Numurkah[59] was forced on the court by the weight of authority. In these circumstances it is perhaps permissible to express some regret that a principle has been adopted involving difficulties of principle which are perhaps quite insoluble. In practice it is likely that tribunals will continue to use views as part of the materials which by a conscious or unconscious logical process influence their decisions. The rule of law then becomes merely a banner to which formal obeisance is made in ordinary cases, but which may cause some injustice when emphasis is thrown on the existence of the rule by the paucity of testimonial evidence and the correspondingly enhanced importance of a view, or when the judge cannot conscientiously feel that there is any part of the evidence which he does not understand so that he cannot conscientiously assent to a suggestion that he take a view.

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VARIATION BY THE ARBITRATION COURT OF ITS OWN MOTION

THE QUEEN v. *KELLY; EX PARTE AUSTRALIAN RAILWAYS UNION*

The present nature of the Arbitration Court's power to vary its awards was examined by the High Court in *The Queen* v. *Kelly; ex parte Australian Railways Union*.[1] The Commissioner for Railways (N.S.W.) had lodged an application for the variation of the Railways Metal Trades Grades' Award (1953) to give effect to an earlier decision of the Arbitration Court[2] abolishing quarterly adjustments of the basic wage.[3] When the matter came on for hearing, the Commissioner sought leave to withdraw his application. This leave was refused, and the Arbitration Court proceeded to make the variation order, notwithstanding that the parties were no longer in disagreement about the terms of their award. The Australian Railways Union thereupon applied to the High Court for a writ of prohibition restraining the Arbitration Court from further proceeding with the matter. Prohibition was unanimously refused, and in the result the High Court upheld the validity of ss. 49[4] and 34[5] of the Commonwealth Arbitration Act.[6]

The grounds on which Dixon, C.J., Taylor and Webb, JJ. based their decisions were substantially the same.[7] The power to vary awards[8] was held to be incidental to the Arbitration power[9] provided, here, the variation was within the ambit of the dispute in respect of which the award sought to be varied had been made. The court was further of opinion that a new dispute or difference between the parties to an award was not a "condition precedent"[10] to the exercise of the Arbitration Court's power of variation.[11] The present case

[59] *Ibid.*

[1] (1953) 89 C.L.R. 461.

[2] I.e. *The Basic Wage and Standard Hours Case* (1953) C. Arb. R. 698.

[3] I.e., according to the "C" Series retail price index numbers.

[4] S. 49 reads: "The Court may . . . if for any reason it . . . considers it desirable to do so . . . (b) vary any of the terms of an award."

[5] S. 34 provides that: "The Court . . . may exercise any of its powers, duties or functions under this act of its own motion or on the application of any party to an industrial dispute . . . ".

[6] The Commonwealth Conciliation and Arbitration Act, No. 13, 1904—No. 34, 1953.

[7] The two other judges in the case, Fullagar and Kitto, JJ. concurred with the Chief Justice.

[8] I.e., as in s. 49 of the Arbitration Act.

[9] S. 51 (xxxv) of the Commonwealth Constitution provides that: "The parliament shall have power 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."

[10] (1953) 89 C.L.R. 461, 480, *per* Taylor, J.

[11] It was also held that the power to make variations in these circumstances was not equivalent to the power to make a common rule. The High Court has unequivocally denied

raised several important issues concerning the Arbitration Court's variation power.

In the first place, the High Court again affirmed the established position that a power to vary is *intra vires* the Commonwealth Arbitration power. Settled disputes are considered as still surviving, and as providing a jurisdictional ground for the variation of awards made in those disputes.[12] This notional survival of settled disputes has a practical justification in allowing the maintenance of settlements over a period of time in a just and appropriate form, having regard to changing circumstances.

In the second place, this case makes it clear that the Arbitration Court[13] can vary an award in the absence of a dispute between the parties concerning the subject-matter of the variation. The High Court, however, did not consider the relationship between the Arbitration Court's power to vary of its own motion and its power to vary awards in the absence of a dispute. Although the former was upheld by the High Court, it does not appear to follow, as apparently Taylor, J. thought it did, that the recognition of a power to vary in the absence of a dispute automatically ratifies a power in the Arbitration Court to vary of its own motion.

In the third place, the High Court considered the "reasons" for which the Arbitration Court might vary its awards. Dixon, C.J. and Taylor, J., in upholding s. 49, took the view that the words: "if for any reason (the Court) . . . considers it desirable" could and must be read as meaning any reason relevant to conciliation and arbitration for the prevention and settlement of industrial disputes. The Arbitration Court has ensured such relevancy in the past[14] by requiring satisfaction, as a prerequisite to the exercise of the variation power, that circumstances have arisen which affect the justice of the awarded terms.[15] In the present case, the reason advanced for the Arbitration Court's variation was simply "the promotion of goodwill in industry", yet the High Court took no objection. It seems then that the degree of "relevancy" now required is, in fact, slight[16] and that the High Court is but little concerned in policing the Arbitration Court's "reasons" for varying awards.[17]

The High Court also considered the doctrine of "ambit" in relation to the variation power. The full significance of this judicially created limitation can, however, only be appreciated in the light of the statutory history of the variation provisions. The power to vary in the original Act of 1904 was provided by s. 38 (o) and (q), which allowed variations for the dual purposes of adjusting awards to new circumstances, and correcting errors and misunderstandings. In *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.*,[18] decided in 1919, the High Court made it clear that a variation under s. 38 (o) could only be made within the ambit of the original dispute. That case also decided that the Arbitration Court had no jurisdiction to take cognizance of a new dispute on the subject-matter of an existing award, during the specified period of operation of that award, although, as just stated, under s. 38 (o) a variation within the ambit of the old dispute could be made.[19] To deal with

that s. 51 (xxxv) will support such a power: *Australian Boot Trade Employees' Federation* v. *Whybrow and Co.* (1910) 11 C.L.R. 311; *R.* v. *Kelly, Ex parte State of Victoria* (1950) 81 C.L.R. 64.

[12] See *Australian Insurance Staffs' Federation* v. *Atlas Insurance Co. Ltd.* (1931) 45 C.L.R. 409, 440, *per* Evatt, J.

[13] And hence also the Commonwealth Conciliation Commissioners.

[14] Further, such relevancy was expressly required by the pre-1947 statutory variation provisions, as to which see *infra*.

[15] See *Australian Builders' Labourers' Federation* v. *South Australian Builders and Contractors' Association* (1942) 48 C. Arb. R. 448; *Australian Federal Union of Locomotive Engineers* v. *Victorian Railways Commissioner* (1925) 22 C. Arb. R. 74.

[16] Cases are conceivable, however, where a variation could have no possible relevance to the further settlement of an industrial dispute, in which case a prerogative writ could be issued out of the High Court against the Arbitration Court.

[17] See (1953) 89 C.L.R. 461, 478, *per* Webb, J.

[18] (1919) 27 C.L.R. 72.

[19] This position was confirmed in *Waterside Workers' Federation of Australia* v. *Com-*

this second problem raised by the *Gas Employees' Case*,[20] s. 28 (3) was enacted in 1920, and provided that:

> if the Court is satisfied that circumstances have arisen which affect the justice of any terms of an award, the Court may, in the same or another proceeding, set aside or vary any of the terms so affected.[21]

This provision was interpreted by the Arbitration Court to mean that, short of a cognizable new dispute, if the parties were in disagreement about an award and circumstances had arisen which made a variation inside the ambit of the original dispute inadequate, then a new award could be made on the subject-matter of the old dispute. The new disagreement was called a "contingent dispute" consisting usually of a demand and refusal concerning a matter dealt with by an existing award. Such a dispute was settled by a summary procedure.[22] However, this interpretation was rejected by the High Court in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.*,[23] where s. 28 (3) was taken to mean that, unless a distinctly new dispute had arisen (when a new award limited only by the new dispute could be made), the Arbitration Court was only empowered to make a variation of the old award within the ambit of the old dispute. Before 1947, therefore, a sharp distinction was drawn between variation proceedings which were limited by the ambit of the old dispute, and a proceeding in a new dispute which gave rise to a new award, even if, in fact, the new award was no more than a variation of the old award.[24]

When the Arbitration Act was revised in 1947, the new variation provision, s. 49, had the effect of combining the old sections 38 (o) and 28 (3). This new variation power could be addressed either to "bettering a provision of the award independently of changes in circumstance or to adjusting the settlement made to changes in circumstance."[25] Further, s. 48 (4) enabled a new award to be made during the specified period of an existing award in a dispute between the same parties and dealing with the same subject-matter, thus giving statutory recognition to the position as stated in the *Insurance Staffs' Case*.[26] An award in such a new dispute is, however, to be distinguished from a variation, which must still be made within the ambit of the original dispute.[27] Finally, as already noted, s. 34 gave the court the right to "exercise any of its powers . . . of its own motion." This is a new power[28] which, although accepted as constitutionally valid, was not, as we have seen, exhaustively examined in the present case.

The present nature of the arbitral power to vary may now be outlined with some certainty. Where the variation power is exercised, whether on the application of a party to an existing award, or of the court's own motion, the variation must be within the ambit of the original dispute and in some way relevant to the further settlement of that dispute. Also where a new dispute has arisen about an existing award, a new settlement may be made limited only by the

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monwealth Steamship Owners' Association (1920) 28 C.L.R. 209, and as result, Knox, C.J. appealed for legislative clarification.

[20] *Supra.*

[21] This provision also allowed for the variation of an award kept in force, after the specified period had expired, under s. 28 (2).

[22] See *Entrepreneurs' Association of Australia* v. *Australian Theatrical and Amusement Employees' Association* (1931) 30 C. Arb. R. 261, 265-66.

[23] (1931) 45 C.L.R. 408.

[24] I.e., *id.* at 444, *per* McTiernan, J. See also *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Victorian Railways Commissioner* (1935) 53 C.L.R. 113.

[25] (1953) 89 C.L.R. 461, 475, *per* Dixon, C.J.

[26] (1931) 45 C.L.R. 408.

[27] See *R.* v. *Blakely; Ex Parte Australian Theatrical & Amusement Employees' Association* (1950) 80 C.L.R. 82.

[28] I.e., when used conjointly with the variation power the novelty is apparent by contrast to the holding of Higgins, J. in *The Gas Employees' Case* (1919) 27 C.L.R. 72, 90, where he says that no variation can be made without the application of a party. To some extent, the conjoint power was judicially anticipated when it was held that a variation could be made to apply to all parties to an award, even those who did not apply for the variation: *Australian Workers' Union* v. *Arndt* (1931) 30 C. Arb. R. 124.

ambit of the new dispute. It is unreal, however, to view the arbitral power to vary entirely in a legal context. The Chief Justice in the present case accorded to the Arbitration Court both a powerful and a responsible position in the economy generally. He said:

> it would be absurd to suppose that it (an arbitral tribunal) was to proceed blindly in its work of industrial arbitration and ignore the industrial, social and economic consequences of what it was invited to do or of what, subject to the power of varation, it had actually done.[29]

That the High Court had its mind directed to these extra-arbitral consequences is apparent when, for instance, it spoke of the continued effectiveness of awards as being the responsibility of the Arbitration Court and hence necessitating a power in the court to control and supervise its awards. The liberal interpretation of the variation power in this case stresses the practically unchecked autonomy of the Commonwealth Arbitration Court in national industries and provides it with the means of ensuring a greater measure of harmony in those industries.

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DEATH DUTY

FRANCIS v. *COMMISSIONER OF STAMP DUTIES* (*N.S.W.*)

The importance of this decision[1] for the practitioner lies in the very wide power which the High Court's interpretation of s. 128 (1) of the Stamp Duties Act, 1920-1952 (N.S.W.), gives to the Commissioner of Stamp Duties to make further assessments of death duty, at any time after the original assessment is made.

Section 128 provides by sub-section (1):

> Notwithstanding any assessment or payment of death duty under this Act . . . or any statement of the Commissioner that no duty is payable, in respect of an estate . . . , it shall be lawful for the Commissioner at any time thereafter, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid, and to recover the same in the same manner as if no previous assessment or payment had been made.

It is also provided that any such further assessment shall be liable to appeal under s. 124 of the Stamp Duties Act, which entitles an administrator to have the Commissioner state a case to the Supreme Court on any disputed assessment. The Supreme Court may direct an inquiry to be made on issues tried if it considers that the questions submitted are not sufficiently set forth in the stated case.

The facts behind the appeal in this case were as follows.

The Commissioner had on 6th October, 1949, made an assessment of death duty payable by the estate of F. D. Muller, who died on 13th May, 1949. For the purpose of the assessment, the Commissioner had accepted the Valuer-General's valuation, as at the date of death, of £4,750 for a parcel of 3,600 £1 shares in Astor Pty. Ltd., the owner of a block of flats known as "The Astor". On 12th October, 1949, Muller's executor paid the death duty assessed and on 4th November, 1949, the shares were sold at public auction for £12,000. The Commissioner on 20th January, 1950, claiming to be authorised under s. 128, made a further assessment of additional death duty based on the difference between the Valuer-General's valuation at the date of death and the amount realised by the sale of the shares.

The deceased's executor disputed the power of the Commissioner to make

[29] (1953) 89 C.L.R. 461, 474.
[1] (1954) 91 C.L.R. 368.