all. From another point of view, we may be disposed to exclaim, with Maria, in *Twelfth Night*—"La you, an you speak ill of the devil, how he takes it to heart!"

Weigall, K.C. (with him *Gregory*), to move.—The publication complained of holds up a Judge of the High Court to contempt, and speaks disrespectfully of him in his capacity as a Judge, and follows that up with illustrations of what occurred in the Arbitration Court. [GRIFFITH, C.J.—Surely that does not amount to a contempt of Court.] It does, if the article speaks of a Judge in such a manner as is calculated to destroy the respect of the community for his decisions, and to create among the public a belief that his judgments are affected by political subserviency. That is cutting at the very root of the Court's authority. [GRIFFITH, C.J.—A Judge is just as much open to be libelled as anyone else. The libel may or may not be justified. Although the publication may be libellous, it is not a contempt of Court unless it is calculated to obstruct or interfere with the course of justice or the law. That has been laid down by the Privy Council in the latest authority—*The Reference from the Bahama Islands*, otherwise called *Re Moseley*, (1893) A.C. 138.] There are two classes of contempt. One amounts to scandalising the Judge or Court, and the other to interfering with the course of justice. The present case comes under the first class—*R. v. Gray*, (1900) 2 K.B. 36, 40. We understand Counsel for the respondent are prepared to withdraw and express regret for the first part of the article, which we regard as a contempt of the learned Judge as a Judge of the High Court. Under those circumstances we do not press the other part of the application, which deals with the conduct of the Judge in the Arbitration Court. Counsel also referred to—*R. v. Almon*, Wilm. Notes 255; *Re Evening News*, 1 N.S.W. L.R. (L.) 211.

McArthur (with him *Miller*), for the respondent, was not called upon to argue. He, however, stated

that his client, while denying that there had been any contempt of Court committed, withdrew the first two sentences of the article complained of, as he had since ascertained that they were inaccurate.

GRIFFITH, C.J., delivered the judgment of the Court:—This motion asks for the committal of the respondent for his contempt of *this* Court, or, in the alternative, for his contempt of the Commonwealth Court of Conciliation and Arbitration, in respect of the publication of an article in the *Hobart Mercury* of 7th April. The article is of some length. The text of it is an episode alleged to have taken place in the Arbitration Court, over which my brother Higgins was presiding. Whether it is correctly reported or not we do not know. That is the subject-matter of the article. It is prefaced by the heading "A "Modest Judge," and begins with these two sentences—"Mr. Justice Higgins is, we believe, what is "called a political Judge—that is, he was appointed "because he had well served a political party. He, "moreover, seems to know his position, and does not "mean to allow any reflections on those to whom he "may be said to be indebted for his judgeship." Then the article goes on to refer to an episode in which he was reported to have said that Counsel was not entitled to speak severely of "those above us." Then the article discusses the question whether he meant by the words "those above us" the Government, or Labour unions. The substance of the article is the reference that the learned Judge had made to "those above us"—if he made it—whatever that may mean, but by which the writer of the article took him to mean the Government or the unions. If the application were to be dealt with as raising the question whether that comment is calculated to bring the Arbitration Court into contempt, it would be necessary to consider the whole of the article carefully; but that part of the motion is not pressed. Possibly the Attorney-General saw the difficulty of contending that the Arbitration Court and this Court are substantially the same Court. The application is therefore now limited to the two introductory paragraphs I have read.

Mr. Weigall has argued that any publication calculated to bring any Judge into contempt or to lower his authority is a contempt of Court. He says—Higgins, J., is a Judge of the High Court; this publication is calculated to bring him into contempt, therefore the respondent is guilty of a contempt of the High Court. The proposition cannot be supported in the large sense in which it is stated. Mr. Weigall relied upon the language of Lord Russell of Killowen, L.C.J., in *R. v. Gray*, (1900) 2 Q.B. 36, in which the learned Lord Chief Justice said (at p. 40)—"Any act "done or writing published calculated to bring a Court "or Judge of the Court into contempt, or to lower "his authority, is a contempt of Court. That is one "class of contempt. Further, any act done or writ-

"ing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L.C., characterised as 'scandalising a Court or a Judge'—*In re Read and Huggonson*, (1742) 2 Atk. 469. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published."

With regard to what Lord Hardwicke, L.C., characterised as "scandalising a Court or a Judge," it was pointed out by my brother O'Connor that in *McLeod v. St. Aubyn*, (1899) A.C. 549 at p. 561, Lord Morris stated that prosecutions for that class of contempt of Court are practically obsolete in England. The case of *R. v. Gray*, (1900) 2 Q.B. 36, was an exceptional one. The article there was a very gross attack on a judge, and the case might well have been put under the other heading. Every defamatory publication of a judge may be said to bring him into contempt as that term is used in the law of libel; but it does not follow that everything said concerning a judge calculated to bring him into contempt in that sense is a contempt of Court. That distinction was pointed out by a Committee of the Privy Council to which the question was referred by the Secretary of State in 1892. The case is reported as *In the Matter of a Special Reference from the Bahama Islands*, (1893) A.C. 138, but it is otherwise known as *Re Moseley*. In that case a man had, in a letter published in a newspaper, held up the Chief Justice of a colony to public ridicule in the grossest manner. He had represented him as a man utterly incompetent to do his work, and as a man who shirked his work, and had suggested that it would be a providential thing if he were to die. The Committee, a very strong one of eleven very learned members of the Judicial Committee, did not give a formal judgment—it is not the practice in such a case to do so—but reported that the letter, though it might have been made the subject of proceedings for libel, was, in the circumstances, not calculated to obstruct or interfere with the course of justice or due administration of the law, and was not, therefore, a contempt of Court.

I apprehend that that is the question to be determined in the present case. Are these two paragraphs I have read calculated to obstruct or interfere with the course of justice in the High Court or the due administration of the law by the High Court? I think it is impossible to answer that question in the affirmative. The words taken by themselves are capable of an innocent meaning, and when taken in conjunction

with the rest of the article it is clear they refer to an episode which took place in the Arbitration Court. As to the further proposition which Mr. Weigall presses, that they suggest partiality, I am not prepared to accept the position that an imputation of partiality to a Judge is necessarily a contempt of Court. On the contrary, I think that if a Judge of any Court were to make a public utterance of such a nature as to be likely to impair the confidence of the public, or of suitors or of any class of suitors, in the impartiality of the Court in any matters likely to be brought before it, any public comment upon such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to a similar protection to that to which any other comment of public interest would be entitled under the law of libel. The only question to be decided is whether these words are calculated to obstruct or interfere with the course of justice or the due administration of the law in this Court. It being impossible to answer that question in the affirmative, no order can be made on the motion, and we dismiss it.

The respondent has very properly expressed his regret for having used language which is said to be capable of being construed as a disrespectful comment which he did not intend, and has very properly withdrawn; but that withdrawal, of course, does not make him guilty of a contempt of Court which he has not committed. The motion will be dismissed.

Motion dismissed.

[Solicitors—For Attorney-General, Powers, Crown Solicitor; for respondent, Moule, Hamilton and Kiddle.] W. A. S.

Supreme Court.

Before A'Beckett, J.

July 26.

In re **LAWN.**

THE BALLARAT TRUSTEES, &c., COMPANY

v. PERRY and Others.

Will—Construction—Gift—To widow—To be used for benefit of herself and children—Absolute gift—Trust.

A testator, after directing payment of debts, devised and bequeathed all his real and personal estate to his wife, "to be used by her as she may think proper for the benefit of herself and our children." There was no further disposition.—

Held, that no trust was created, and the widow took absolutely.

Having regard to *Lambe v. Eames*, L.R. 6 Ch. 597; and *McAlinden v. McAlinden*, I.R. 11 Eq. 219, *Raikes v. Ward*, 1 Ha. 445, is no longer an authority.