SAMUELS v. HALL

COUNCIL BY-LAWS — ARREST UNDER S. 75 POLICE OFFENCES ACT, 1953-1967 — OFFENSIVE OR DISORDERLY BEHAVIOUR

Samuels v. *Hall*[1] is a judgment of a majority of the Full Court (Chamberlain and Walters J.J.; Mitchell J., dissenting) dismissing an appeal against a judgment of Zelling A.J. (as he then was),[2] in which he answered certain questions put to him by a magistrate in a special case stated. In September, 1970, leave to appeal against that majority decision was refused by the High Court.

The case arose from an incident in February, 1969, when the defendant Hall, a conscientious objector, was standing on the footpath outside the G.P.O. in King William Street, handing out pamphlets which sought to encourage persons eligible for National Service not to register. A by-law had been passed by the Corporation of the City of Adelaide, prohibiting *inter alia*, the distribution of pamphlets to passers-by and bystanders. When approached by a member of the police force he refused to hand over his bundle of pamphlets and he refused to give his name and address. A police officer then arrested him. Hall went limp and had to be carried to the police van. He was charged with two offences against the Police Offences Act, 1953-67, namely:

(1) Behaving in a disorderly or offensive manner in a public place, contrary to s.7; and,

(2) Committing an offence contrary to by-law IX, s.3(19), and on being required to state his full name and address refusing to do so, contrary to s.75.

The learned magistrate stated five questions of law for the opinion of the Supreme Court (Zelling A.J.) and these provide convenient headings for the comments which follow.

1. *Whether the powers of a member of the police force under s.75 of the Police Offences Act apply to a breach of the by-law IX, 3(19).*

S.75, Police Offences Act provides:

> "75. (1) Any member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

Sub-section (2) provides, *inter alia*, that,

> "Any member of the police force may require any such person to state his full name and address;".

Sub-section (3) makes it an offence for "any such person" to refuse "to comply with any such requirement". Part IX, s.163 of the Local Government

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1. [1969] S.A.S.R. 310.
2. *Samuels* v. *Hall* [1969] S.A.S.R. 296.

Act, 1934-67, confers power on a council officer or person authorized by the council to request any person found committing an offence against council by-laws to give his full name and address. Sub-section (3) of s.163 gives power to a council officer or authorized person or a *police officer* to arrest without warrant any person who refuses to comply with the request.

The major contention on behalf of the defendant, with respect to the application of s.75 to by-laws, was that Part IX, s.163 of the Local Government Act constituted a code relating to the arrest of persons who commit breaches of by-laws and that that "ousts" the jurisdiction given to the police by s.75, Police Offences Act. The majority of the Full Court on appeal confirmed the rejection of this argument by Zelling A.J. In the words of Chamberlain J.:

> "By s.75 a member of the police force may require 'any such person', that is to say, 'any person whom he finds committing an offence or has reasonable cause to suspect . . . etc. . . .' to give his name and address, whether or not the suspect is arrested. By subsec. (3) refusal of the requirement or the giving of false particulars is an offence, and one for which an arrest would be warranted under subsec. (1). Under this provision the offence does not arise unless the requirement has been made by a police officer. Under subsec. (3) of s.163 (Local Government Act), an arrest may be made by a police officer if, and only if, the demand has been made (and refused or met with false information) by a council officer or authorized person.
> S.163 therefore adds to the powers conferred by s.75, but it takes nothing away from them. The two provisions can stand together[3]."

Thus the majority of the Full Court rejected any argument based on the maxim *generalia specialibus non derogant;* that the general powers of s.75 did not apply to the area of specific power, s.163. However, Mitchell J. in a dissenting judgment accepted that argument:

> "In my view, the Local Government Act in s.163 contains the exclusive provisions concerning arrest for a breach of a by-law, and is not to be read in the light of s.75 of the Police Offences Act. If this is so, then s.75 has no application in the case of offences to which s.163 applies[4]."

Samuels v. *Hall* confirmed that the power given to police in S.A. to arrest without warrant applies, not only to felonies, misdemeanours or serious breaches of public peace[5], nor only to offences created or recognized by statute[6], but to breaches of local council by-laws as well. There seems little doubt now that s.75 confers the widest powers of arrest without warrant in

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3. [1969] S.A.S.R. 310, at 311-312.
4. *Ibid.* at 567.
5. At common law a constable can only arrest without warrant where:
   (1) a person is reasonably suspected of having committed a *felony; Beckwith* v. *Philby* (1827) 108 E.R. 585.
   (2) A person is *found committing* a felony, misdemeanour or serious breach of the peace. *Gelberg* v. *Miller* [1961] W.L.R. 153.
   See also *Timothy* v. *Simpson* 149 E.R. 1285.
6. *E.g.* Criminal Law Consolidation Act, 1935-1969, Police Offences Act, 1953-67, Road Traffic Act, 1961.

Australia[7]. It applies in both the day and night[8] to persons found committing or reasonably suspected of having committed[9] or being about to commit[10] an offence[11]. It also confers authority on a policeman to enter private property to exercise arrest under the section[12]. Yet to say that the powers are wide is not necessarily a foundation for adverse criticism. In the words of a witness before the 1968 Victorian Statutory Law Revision Committee;

> "Power of any description is a commodity capable of easy abuse, and should be sparingly bestowed and only to the extent that the recipient can be entrusted to use it wisely and in the spirit it is given. Where a group of people prove themselves incapable of exercising their authority in a responsible manner, action can be taken to circumscribe and limit their powers and area of discretion. The police in this State have shown themselves worthy of the trust and public confidence reposed in them, and in return have been enabled to give the public a reasonable standard of service and protection from the anti-social element."

Opposed to that is the view that the powers are far wider than is actually needed in practice, and the "liberty of the individual" is more effectively achieved by legal restrictions than by the high sense of responsibility which no doubt exists at present in the S.A. police force, but which can only be guaranteed in future to the same degree as the police force's tradition of responsibility and service.

2. *Whether By-Law IX, 3(19) is a valid exercise of the Adelaide City Council's power to make by-laws.*

By-law IX, 3(19) provides:

> "In respect of good rule and government;
>
> S.3. No person shall—
>
> (19) Upon any street, footway or other public place give out or distribute to by-standers or passers-by, any handbills, placards, notices, advertisements, books, pamphlets or papers."

The main heads of power, in the Local Government Act, relied upon to validate the by-law were:

> S.667(28) For regulating the management of any lands, etc.
>
> (31) For the suppression and prevention of nuisances.
>
> (47)IV. For regulating or controlling pedestrian traffic on streets, etc.

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7. See Report of 1968, Vic. Statutory Law Revision Committee, para. 45; generally paras. 45-53.

8. *Cf.* N.S.W.—s.352(2)(b) Crimes Act, 1900 (N.S.W.).

9. *Cf. Beckwith* v. *Philby* (above)—only for felonies.

10. *Cf.* s.352(2)(b) Crimes Act 1900, (N.S.W.); applies only to felonies at night. See also s.8A Crimes Act, 1914-60 (Cth.)—no arrest in such a situation.

11. No distinction between serious and minor offences—applies to by-laws, (*Samuels* v. *Hall*).

12. *Dinan* v. *Brereton* [1960] S.A.S.R. 101, per Napier C.J.

S.669(25)I. For preventing the obstruction of any streets, footways, water channels and watercourses.

(25)XII. For prohibiting or regulating the throwing or discharging of handbills or other printed matter in the streets, roads or public places.

S.667(50) For any other purpose in respect of which the council is authorized by this or any other Act to make by-laws, and,

(51) Generally for the good rule and government of the area and for the convenience, comfort and safety of the inhabitants thereof.

Zelling A.J. began by adopting the remarks of Mann J. (as he then was) in *Shire of Mildura* v. *Jenner*[13] where the learned judge agreed that "the descriptive heading to the by-law here in question is not conclusive as to the real nature of the by-law, or as to the Council's authority to make it." Zelling A.J. then proceeded to uphold the by-law under the specific powers of s.667(28) and s.667(47), but he was not prepared to base his decision on s.667(51), which he held to be neither a general nor a specific power and therefore subject to special requirements. The Crown argued that the placitum was supplementary to the specific powers, and it supported by-law IX, 3(19) as coming within a genus which belongs to local government. The appellant argued for a restrictive interpretation of s.667(51) by which by-law IX, 3(19) could only be supported if the by-law were *eiusdem generis* with a specific power, or could be aided by a specific power. Zelling A.J. held that a by-law made under placitum (51) "must bear a factual relation to the good rule and government of the area and the convenience and safety of the inhabitants"[14]. Since the argument was between the police and the defendant, the Corporation was precluded from showing a factual basis, and in its absence, his Honour felt unable to rely upon the placitum as a head of power.

Chamberlain J. held that the specific powers in s.667(31) and s.667(47)IV related to a subject of the same genus as the questioned by-law and could be aided by the general power in s.667(51). Walters J., in a concurring judgment, was prepared to uphold the by-law under the power to make by-laws "for the good rule and government" of the municipality but, in the event, agreed in the judgment of Chamberlain J. The learned judge did, however, comment on the clear intention of the legislature to entrust to local councils "powers with respect to the general oversight of streets within its area," and he did not think that the by-law was "inconsistent with that intention"[15]. He added that on the principle that local government by-laws should be supported if possible[16], in the present case the by-law should be given an interpretation which would put it within the law-making powers of the council "and not make it abortive."

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13. [1926] A.L.R. 396, 400.
14. [1969] S.A.S.R. 296, at 307.
15. [1969] S.A.S.R. 310, at 330.
16. His Honour referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91, 99; *Widgee Shire Council* v. *Bonney* (1907) 4 C.L.R. 971.

Mitchell J., dissenting in the Full Court, considered that the by-law was *ultra vires* the Adelaide City Council. Her Honour felt unable to justify the by-law under any of the specific placita discussed[17]. With respect to s.667(51) she was "unable to envisage what Zelling A.J. had in mind" regarding the necessity of establishing a "factual nexus" between the by-law and the placitum[18]. She held herself free to consider whether the by-law could be supported under s.667(51). It was her opinion that s.667(51) should be construed restrictively, and agreed with counsel for the defendant that there were no specific powers with which by-law IX, 3(19) could be said to be *eiusdem generis*, or in aid of which such a power could be used[19].

3. *Whether the arresting officer was entitled to arrest the defendant Hall*

5. *Whether the defendant Hall was entitled to resist his arrest.*

On the basis of the conclusions thus reached, the majority in the Full Court agreed with Zelling A.J. that the arresting officer was entitled to arrest Hall, and that Hall was not entitled to resist his arrest. Mitchell J., believing the arrest to be illegal[20] and the by-law invalid, was of the contrary opinion.

4. *Whether the conduct of the defendant amounted to disorderly or offensive behaviour under s.7 of the Police Offences Act.*

(i) Offensive Behaviour

Zelling A.J. took the very definite view that what was in question was the *behaviour* of the defendant and not the contents of the pamphlet[21]. For the purpose of offensive behaviour, what was contained on the outside of the pamphlet, (an invitation to encourage defiance of the National Service Act), was immaterial, but the general nature of the pamphlet (an anti-conscription pamphlet) *was* material to the defendant's behaviour. By the reasoning inherent in his judgment, it would appear to be his Honour's view that anything more detailed than the general nature of the pamphlet could not be relevant to the defendant's *conduct*, since a passer-by would only react to the general nature of what was being handed to him, and any reaction to the contents would occur *after* the "conduct" had been "completed". The learned judge agreed with counsel for the defendant that to have handed out anti-conscription pamphlets in front of the R.S.L. Headquarters would have been offensive. Therefore, the other relevant consideration seems to have been *to whom* the pamphlets were being handed out. His Honour referred to *Ball* v. *McIntyre*[22] where it was not considered to be offensive behaviour, in the circumstances, to climb on to a public statue of George V during a political demonstration, the better to display a political placard. Zelling A.J. accepted that case as supporting the proposition that conduct incidental to political protest is not regarded these days as offensive. Thus, the defendant's conduct in handing out anti-conscription pamphlets to various and sundry passers-by,

17. See *supra.*
18. [1969] S.A.S.R. 310, at 324; the majority did not defer to the "difficulty".
19. *Ibid.*, 571.
20. See *supra.*
21. [1969] S.A.S.R. 296, at 308.
22. (1966) 9 F.L.R. 237.

in King William Street, was incidental to political protest and therefore not offensive. Presumably, handing out the same pamphlets in front of R.S.L. Headquarters would be offensive because it is not incidental to political protest against Government conscription generally, but is aimed specifically and personally at a sector of the community which would undoubtedly be offended and affronted.

Mitchell J. was not prepared to exclude from her consideration of the defendant's conduct the words which appeared on the *outside* of the pamphlet and which clearly incited people to defy the National Service Act. Yet, nevertheless, she considered that his behaviour was not offensive. She characterized his conduct as "the mere expression of political views" which, in *Worcester* v. *Smith*[23], was not considered to be offensive "even when made in the proximity of the offices of those whose opinions or views are being attacked"[24]. In that case it was held that the carrying of banners, outside the U.S. consulate, and criticizing U.S. presence in Korea, did not support a charge of offensive behaviour.

It might be thought that this position is directly contrary to the view adopted by Zelling A.J., that to have handed out anti-conscription pamphlets outside R.S.L. Headquarters would have been offensive behaviour. But there is a possible distinction. To stand outside the U.S. consulate protesting at U.S. foreign policy might well be regarded as "a mere expression of political views" and "incidental to political protest", since the consulate would be purely symbolic of the U.S. government. But to stand outside the R.S.L. Headquarters protesting at conscription might be regarded as the expression of views of a more specific and personal nature; even insinuating.

In the context of the whole incident as "the mere expression of political views", her Honour evidently considered that the words on the outside of the pamphlet "though they are in one sense offensive to very many people in the community"[25], were not significant enough, in the circumstances, to make the conduct "offensive within the meaning of the Act".

The majority of the Full Court, Chamberlain J., (with whom Walters J. concurred) characterized the defendant's behaviour as conduct calculated to encourage people to defy the law with regard to National Service. It seems to have been the object of Chamberlain J.'s reasoning to point out that the words on the outside of the pamphlet, and hence, what they implied, would be clearly visible to a passer-by[26]. Thus, not only the general nature, but the specific nature of the pamphlet as well was a material consideration:

> "The outside of the pamphlet which was being handed to passers-by bears *a picture of a soldier in uniform* and presumably in action, and *in conspicuous type* the words 'Why register for National Service', 'If your son or boyfriend is due to register please pass this on to him' "[27]. (Emphasis added.)

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23. [1951] V.L.R. 316.
24. *Ibid.*, at 318.
25. [1969] S.A.S.R. 310, at 328.
26. *Cf.* Zelling A.J.; *supra.*
27. [1969] S.A.S.R. 310, at 316.

The learned judge held that the handing out of such a pamphlet could be considered offensive behaviour. He added that it was "a flagrant breach" of s.7A of the Commonwealth Crimes Act[28]. Later in his judgment, Chamberlain J. remarked of the defendant:

> "Although I do not think it matters[29], I think his answers in the witness box support the idea that he desired to make the most of his arrest in order to create a scene and thereby attract publicity"[30].

Those remarks, together with the learned judge's opinion that the defendant's refusal to hand over the pamphlets and his passive resistance to arrest could also be inferred as offensive conduct, supports the view that his Honour was prepared to consider any behaviour in the whole incident which conveyed to passers-by the object of the defendant's activities[31]. It should be mentioned that the learned judge did not have in mind any question of *mens rea;* his reference to the defendant's objects can be seen as merely emphasizing that what was relevant was not the conduct in isolation, but the *impression* which it conveyed to the passer-by. And in his Honour's judgment, the ordinary citizen could not reasonably have avoided the impression that the defendant was encouraging people to defy the law. He regarded that as offensive to a reasonable man. It seems, therefore, that the defendant's subsequent conduct when approached by the police was considered to have contributed to that impression.

As has been demonstrated, the proper application of s.7 is not an easy matter for the courts to consider. Perhaps it is because, as was said by Napier J. (as he then was) in *Barrington* v. *Austin*[32],

> "In all these cases[33] it is a question of fact and opinion whether the conduct complained of amounts to a 'nuisance'."[34]

It is not denied that some might take issue with the majority's assessment of the defendant's conduct. Yet one must be careful of the grounds on which the criticism is advanced; for there are two major steps in the reasoning of *all* the learned judges: what was the relevant conduct to be considered (material fact); was that conduct offensive (opinion)? It is submitted that the approach of the majority to the first stage is a proper one, though its conclusions on the second stage might more easily be disputed. It is, perhaps, a difficult thing to say how many people these days would be offended by being invited to encourage defiance of the National Service Act. Even if such an invitation brought a reaction from passers-by, would it "wound the feelings, arouse anger or disgust or outrage in the mind of a reasonable

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28. Inciting to or urging the commission of an offence against Cth. law.
29. Presumably, in affecting the eventual decision.
30. [1969] S.A.S.R. 310, at 316, see also similar remarks by Zelling A.J., [1969] S.A.S.R. 296, at 309.
31. [1969] S.A.S.R. 310, at 316.
32. [1939] S.A.S.R. 130.
33. Various forms of nuisance, including offensive and disorderly behaviour; Police Act, 1936-51, Pt. VIII, s.75.
34. At 132.

man"[35]? In other words, to adopt the comments of Kerr J. in *Ball* v. *McIntyre*[36],

> "behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non-acceptance of his views."

(ii) *Disorderly Behaviour*

The question of disorderly behaviour seems to have depended largely on what conclusions the learned judges reached as to the application of s.75 to council by-laws in general, and the validity of the particular by-law.

The words of Napier J. (as he then was) in *Barrington* v. *Austin* (above), adopted by the Full Court in *Rice* v. *Hudson*[37] and approved by the New Zealand Court of Appeal in *Melser* v. *Police*,[38] were generally taken as the definition of disorderly behaviour:

> "I have no doubt that these words 'disorderly behaviour' refer to any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in or in the vicinity of the street or public place."[39]

Zelling A.J. held that there were three elements in the defendant's behaviour which could be regarded as "disorderly":

(1) The pamphlet incited people to break the law;

(2) The defendant refused to hand over the bundle of pamphlets, necessitating the use of force by a police officer to try to obtain possession of them[40].

(3) The defendant, when arrested, fell limp to the pavement and had to be carried to the police wagon.

In his Honour's judgment all three were calculated "in greater or less degree to lead to breaches of public order"[41] and could therefore amount to disorderly behaviour within the meaning of s.7. That the third element was purely a passive resistance to arrest was not any defence, since he had held that the arrest was lawful, and the defendant therefore not entitled to resist his arrest[42].

Of the three reasons enumerated by Zelling A.J., Mitchell J. could find no element of disorder in the last two. The arrest was not lawful in her opinion[43], and the defendant was therefore entitled to resist arrest, which was the object

35. Per O'Bryan J. in *Worcester* v. *Smith* [1951] V.L.R. 316, 318. See also *Re Marland* [1963] 1 D.C.R.(N.S.W.) 224; *Inglis* v. *Fish* [1961] V.R. 607, 611 (Pape J.).
36. 9 F.L.R. 237, at 242, commenting on the above definition of O'Bryan J.
37. [1940] S.A.S.R. 290.
38. [1967] N.Z.L.R. 437.
39. [1939] S.A.S.R. 130, 132.
40. See below.
41. [1969] S.A.S.R. 296, at 309.
42. See above.
43. See above.

of his going limp. And the police had no right to attempt to take possession of the pamphlets. This point does not receive much attention in any of the judgments. The magistrate's findings specify[44] that the arresting officer did not form the intention to arrest until *after* the defendant refused to give his name and address. The attempt to take possession of the pamphlets occurred *before* that. Police officers have statutory authority to search, examine and take certain particulars from persons *in custody*[45] but there was little authority recognizing the power of police officers to do the same *before* arrest. Wright J. in *R.* v. *Lushington; ex parte Otto*[46] said:

> "In this Country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidence of crime, and which have come into the possession of the constables without wrong on their part."

With regard to *this* offence, the question still remains whether the officers attempted to take possession of the pamphlets, "without wrong on their part." It might be concluded that the answer lies in the view the learned judges took of the validity of the impugned by-law and the power of arrest in that situation. The majority in the Full Court agreed with Zelling A.J. that the by-law was valid and the arrest lawful. It is inherent in their judgments that they considered the initial attempts by the police to take possession of the pamphlets as quite within their powers. It might therefore be inferred (though their Honours did not expressly deal with the point) that, where a person is found committing an offence, a police officer may confiscate things in the possession of the offender, for use in court as evidence of the offence—and that is so, whether the offender is arrested or not. Mitchell J., took a contrary view of the validity of the by-law and the arrest, and therefore, could not have considered the circumstances as being open to the operation of such a principle.

Her Honour had more difficulty with the first reason given by Zelling A.J. In the result, she concluded that there was nothing in the defendant's conduct which was disorderly, unless it was disorderly to hand out that particular pamphlet; and she did not think that liability under a Commonwealth Statute was any criterion of disorderly behaviour. In arriving at that conclusion, Her Honour, with respect, did not counter, exactly, Zelling A.J.'s reasoning. His Honour's attention was not directed towards the defendant's liability under a Commonwealth Statute but towards the possibility that the defendant's conduct, in handing out pamphlets inciting defiance of the law, might reasonably lead to a "breach of public order". Chamberlain J. took the view that the incident as a whole might "properly be regarded as disorderly."

The differences of approach between the majority of the Full Court and Mitchell J. (who based her opinion initially on the approach adopted by Zelling A.J.) should be noted. Mitchell J. (and Zelling A.J.) regarded each element in the incident as pertaining *either* to offensive or disorderly behaviour, but not to both. The majority looked at the incident as a whole

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44. See para. 5, [1969] S.A.S.R. 296, at 300.
45. S.81, Police Offences Act.
46. [1894] 1 Q.B. 420, 423.

in order to gauge the impressions of offensiveness and disorderliness it might reasonably have conveyed to the public. Thus, elements which constituted a picture of offensiveness could also go to the question of disorderliness; the learned judges did not seek to divide the total picture into component parts and judge of the offensiveness or disorderliness of each part.

By this approach, the majority reached the stage where an opinion of the ordinary and reasonable man's reaction was required. If, especially in relation to the offensiveness of the defendant's conduct, they erred in that final stage, it was not, it is submitted, the result of an imperfect or unjust approach, but rather of the natural conservatism of the law.

*Jonathan Wells**

BLACKLEY v. DEVONDALE CREAM (VIC.) PTY. LTD.

ARBITRATION AND SECTION 109

The *Metal Trades* case[1] held that a Commonwealth award could regulate the minimum rate of wages to be paid by an employer to all his employees whether or not they were members of the disputing union, although there was no direct control over persons not involved in the dispute. In *Blackley* v. *Devondale Cream (Vic.) Pty. Ltd.*[2] the High Court considered whether such a provision was inconsistent with a State law obliging an employer to pay a higher rate. Devondale Cream employed Macdonald to do work covered by a classification in the Transport Workers Award, which laid down a minimum rate of wages to be paid to all employees whether or not they were members of the Transport Workers Union, the only union bound by the award. The company was a named party to the award, but Macdonald was not a Transport Workers Union member. The determination of the Frozen Goods Board, a Victorian statutory body, prescribed a higher rate of wages to be paid to Macdonald than that specified in the Arbitration Commission award. It was alleged that the company had failed to pay Macdonald the appropriate rates, in breach of the Labour and Industry Act 1958.

The company's contention that the rate fixed by the Frozen Goods Board was inoperative under section 109 of the Constitution for inconsistency with the federal award had been upheld at first instance, and by the Industrial Appeals Courts of Victoria. The appeal to the High Court against this decision was dismissed by a majority.

It was argued for the appellant that the State could give Macdonald rights against his employer since that subject was outside the field covered by the award. Barwick C.J. could not accept such a contention as " . . . it attempts to dissociate in an inadmissible way the right of an employee to recover a

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1. (1935) 54 C.L.R. 387.
2. (1967) 117 C.L.R. 253.