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That being so, it is impossible for this Court to interfere with those findings. As the findings stand, there was every justification for the action which was taken by the Government. I therefore agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Foxton & Hobbs.*

Solicitor, for the respondent, *Hellicar (Crown Solicitor).*

N. G. P.

[HIGH COURT OF AUSTRALIA.]

THE FEDERATED AMALGAMATED GOVERNMENT RAILWAY AND TRAMWAY SERVICE ASSOCIATION . APPELLANTS;

AND

THE NEW SOUTH WALES RAILWAY TRAFFIC EMPLOYES ASSOCIATION . RESPONDENTS.

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SYDNEY, *Aug.* 13, 20, 29, 30, 31.

MELBOURNE, *Sept.* 4, 5, 7, 10, 11, 12, 13, 14.

SYDNEY, *Dec.* 17.

Griffith C.J., Barton and O'Connor JJ.

The Constitution (63 & 64 *Vict.*, *c.* 12), *secs.* 51, 98, 101, 102, 104—*Validity of Commonwealth legislation — Interference with State instrumentality — Limited power— Validity of Act going beyond power—State railways—Regulation of wages and conditions of employment—Jurisdiction of President of Commonwealth Court of Conciliation and Arbitration—Appeal from registrar—Stating case—Commonwealth Conciliation and Arbitration Act* 1904 (*No.* 13 *of* 1904), *secs.* 2, 4, 6, 17, 18, 19, 23, 24, 28-31, 40, 48.

The rule, laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91, at p. 111, viz., that when a State attempts to give to its legislative or executive authority an operation, which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative, is reciprocal. It is equally true of attempted interference by the Commonwealth with State instrumentalities. The application of the rule is not limited to taxation.

Sec. 51 (xxxv.) of the Constitution does not either expressly or by necessary implication authorize such an attempt.

A State railway is a State instrumentality within that rule.

The legislative authority of the Commonwealth Parliament under the powers contained in secs. 51 (i.) and 98 of the Constitution, so far as regards wages and terms of engagement, does not extend further than to prohibit, for causes affecting interstate traffic, specific persons from being employed in such traffic.

Quære, whether that authority extends so far.

When in the attempted exercise of a power of limited extent an Act is passed which in its terms extends beyond the prescribed limits, the whole Act is invalid, unless the invalid part is plainly severable from the valid.

Held, therefore, that the *Commonwealth Conciliation and Arbitration Act* 1904, so far as it purports to affect State railways, is *ultrâ vires* and void, and, consequently, that an organization consisting solely of employés on State railways was not entitled to be registered under that Act.

The President of the Commonwealth Court of Conciliation and Arbitration, in hearing an appeal under sec. 17 of the above Act from the decision of the registrar granting an application to register an organization, is acting as the Court.

The term "proceeding before the Court" in sec. 31 (2) of the above Act includes every matter brought before the President in the exercise of the judicial functions conferred upon him by that Act.

Held, therefore, that, on the hearing of an appeal from the decision of the registrar granting an application to register an organization, the President may state a case for the opinion of the High Court.

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904.

The New South Wales Railway Traffic Employés Association, an association of employés on the State railways of New South Wales, applied to the registrar of the Commonwealth Court of Conciliation and Arbitration to be registered as an organization under the *Commonwealth Conciliation and Arbitration Act* 1904. The application was opposed by the Federated Amalgamated Government Railway and Tramway Service Association, but was granted by the registrar. From his decision the Federated Amalgamated Government Railway and Tramway Service Association appealed to the President of the Commonwealth Court of Conciliation and Arbitration. One of the grounds of appeal was that the applicant association, being an

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association of State railway servants, could not be registered under the Act, and that the Act, in so far as it purported to include State railway servants within its provisions, was *ultra vires* and void. The President, treating this objection as a question of law, pursuant to sec. 31 (2) of the Act stated a case for the opinion of the High Court setting out these facts.

Rolin moved for leave to intervene on behalf of the Government of New South Wales.

Shand K.C. (with him, *Ferguson* and *Holman*), for the respondents. The State of New South Wales is not interested in this application. The question of constitutionality is not properly before the Court, and the State cannot be affected by the registration of the respondent association.

The Court intimated that they acceded to the motion and allowed the Government of New South Wales to intervene.

Shand K.C. This is not a matter which the President has power to refer to the High Court. A case was stated by him under sec. 31, sub-sec. (2), of the *Commonwealth Conciliation and Arbitration Act* 1904. But that can only be done "in any proceeding before the Court." The power of the President to review a decision of the registrar under sec. 17 is a power which he exercises as the President not as the Court. There was therefore no proceeding before the Court, but an appeal from the registrar to the President. The Court as such has no jurisdiction over matters until there is an industrial dispute referred to it in accordance with the Act. The Act clearly distinguishes between the President and the Court: see secs. 16, 17, 18, 20, 22, 23 and 24; in some cases the President has a jurisdiction apart altogether from that of the Court, *e.g.*, that of mediation and conciliation, and the power to review the registrar's decision. The distinction between the President acting as President and the Court of which the President is a member is similar to the distinction between the two functions of a District Judge, who is in one aspect a Judge and in another Chairman of Quarter Sessions.

Assuming that the matter was one which the President had power to refer to this Court, it is not a proceeding in which

this Court will decide the important question of the constitutionality of the *Conciliation and Arbitration Act*. The State of New South Wales has no interest in having the question decided now, because the application was merely for registration, and that, if granted, could not affect the rights of the State in any way. The application for registration is merely preliminary. Until there is a dispute and some order is asked for affecting the State, the State has no interest and is not entitled to have the greater question decided. It is not necessary to decide that question at this stage. [He referred to *Cooley on Constitutional Limitations*, 6th ed., p. 196; *Black on Constitutional Law of United States*, 2nd ed., p. 58 (sec. 34); *Hingham and Quincy Bridge and Turnpike Corporation* v. *County of Norfolk* (1); *Encyclopædia of English and American Law*, 1084; *Wellington and other Petitioners &c.* (2); *Dalgarno* v. *Hannah* (3).]

The President is as distinct from the Court as a Judge sitting in Chambers is from the Supreme Court. [He referred to *Lush's Practice*, 3rd ed., 968; *Smith* v. *Bird* (4).]

On the other point, the Court will not decide the constitutional question until the State's rights are invaded. [He referred to *Forster* v. *Forster & Berridge* (5); *Chicago and Grand Trunk Railway Co.* v. *Wellman* (6); *Clark* v. *Kansas City* (7).]

Rolin, for the State of New South Wales. The constitutional question does arise for the determination of this Court. It is necessary to decide it for the purpose of the question that was before the President, and it has been raised by a party to that matter. The State has an immediate interest, because the applicant for registration is seeking to acquire a certain status which will give it power to take proceedings in the Arbitration Court against the State, and to interfere with its agencies. There is no necessity for the State to wait until an award has been made, any more than there is for a person likely to be affected by an excess of jurisdiction in an inferior Court to wait until the order is made against him. Having intervened, the State is a party

(1) 6 Allen (Mass.), 353, at p. 357.
(2) 16 Pickering (Mass.), 87, at p. 95, *per Shaw* C.J.
(3) 1 C.L.R., 1.
(4) 3 Dowl. P.R., 641.
(5) 4 B. & S., 187.
(6) 143 U.S., 339.
(7) 176 U.S., 114.

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and entitled to object to the exercise of the Arbitration Court's jurisdiction on any grounds.

As to the other objection, the President must be acting as the Court, or as a part of the Court, whether he sits with the other members or not, and may refer any matter before him to this Court.

Cur. adv. vult.

The following judgments on the preliminary question were read, and the argument on the main point was allowed to stand over.

August 20.

GRIFFITH C.J. This matter came before the Court as a case stated by the President of the Commonwealth Court of Conciliation and Arbitration under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904. The New South Wales Railway Traffic Employés Association are an association within the literal meaning of that term as defined in sec. 4 of the Act, which defines "Association" as meaning "any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés." They made application in due course to the registrar of the Arbitration Court for registration, and their application was opposed by the Federated Amalgamated Government Railway and Tramway Service Association on various grounds, but the registrar intimated that he would grant the application. The opponents then appealed to the President against his decision. Upon the hearing of the appeal it was objected, amongst other objections, that the applicants, being an association of State railway servants, could not be registered under the Act, and that the Act, in so far as it purported to include State railway servants within its provisions, was *ultra vires* and void. The President, treating the objection as a question of law arising in a proceeding in the Arbitration Court, stated a case for the opinion of this Court. The point so stated arises under paragraph xxxv. of sec. 51 of the Constitution under which the Commonwealth Parliament has powers to make laws with respect to "Conciliation and arbitration for the pre-

vention and settlement of industrial disputes extending beyond the limits of any one State," and sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904, which defines an industrial dispute for the purposes of that Act as "including disputes in relation to employment upon State railways."

There can be no doubt that this is a question of law, nor that it is a question of great importance. But it is objected that it is not a question arising in a proceeding before the Court, and that the President has therefore no power to state a case with respect to it, and that this Court has no jurisdiction to hear such a case. It is contended that the President, in hearing an appeal from the registrar, is not acting as the Court, but in the exercise of a personal authority conferred on him as President of the Court, and that, so acting, he constitutes a different and separate tribunal, to which the power to state a case for the opinion of the High Court does not attach. Sec. 11 of the Act provides that there shall be a Commonwealth Court of Conciliation and Arbitration which shall be a Court of record and shall "consist of a President." Division II. of Part III. of the Act, headed "The Jurisdiction of the President and of the Court," comprises three sections, the first of which (sec. 16) charges the President with certain extra-judicial duties by way of mediation, to which it is not necessary to refer. Sec. 17 provides that:—"The President may review annul rescind or vary any act or decision of the registrar in any manner which he thinks fit;" and sec. 18 provides that:—"The Court shall have jurisdiction to prevent and settle, pursuant to this Act, all industrial disputes." In my opinion, notwithstanding the difference in language between secs. 17 and 18, the duty of the President under sec. 17 is judicial and not ministerial. It is a duty cast upon him as the President and sole member of the Court constituted by the Act. I cannot accept the suggestion that in the discharge of this duty he is exercising a jurisdiction conferred upon him personally as distinguished from the Court.

The only question that remains is whether an appeal from a decision of the registrar is a "proceeding before the Court" within the meaning of sec. 31, sub-sec. (2). Sec. 54 provides that the registrar shall keep a register of all organizations registered under the Act. Sec. 55 provides that certain specified associations

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may, on compliance with the prescribed conditions, be registered as organizations. Sec. 60 requires the registrar, if it appears to him that certain conditions exist in the case of any registered organization, to make application to the Court for the cancellation of the registration. One of them is that the organization has been registered erroneously or by mistake. If the registrar on application to him refuses to apply to the Court for the cancellation of the registration of an organization, the Court may, on the application of any person interested, order the registration to be cancelled. There can be no doubt that an application to the Court under this section is a "proceeding before the Court" within the meaning of sec. 31, sub-sec. (2). If the objection now under consideration is a good one, the only result would be that the President, if he desired to obtain the opinion of the High Court, would formally affirm the decision of the registrar granting registration, whereupon the objector or appellant (whom I assume to be a person interested) would apply to the registrar to make application for cancellation of the registration, and then, whether the registrar made that application or not, the Court would deal with the matter, and obtain the opinion of the High Court on a case stated. The point raised, therefore, is purely one of form, and involves no question of substance. If necessary I think that the present case should be regarded as an appeal from a refusal of the registrar to apply for cancellation of the registration of the applicant association. But I do not think it necessary to have recourse to this fiction. The term "proceeding" is a term of very wide application. In my opinion the term "proceeding before the Court" includes every matter brought before the President in the exercise of the judicial functions conferred upon him by the Act.

I think also that the objectors, who were an association of persons in the railway service of New South Wales, were persons interested, since the registration of the applicants might under sec. 59 have deprived them of a right of registration, which possibly they might have had. I think, further, that the objection, being one to the status of the applicants, was, in effect, one to the jurisdiction of the Court itself, and that such an objection

may with the sanction of the Court be made by any person, if only as *amicus curiae*. (See *Corporation of London* v. *Cox* (1).

It was further objected by the applicants that the question sought to be raised is as to the validity of an Act passed by the Commonwealth Parliament, and that the Court will not in its discretion decide such a question, or even allow it to be raised, except in a litigation between parties in which the point is necessarily and distinctly raised. Without disputing the general proposition, I do not think that it applies to a case in which the Court is asked to exercise a jurisdiction the existence of which depends upon the constitutional validity of the Statute in question. A point of jurisdiction, when it is seriously raised, or if it suggests itself to the Court without being taken by a party, cannot properly be disregarded. Nor is a Court justified in making an order which it has no jurisdiction to make by the mere fact that no objection is offered.

For these reasons I am of opinion that the objections taken by Mr. Shand to the hearing of the case were untenable.

BARTON J. I concur.

O'CONNOR J. There is nothing in the preliminary objection. The Act no doubt distinguishes between the cases in which the President acts ministerially, as in mediating between industrial disputants not judicially before him under sec. 16, or in annulling some act of the registrar under sec. 17, and the cases in which he acts judicially. But Mr. Shand's objection is founded on the view that the President has two separate judicial capacities, one as President constituting "The Court" as described in the Act, the other as President acting judicially in those matters which the Act expressly empowers the President to deal with. It must be admitted that in the latter case equally as in the former the President constitutes a judicial tribunal—but it is contended that in the former case that tribunal is "The Court" and in the latter it is not "The Court" but another tribunal which is described as "The President." There is only one judicial tribunal constituted by the Act. Sec. 4 defines "The Court" as "The Commonwealth

(1) L.R. 2 H.L., 239.

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Court of Conciliation and Arbitration constituted pursuant to this Act." The Court is constituted by sec. 11 in the following words :—"There shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President." Whenever the President sits judicially he constitutes "The Court," and he cannot sit judicially without constituting "The Court." There is no warrant in the Act for the contention that the President sitting as a tribunal hearing one class of judicial proceedings is "The Court," but when sitting as a tribunal hearing another class of judicial proceedings he is not "The Court." Reference was made to sec. 32 which enables certain matters to be decided by the "President sitting in Chambers." A Court ordinarily speaking conducts its business in public—but it has always been the practice in the several jurisdictions of the Supreme Court for Judges, when they so deem it advisable, to deal with the class of proceedings mentioned in sec. 32 in Chambers either in public or in private. It is to make it quite clear that this method can be followed in the Federal Arbitration Court that similar power has been expressly conferred on the President by that section. But whether the President sits in Court in the ordinary sense of the word or in his own Chambers under that section, he constitutes the Court under the Act. In other words, whenever the President sits judicially he constitutes the Court, and as he sits judicially in reviewing under sec. 17 a decision of the registrar, the proceeding on that review is a "proceeding before the Court" within the meaning of sec. 31, and he may state a case for the opinion of the High Court on any question of law arising in that proceeding. As to the other matters mentioned by my learned brother the Chief Justice, I entirely agree with his observations.

Leave to intervene was subsequently granted to the Commonwealth and to the State of Victoria.

Aug. 29.

Rolin, for the State of New South Wales. The question raised by the case stated is whether the *Commonwealth Conciliation and Arbitration Act* 1904, so far as it purports to include State railway servants, in its purview, is invalid and void. Registra-

tion is the first step towards enabling an organisation to institute an industrial dispute and bring it before the Court. When the matter is brought before the Court, the Court will have power to deal with the dispute and make an order or award and impose penalties for a breach.

[GRIFFITH C.J.—It looks at first sight as if the definition of an "industrial dispute" in sec. 4 were a contradiction in terms.]

Yes, it is difficult to see how a dispute between a State as an employer and its employés could extend beyond that State.

It can hardly be contended that to empower the Arbitration Court to intervene in such matters as the relation between a State and its railway employés in the way contemplated by the Act is not empowering it to interfere with the instrumentalities of the State. As to the relation between the State of New South Wales as employer and its railway servants: *see The Government Railways Act* (N.S.W.) (No. 6 of 1901), secs. 4, 14, 16, 17, 43, 44, 45, 71, 72, 104. Sec. 72 provides that the amount to be paid as wages, &c., is to be such sum as Parliament appropriates for that purpose. [He then referred to the definition of "Government" and "Minister" in sec. 15, sub-secs. 2 and 3, of the *Interpretation Act* (N.S.W.) (No. 4 of 1897.)] There is no power under the *Commonwealth of Australia Constitution Act* to interfere between the State and its servants. Assuming that the Commonwealth claims to be acting under the powers conferred by sec. 51, sub-sec. (xxxv.) of the Constitution, the terms of that section seem to make it inapplicable to matters arising between the State and its servants. No dispute in connection with such matters could extend beyond the State, because the State does not carry on business outside its territorial limits.

Apart from that, assuming that the section gives a general power to legislate on this point in regard to State businesses, it ought not to be construed as extending to businesses which are instrumentalities of the State. Such a power is not given by express terms, and it should not be deemed to be given by implication. It is an interference with State sovereignty. The State equally with the Commonwealth is left supreme in its own ambit, and the same principle which should be applied in considering questions of impairing Commonwealth sovereignty by

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State Acts should also be applied in considering attempts by the Commonwealth to interfere with the sovereignty of the States. The American Courts have followed that principle, and it should be followed here where analogous questions arise. If that is so, any limit imposed upon the States' sovereign rights is an interference. The *Conciliation and Arbitration Act* 1904 purports to give the Court such a power of interference, and so far as it does it is *ultra vires*. The Commonwealth cannot do indirectly what it cannot do directly. In *Collector* v. *Day* (1) it was held that it was not competent for Congress to impose a tax upon a judicial officer of a State. The principle applied there was deduced from *M'Culloch* v. *Maryland* (2).

[GRIFFITH C.J.—You may take it that we are familiar with the principle of those cases. You may start from this, that the Commonwealth cannot interfere with the conduct and management of State business.]

Although in the United States Constitution there was full power to tax, it was restricted by the Courts by implication. So it must be limited here. Though *primâ facie*, there is power under sec. 51, sub-sec. (xxxv.) of the Constitution to legislate in all directions and to any extent on that particular matter, it must be limited in the same way as the power to tax has been limited. It is admitted that the limitation would not apply to the States carrying on ordinary private business in competition with private persons, as was held in *South Carolina* v. *United States* (3); but the management of the national railways by the Government cannot be treated as an ordinary private business under the conditions of the Australian States. Here it is a recognized function of the Government. [He referred to *Miller* v. *McKeon* (4).] But it is not contended that the Government can of its own motion create some new department, not an ordinary function of Government, and so render it exempt from Commonwealth taxation. Railways are recognized by the Constitution as undertakings ordinarily carried out by State Governments, and in America it has been held that a State cannot tax a Commonwealth franchise to make railways through the State. [He referred to secs. 98, 99, 100 of the Constitution.]

(1) 11 Wall., 113.
(2) 4 Wheat., 316.
(3) 199 U.S., 437.
(4) 3 C.L.R., 50.

[*Higgins* K.C.—We justify the Act under the trade and commerce powers.]

Sec. 101 of the Constitution by providing for an Inter-State Commission to administer the trade and commerce laws of the Commonwealth suggests that the legislature did not intend that that there should be a power in the Commonwealth to interfere in any other way. There is nothing in the Constitution to warrant interference by an Arbitration Act. [He referred to the *United States* v. *Railroad Co.* (1), and *Georgia* v. *Atkins* (2).] Secs. 102 and 104 also recognize railways as a State function.

[BARTON J.—May it not be taken that the provisions to which you have last been referring were passed in view of what was said in *Farnell* v. *Bowman*? (3).

GRIFFITH C.J.—The Constitution distinctly recognizes State railways, and, if it did not, we could take cognizance of historical facts. Sec. 102 expressly recognizes the responsibilities of State Governments.]

That section also, by pointing out expressly how far State railways may be interfered with by the Commonwealth Parliament, suggests that there is not to be any implied power of interference.

[GRIFFITH C.J.—You say that this is a State function, with which there is *primâ facie* no power to interfere, and therefore there are no powers of interference unless expressly given.]

It was held in *Kentucky* v. *Dennison* (4) that as there was no express provision in the Constitution requiring States to hand over criminals to other States or to the federal authority, there was nothing more than a moral obligation to do so.

Looking at sub-sec. (xxxv.) of sec. 51, a dispute between the employés of a State and the State could not in the nature of things extend beyond the State. It might remotely touch inter-state commerce, but in another State it would be another dispute, not an extension of the same dispute. The employés of two or more States might belong to one organization, but the States must always remain independent entities.

(1) 17 Wall., 322.
(2) 1 Abbott, 32.
(3) 12 App. Cas., 643, at p. 649.
(4) 24 How., 66.

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[GRIFFITH C.J.—A State has a definite localization, though a private employer has none.]

There are many industries extending beyond the bounds of a single State, and organizations of employers and employés might exist in those industries. They are the cases to which the legislature was directing its attention in the Constitution.

Higgins K.C. and *Holman* (with them *Shand* K.C. and *Ferguson*) for the respondents.

The only question here is whether a particular union was entitled to registration. It may be that the Act is valid so far as regards registration, but invalid with regard to compelling parties to go to the Arbitration Court. The Act does not only deal with arbitration and conciliation. Sec. 16 for instance provides for mediation by the President. A registered organization has the benefit of that section. Why should a State be exempted from its operation? There is no instance of an exemption of State instrumentalities except in respect of burdens. The argument for the State of New South Wales is based on the assumption that the Imperial Parliament, in giving the Commonwealth Parliament power to make laws for conciliation and arbitration, was necessarily giving powers to impose burdens. The doctrine applied in America relates solely to cases of impeding the exercise of sovereign functions. It cannot be said that the State of New South Wales is affected prejudicially or by way of burden by the President's mediation. The power given to the President is a gift or benefit to the party in respect of whom it is to be exercised. The States should therefore come under the Act, and, as it is only registration that is now in question, registration will give the registered body the rights conferred by the Act so far as they are beneficial or not burdensome to the States. There is nothing in the Constitution which would prevent Parliament from allowing its President to mediate. It cannot be assumed that an attempt will be made to go further; at any rate the question whether the State is wholly within the Act does not arise until some such attempt is made. The validity of the law is a question which is not dealt with unless the Court is driven

to it, when the rights of parties necessarily turn upon the question: *McClain's Constitutional Law Cases*, p. 21.

[GRIFFITH C.J.—When you ask the Court to exercise its jurisdiction you must show that it has jurisdiction.

O'CONNOR J.—The States have *primâ facie* the right to manage their own business in their own way. If you seek to show that that is not so in a particular case you must discharge the onus. It is a question of the right of the Court to adjudicate upon registration.]

The Act may be valid to a certain extent, that is, so far as it deals with conciliation. The State may take advantage of the benefits conferred by the Act. It could claim a bounty under sec. 51 (iii.) of the Constitution. Why should it not get the benefit of legislation under sec. 51 (xxxv.)? There is no implied prohibition in that sub-section.

[GRIFFITH C.J.—The question is whether there is an implied exception, not an express prohibition. Everything not included is prohibited.]

Sec. 51 (xxxv.) merely gives power to legislate, it does not purport to bind anybody. The authority which gave that power has it in its power to approve or disapprove of the way in which it is exercised by the power of veto. There is no necessity to adopt the narrow construction of powers adopted in America, because there there was no protection by a central power like the Crown.

[GRIFFITH C.J.—That argument was overruled in *Deakin* v. *Webb* (1).]

It cannot be contended that it was the intention of the Imperial Parliament not to give the Commonwealth Parliament power to intervene in order to prevent so great an evil as a strike by state employés. [He referred to *In re Debs* (2).]

[BARTON J.—There it was held that the Federal Government was entitled to interfere to preserve in the face of force the Executive power to maintain the postal services of the Union. That is a wholly different matter.]

GRIFFITH C.J.—They interfered because their own sphere of action was being invaded.]

(1) 1 C.L.R., 585. (2) 158 U.S., 564.

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The Commonwealth has taken over certain departments and regulated the largest: The Constitution, secs. 69, 51 (v.), 52 (ii.). There is nothing so vital to interstate trade as railways. It must be presumed that the Imperial legislation meant to include railways in the power to regulate interstate trade and commerce. The Interstate Commission is a subsidiary authority, not inconsistent with the Arbitration Court, and was not intended to be the exclusive authority on trade and commerce between the States. In the opening words of the New South Wales Constitution there are almost the same words as those in the Commonwealth Constitution giving the power to legislate, and it has never been questioned that they gave power to legislate so as to bind the Crown.

[O'CONNOR J.—Yes. But the New South Wales Government only binds itself, not the Crown apart from New South Wales.]

Sec. 51 gives power without any express limitation, and the Crown is bound by legislation under the power, if it consents to the legislation.

The Constitution should be construed in such a way as to be effective for its purposes, the securing of peace, order, and good government. Legislation under this power cannot be made effective unless it applies to State servants. A dispute might be taken up with a common object in different States, and the State laws might be powerless to settle it. It will not be assumed that the Arbitration Court will do what is injurious to the States, and it is only by giving it this power that the mischief aimed at can be prevented. [He referred to *Gibbons* v. *Ogden* (1); *Cooley's Constitutional Limitations*]. The presumption is that a remedial Act extends to the Crown. [He referred to *Ex parte The Postmaster General* (2).]

[O'CONNOR J.—That is only as to the question whether a State is bound by Acts passed within that State. The question here is whether the Crown is bound by the Acts of another Parliament.]

The main object of the *Commonwealth Conciliation and Arbitration Act* 1904 is shown in sec. 6 to prevent strikes. The

(1) 9 Wheat., 1, at p. 187.

(2) 10 Ch. D., 595, at p. 601.

order of the Arbitration Court is merely a certificate that a certain person should do something.

[GRIFFITH C.J.—It is more than that. The Judge could order property to be seized.]

The State need not appropriate money for the purpose ordered, and could not be compelled to do so. The same position would arise as in every case in which a judgment is obtained against a State. In such a case the Commonwealth would be content with an order which did not amount to more than a direction to the State.

[GRIFFITH C.J.—But in New South Wales that is not the effect of a judgment against the Crown. The rolling stock can be seized in execution.

O'CONNOR J.—The Commissioners are a legal entity and the railways are vested in them.

GRIFFITH C.J.—Surely when a power is given to the Court to make an award it is intended that the ordinary consequences of an award should follow.]

The Court should be trusted not to make an order with such serious consequences to the States. Even if the Act is invalid in so far as it purports to give power to do such things in the case of a State Government, it does not follow that the provisions as to registration are invalid. The State may take advantage of the benefits conferred while remaining free from the burdens. *Black's Interpretation of Laws*, pp. 119, 122; *Commonwealth* v. *Boston and Maine Railway Co.* (1); *Prentice and Egan on Commerce Clauses of the Constitution*, p. 181; *Western Union Telegraph Co.* v. *James* (2). Aiding the State is not an objectionable interference: *D'Emden* v. *Pedder* (3); *Deakin* v. *Webb* (4); *The Commonwealth* v. *The State of New South Wales* (5); *Municipal Council of Sydney* v. *The Commonwealth* (6); *Roberts* v. *Ahern* (7); *The Commonwealth* v. *Baume* (8); *National Bank* v. *Commonwealth* (9); *Chitty's Prerogatives of the Crown*, p. 382.

(1) 3 Cushing, 25, at p. 45.
(2) 162 U.S., 650.
(3) 1 C.L.R., 91, at p. 111.
(4) 1 C.L.R., 585, at p. 613.
(5) 3 C.L.R., 807.
(6) 1 C.L.R., 208.
(7) 1 C.L.R., 406.
(8) 2 C.L.R., 405.
(9) 9 Wall., 353.

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Looking at the context in sec. 51, it appears that all through the intention was that State Governments were to be bound unless expressly excepted, *e.g.*, sub-secs. (xiii.), (xiv.)

[O'CONNOR J.—On that argument the power to tax States must be implied, because they are not expressly exempted.]

No; taxation must be a burden, whereas other legislation may not be so. Whenever exceptions are intended they are made. If the State is not to be affected by sub-sec. xxxv. it is not affected by sub-sec. xvii., and the consequences would be that a State would not get the benefit of the bankruptcy laws against a debtor. [He referred also to sub-sec. (vi.), under which the *Defence Act* is passed interfering with the State railways.] It is a mere matter of construction, because the Imperial Parliament could have given the Commonwealth any power to interfere that they chose to give. In America, under the general power to make laws as to bankruptcy, without express mention of the States, laws have been passed without question binding the States in certain ways: *United States' Statutes at Large*, vol. 30, cap. 541.

[O'CONNOR J.—Would not your argument apply to all departments of State?]

No; only to those employés who were industrial.

Next, the sub-section giving Parliament power to make laws in respect to trade and commerce between the States, taken in conjunction with sec. 98, is sufficient to give power to create a Court of Arbitration affecting State railway servants. Parliament under that has all the powers of Congress as to trade and commerce, and one of those is to provide for arbitration in railway employés disputes, and therefore Parliament has undoubtedly power to provide for arbitration in such disputes so far as regards private railways, and by sec. 98 the power is extended "to railways the property of any State." That is, of course, subject to the limitation that it must refer to interstate traffic only. [He referred to *United States Statutes at Large*, vol. 25, cap. 1063, (Act of 1888) and vol. 27, cap. 196 of 1893; and *Prentice and Egan's Commerce Clauses of the Constitution*,

pp. 90, 91; *The Daniel Ball* (1); *In re Debs* (2); *Nashville, Chattanooga and St. Louis Railway* v. *Alabama* (3).]

It is not to be assumed that because the *Arbitration Act* may affect the discretion of the Railway Commissioners or swell the Appropriation Act of a State, the Federal Arbitration Court is not to have power to deal with such matters. Under the American Constitution, from which our own is largely derived, the interferences by the Federal Government with State officials are numerous. For an example, see *Ex parte Siebold* (4); *Boyd's Cases on American Constitutional Law*, pp. 577, 659.

A dispute which extends beyond one State might and probably would apply to interstate traffic, and an organization would have to show, not only that the dispute did extend beyond one State, but also that it affected interstate traffic: *See Tiedeman's State and Federal Control of Personal Property*, vol. I., p. 597. There is nothing *primâ facie* absurd in the idea of a strike extending beyond one State. Where the men engaged in an industry in different States make common cause the dispute extends beyond one State. Just as in *In re Debs* (5), it was held that the United States Government could interfere to keep the mails going, so here the Commonwealth may legislate as to conciliation with regard to interstate railway traffic. There is no doubt that a federal law as to bankruptcy could operate so as to discharge a bankrupt from debts owing by him to the State. That at any rate is an interference with the State.

[GRIFFITH C.J.—That is an interference *ex necessitate*.]

It is not a necessary consequence. For years the States in America were exempt from federal legislation as to bankruptcy, and there is now positive legislation as to bankruptcy as affecting the States. See *Prentice and Egan on the Commerce Clauses of the United States Constitution*, pp. 27, 142. In America it has been held that Congress may by means of its regulations of interstate trade vary the rights of a State to its bridges if they interfere with interstate commerce: *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (6). In *Attorney-General for Ontario* v.

(1) 10 Wall., 557, at p. 559.
(2) 158 U.S., 564, at p. 580.
(3) 128 U.S., 96.
(4) 100 U.S., 371, at p. 379.
(5) 158 U.S., 564.
(6) 13 How., 518; 18 How., 421.

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Attorney-General for the Dominion (1), it was held that dominion enactments, when competent, supersede, although they cannot directly repeal, provincial enactments. See also *D'Emden* v. *Pedder* (2). There is a distinction between that which directly, and that which indirectly, affects a State instrumentality: *McClain's Constitutional Law*, p. 153. The mere fact that a federal Act has the result of causing increased expenditure on the part of a State does not constitute an interference. There is also a distinction between the immunities which belong to a sovereign State by virtue of its sovereignty, and those immunities which belong to it in respect of its commercial undertakings. A sovereign power entering into a contract is liable to the incidents of contracts: *Moodalay* v. *Morton* (3); *Bank of Kentucky* v. *Wister* (4); *Bank of United States* v. *Planters' Bank of Georgia* (5); *Briscoe* v. *Bank of the Commonwealth of Kentucky* (6); *United States* v. *Bank of the Metropolis* (7); *Louisville, Cincinnati and Charleston Railroad Co.* v. *Letson* (8); *Curran* v. *Arkansas* (9); *United States* v. *State Bank* (10). In all the American cases it is recognized that the doctrine of the non-interference with State instrumentalities does not extend to instrumentalities which are used for the purpose of commerce. "The exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business:" *South Carolina* v. *United States* (11).

[GRIFFITH C.J.—It would follow from that that the actual functions of government can now be enlarged.

O'CONNOR J.—And it involves the question what are the attributes of sovereignty?]

The main attributes of sovereignty are three, viz., legislative, executive, and judicial functions. With regard to the business of railways, one can conceive of them being given up by the States. If there is a function which is essential to government that is an

(1) (1896) A.C., 348.
(2) 1 C.L.R., 91, at p. 111.
(3) 1 Bro. C.C., 469.
(4) 2 Peters, 318.
(5) 9 Wheat., 904, at p. 907.
(6) 11 Peters, 257, at p. 323.
(7) 15 Peters, 377, at p. 392.
(8) 2 How., 497, at p. 551.
(9) 15 How., 304.
(10) 96 U.S., 30, at p. 36.
(11) 199 U.S., 437, at p. 461.

attribute of sovereignty. The whole tendency of recent decisions in the United States has been to limit the doctrine of the immunity of State instrumentalities. See *Western Saving Fund Society* v. *Philadelphia* (1); *Bailey* v. *Mayor of New York* (2). The argument on the other side would have the result of putting a premium on all State enterprises.

[GRIFFITH C.J.—It is important to remember that State railways were recognized functions of government at the time of the inauguration of the Commonwealth, and that they are recognized as such by the Constitution.]

At that time there were State industries in all the States and the tendency was for them to increase in number. Can it reasonably be supposed that, when the Commonwealth was given power to legislate as to conciliation and arbitration, State enterprises were to be excluded? Although the Constitution recognizes railways as being carried on by the States, there is nothing in the Constitution which lifts railways out of the ordinary category of business undertakings up into the domain of strictly governmental functions. See the Constitution, secs. 51, 98. The distinction between the governmental functions and the business enterprises carried on by a State is a reasonable one. The governmental functions are those functions which cannot be contemplated as being intended to be delegated to private persons. Even assuming the doctrine of the immunity of State instrumentalities extended to State business concerns, it is by no means clear that the Railways Commissioners could claim the benefit of that immunity, for they have a discretion which they can exercise apart from and independently of the Crown. See *Gilbert* v. *Corporation of Trinity House* (3); *In re Woods' Estate*; *Ex parte Commissioners of Works and Buildings* (4). Although an Arbitration Court could not be created by the Commonwealth which should have power to compel a State or the Railways Commissioners of a State to pay any money, yet an Arbitration Court might be created which should have power to say that a State or the Railways Commissioners of a State *ought* to pay money. Appropriation by Parliament is not a condition pre-

(1) 31 Pen. St. R., 175.
(2) 3 Hill, 531, at p. 585.
(3) 17 Q.B.D., 795, at pp. 797, 801-2.
(4) 31 Ch. D., 607, at p. 621.

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cedent to the right to recover judgment. *Bond* v. *Commonwealth of Australia* (1); *The King* v. *Fisher* (2); *Bremner* v. *Victorian Railways Commissioner* (3).

[GRIFFITH C.J., referred to *Shire of Arapiles* v. *Board of Land and Works* (4).]

There is no more obligation upon the Commissioners of Railways to pay under an award than there is under a judgment. Just as in an action for negligence, so under an award, the Commissioners are to be supplied with funds by Parliament. Even if it could be said that there could be no railway dispute extending beyond one State, that would not affect the validity either of registration under the *Commonwealth Conciliation and Arbitration Act* 1904, or of that Act itself. It would merely mean that the Act is inapplicable to railway disputes. The question is not whether the Act is nugatory and inapplicable, but whether it is void because it is beyond the powers of Parliament. A dispute "extending beyond the limits of any one State" involves a common dispute. There must be united action on one side or both sides to the dispute. It means generally, in relation to railways, that the railway servants of two or more States must be making common cause or have a common ground of complaint. For example, suppose there were a shearing dispute in Victoria and New South Wales, and the railway servants in those two States were to refuse to carry wool not shorn by a union. That would be a dispute extending beyond one State.

[GRIFFITH C.J.—Would that be an industrial dispute ?]

It would be a dispute as to the industry of working the railways.

[GRIFFITH C.J.—Would a refusal by the railway servants in two adjoining States to carry Chinese be an industrial dispute ?]

Yes, if the railway servants in the two States acted together. An industrial dispute is a dispute in an industry as to the mode of carrying on that industry, and in respect of it there must be unity of action between the employés of more than one State.

(1) 1 C.L.R., 13, at p. 24.
(2) (1903) A.C., 158, at p. 167.
(3) 27 V.L.R., 728, at p. 736; 23 A.L.T., 210.
(4) 1 C.L.R., 679.

Although an award by a Commonwealth Court of Arbitration might have the incidental effect of rendering increased taxation necessary in a State, it cannot be said that the *Commonwealth Conciliation and Arbitration Act* imposes that taxation, and thereby infringes the rights of the States. It must be proved conclusively that a Commonwealth Act is unconstitutional before this Court will declare that it is: *Tucker's Constitution*, vol. I., p. 380; *Fletcher* v. *Peck* (1); *Ogden* v. *Saunders* (2).

[GRIFFITH C.J.—I do not agree with the principle as stated in the latter case. According to it, if a law is capable of two constructions, the Court must decide in favour of its validity.]

The Court need not deal with the grave question of the constitutionality of the *Commonwealth Conciliation and Arbitration Act*, but may deal only with the question of registration under it: *Weimer* v. *Bunbury* (3). Looking at the words of sec. 51 (xxxv.) of the Constitution the power given is unlimited as to its objects within the bounds of the actual words, and the extension of that power to State agencies is a matter for the King and the Parliament, and the same may be said of all the powers given by sec. 51 except those the exercise of which would impose burdens. The *Commonwealth Conciliation and Arbitration Act* may be an aid and need not impose a burden. The Court need not say that it is an aid, but it was intended to help the Commonwealth. The tendency of the power conferred by sec. 51 (xxxv.) is in accordance with the tendency to bring more and more matters within the domain of law and out of the domain of force. There is no doubt that the interstate commerce powers may be exercised as to State railways. Sec. 51 (xxxv.) was meant to apply to all railways and to all industries as no industry is expressly excluded. Wherever it was meant to include State and private railways the Constitution uses the word "railways," but wherever a law is meant to apply to State railways only the words "State railways" are used.

If some of the provisions of the *Commonwealth Conciliation and Arbitration Act* are beyond the powers of the Parliament,

(1) 6 Cranch, 87, at p. 128. (2) 12 Wheat., 213, at p. 270.
(3) Thayre's Cases, vol. II., p. 1208.

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the Court need not declare the whole Act invalid: *Field* v. *Clark* (1). The test as to whether the whole Act falls is whether the Act has one object or more. See also *Cooley's Constitutional Limitations*, 7th ed., p. 247.

This Act has more than one object. One of them is inquiry into industrial disputes. So far as that is concerned the Act may stand. As to the right to make inquiries see *Clough* v. *Leahy* (2). The part of the Act dealing with arbitration may be invalid, but that need not affect an application to be registered under the Act. The utility of what is left is a matter for Parliament and not for this Court to consider. It does not matter to the present applicants whether they can be engaged in a dispute extending beyond one State. At any rate, it is for the other side to satisfy the Court that they cannot be engaged in such a dispute. A dispute may be said to extend beyond one State either where a dispute has begun between an employer and his employés in one State and a sympathetic dispute thereupon arises in another State, or where there is a dispute between one employer and his employés in more than one State. The location of the dispute would be where the work is being done. The applicants are entitled to take the widest meaning of the words "extending beyond the limits of one State." It would include a dispute, one party to which was an association of employers or employés in more than one State, as well as a dispute each party to which was such an association. So also if two unassociated bodies of employés in different States had a collective dispute with their respective employers, that would be a dispute extending beyond the limits of one State.

[GRIFFITH C.J.—If that is so a New South Wales union could summon a Victorian employer to the Court.]

No employer could be summoned to the Court except by his own employés or an association representing his own employés. Where there is an ambiguity in a power conferred by the Constitution and Parliament has taken one view, the Court will not be astute to take the other view.

[GRIFFITH C.J.—One construction of the power conferred by sec. 51 (xxxv.) of the Constitution would be that, where a dis-

(1) 143 U.S., 649, at p. 695. (2) 2 C.L.R., 139, at p. 156.

pute has begun in one State between an employer and his employés and that dispute has extended beyond that State, then the Arbitration Court has power to settle the original dispute.]

[Counsel also referred to *Cooley* v. *Board of Wardens of the Port of Philadelphia* (1); *Gloucester Ferry Co.* v. *Pennsylvania* (2); *United States* v. *Workingmen's Amalgamated Council of New Orleans* (3); *Charge to Grand Jury of Illinois* (4); *Charge to Grand Jury of California* (5); *United States* v. *Trans-Missouri Freight Association* (6); *Ex parte McNeil* (7); *Valin* v. *Langlois* (8); *Holland's Jurisprudence*, 2nd ed., p. 288.]

Mitchell K.C. and *Irvine* (with them *Harrison Moore*), for the State of Victoria.

As to the meaning of sec. 51 (xxxv.) of the Constitution, the words "extending beyond the limits of any one State," are words of limitation to preserve the powers of the States. The Court should not strive to give a wide meaning to those words so as to cut down the rights which it is intended to preserve. The words are to be taken in their ordinary meaning. Any leaning should be towards restriction and the preservation of the powers of the States. Two things are required to give Parliament power to legislate, there must be an industrial dispute, and that dispute must extend beyond the limits of one State. An industrial dispute means a dispute between employer and employé as to the terms and conditions of employment in a particular industry. See *The Colliery Employés Federation of the Northern District, New South Wales* v. *Brown* (9). A dispute as to some other industry in which there was a dispute, for example, a sympathetic strike, would not be an industrial dispute within that definition. A strike is not necessarily an industrial dispute. Then there must be an extension of the dispute beyond one State, and it must so extend as to both parties to it. A dispute between a union of pastoralists of Victoria only and a union of shearers of several States as to the wages to be paid for shearing in Victoria

(1) 12 How., 299.
(2) 114 U.S., 196, at p. 215.
(3) 54 Fed. Rep., 994, at p. 999.
(4) 62 Fed. Rep., 828, at p. 831.
(5) 62 Fed. Rep., 835, at p. 838.
(6) 166 U.S., 290, at p. 343.
(7) 13 Wall., 236.
(8) 3 Can. S.C.R., 1.
(9) 3 C.L.R., 255, at p. 267.

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could not be said to extend beyond Victoria. Nor would a dispute between one union of shearers of several States with distinct bodies of employers in different States be a dispute extending beyond one State. The subject matter of the dispute must extend beyond one State. The object is to make provision for cases with which the Parliaments of the States could not deal effectively. If once the idea of a sympathetic strike is introduced into the definition of an industrial dispute extending beyond the limits of one State, the power is given to an organization of employés at any time to bring any dispute within the jurisdiction of the Commonwealth Arbitration Court.

[O'CONNOR J.—There might then be a real dispute extending beyond the limits of one State, but, because the employers in different States do not combine, this Court would not have cognizance of the dispute.]

The mere fact of combination would not make a dispute one extending beyond the limits of one State. If a dispute is as to the rate of wages in Victoria it cannot be a dispute extending beyond the limits of Victoria. But if the employers in different States were under an agreement as to the rates of wages and the conditions of employment, then a dispute as to wages or conditions of employment might extend beyond the limits of one State. The Parliament of the Commonwealth has no jurisdiction except in a dispute which actually extends beyond the limits of one State. The test is, are the respective parties to the dispute, who would be directly affected by the award of the Court, the same in the several States over which the dispute extends. The association seeking to be registered here could not possibly, having regard to the local conditions, be an organization which could be a party to a dispute extending beyond the limits of one State. This may be put on the provisions of the New South Wales *Railway Act*, and also on the fact that the association consists of servants of a Government department. The Railways Commissioners are trustees for the Government, and their power is limited to the territorial boundaries of New South Wales. They could not arrange with the Victorian Commissioners for a common rate of wages in the two States. Railways, having been at the time when the Commonwealth was inaugurated and for a

long time before, a recognized and ordinary function of Government used to enable the Governments to carry on their police and postal functions, it is not necessary to show anything in the Constitution which lifts up railways into governmental functions. On that ground *South Carolina* v. *United States* (1) may be distinguished, for the judgment in that case was based on this, that the sale of liquor was not within the contemplation of the framers of the United States Constitution as a function of government. The point taken by *Higgins* K.C. as to the limit of the functions of government has never been recognized in English law: *R.* v. *McCann* (2); *Nabob of Arcot* v. *East India Co.* (3); *Young* v. *SS. "Scotia"* (4); *Bainbridge* v. *The Postmaster-General* (5). If the *Commonwealth Conciliation and Arbitration Act* is within the competence of the Commonwealth Parliament, they might legislate so as to fix the rates of wages to be paid by the States, and to decide whom the States should employ. If once it is established that railways are a State instrumentality, there could be no greater interference than the provisions of this Act.

As to whether this Act is within the trade and commerce clause —sec. 51 (I.) of the Constitution—there is no case in the United States in which it has been held that that clause authorizes such legislation, and, when in par. (XXXV.) of the same section express provision is made as to the extent to which the Commonwealth Parliament is clothed with power to legislate as to conciliation and arbitration, on the principle of *expressio unius exclusio alterius*, the conclusion must be that that power was not intended to be conferred by the trade and commerce clause. If that power were included in the trade and commerce clause there would be no reason to limit it to disputes extending beyond the limits of one State, for a dispute within one State might very well interfere with trade and commerce. The fact that in sec. 98 of the Constitution the trade and commerce clause is extended to State railways is an additional reason for saying that the trade and commerce clause was not intended to cover power to legislate as to conciliation and arbitration in regard to State railways. Even if the *Commonwealth Conciliation and Arbitration Act* be

(1) 199 U.S., 437.
(2) L.R. 3 Q.B., 677,
(3) 3 Bro. C.C., 292.
(4) (1903) A.C., 501.
(5) (1906) 1 K.B., 178.

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within the competence of the Commonwealth Parliament under sec. 51 (I.) of the Constitution, this Association cannot be registered, for by sec. 4 "industrial dispute" is limited in the same way as in sec. 51 (xxxv.), viz., that the dispute must be one extending beyond the limits of any one State. The definition of industrial dispute in the *Industrial Arbitration Act* (N.S.W.) is practically the same as that in this Act, and therefore the decision of this Court in *The Colliery Employés Federation of the Northern District, New South Wales*, v. *Brown* (1), is directly in point as to what is an industrial dispute.

Apart from the doctrine of *expressio unius exclusio alterius* the trade and commerce clause does not authorize legislation of this kind. What is the character of this legislation? The objects are expressly stated in sec. 2. Those objects may be shortly stated to be the prevention or settlement of industrial disputes by compulsory determination of the conditions of employment. The whole essence of the legislation is compulsion. The remainder, as to registration, &c., is machinery. The provisions as to conciliation are compulsory so far at any rate as bringing the parties together is concerned. There is a distinction between the Australian Constitution and that of the United States as to the mode in which the power in regard to trade and commerce is granted. In the former case Parliament has power "to make laws for the peace, order, and good government of the Commonwealth" with respect to trade and commerce among the States while in the latter case Congress has power "to regulate commerce" among the States (Art. I., sec. 8 of the United States Constitution). The power is very general in both cases and is only limited by the meaning of "trade and commerce" in the one case and "commerce" in the other. Apart from that there is no greater power given here than in the United States. As to the meaning of "trade and commerce": See *Citizens Insurance Co. of Canada* v. *Parsons* (2). As to the meaning of "commerce": See *Gloucester Ferry Co.* v. *Pennsylvania* (3). The Courts of the United States have always refused to give an exhaustive definition of the power to regulate commerce. That power includes, according to American decisions, (1) power to

(1) 3 C.L.R., 255. (2) 7 App. Cas., 96. (3) 114 U.S., 196.

prevent obstructions to commerce, and (2) power to restrict or prohibit commerce of a kind which is hurtful to the public welfare: *Lottery Case* (1). The power to prevent obstructions to commerce includes, (*a*) power to prevent or remove all kinds of physical interference with interstate commerce, (*b*) power to prevent any action by the States the effect of which is to impose any tax or embargo on interstate commerce, and (*c*) power to prohibit agreements between individuals in restraint of interstate commerce. There is a clear consensus of opinion that the power to regulate commerce does not include power to control the relations of employers and employés or of associations of employers and of employés in respect of employment. In *In re Debs* (2) the power is clearly limited to the illegal results of agreement. The contract of employment must be a contract of interstate commerce. If the act done is illegal the combination to do it is illegal. Many things which clearly interfere with interstate commerce have been held not to be within the power. If all that can be proved is an agreement to endeavour by stopping work to obtain better terms of employment, that of itself is not sufficient to found jurisdiction in the federal Courts: see *United States* v. *Workingmen's Amalgamated Council of New Orleans* (3); *United States* v. *E. C. Knight Co.* (4); *United States* v. *Trans-Missouri Freight Association* (5); *United States* v. *Joint Traffic Association* (6); *Hopkins* v. *United States* (7); *Northern Securities* v. *United States* (8); *Anderson* v. *United States* (9); *Addyston Pipe and Steel Co* v. *United States* (10). It may be possible for the Commonwealth Parliament under the trade and commerce clause to enact that any combination to directly impede interstate trade is an offence, but it could not make it an offence for the workmen employed by carriers carrying on business beyond the limits of one State to agree to stop work. See *Montague & Co.* v. *Lowry* (11); *Northern Securities Co.* v. *United States* (12); *Patterson* v. *Bark Eudora* (13).

(1) 188 U.S., 321, at p. 352.
(2) 158 U.S., 564.
(3) 54 Fed. Rep., 994, at p. 1,000.
(4) 156 U.S., 1.
(5) 166 U.S., 290, at p. 325.
(6) 171 U.S., 505, at p. 565.
(7) 171 U.S., 578, at p. 587.
(8) 193 U.S., 197, at p. 397.
(9) 171 U.S., 604, at p. 615.
(10) 175 U.S., 211, at p. 228.
(11) 193 U.S., 38.
(12) 193 U.S., 197, at p. 342.
(13) 190 U.S., 169.

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Isaacs A.-G. (with him *Bavin*), for the Commonwealth. The *Commonwealth Conciliation and Arbitration Act* 1904 is within the powers conferred by sec. 51 (I.) of the Constitution. No distinction need be drawn between trade and commerce in that subsection. Once a subject matter is within the power of the Commonwealth Parliament the power of Parliament as to that subject is plenary. In many cases in the United States it has been said that as to such matters the States cannot interfere, in others that the States can interfere until the Commonwealth Parliament passes a law dealing with the matter. See *Peik* v. *Chicago and North-Western Railway Co.* (1). The Commonwealth has unlimited power over interstate commerce, and that power is not limited to an unfair use of interstate commerce. The power is as large as that which the Parliament of Victoria has over its own commerce: *Smith* v. *Alabama* (2); *Nashville Chattanooga and St. Louis Railway* v. *Alabama* (3). The Supreme Court of the United States assumed in those cases that Congress could legislate in some way that would prevent the States from legislating in the same way.

[BARTON J.—Could the Commonwealth Parliament order a State to make a railway, on which was carried interstate trade, of a certain gauge ?]

The Commonwealth Parliament could not order that thing to be done, but they could say that no interstate traffic should be carried on a railway of a certain gauge.

[GRIFFITH C.J.—Suppose on one construction of the Constitution the result would be that, if a power said to be conferred by it were exercised, the whole federation would break up, should not this Court give a narrower construction to the Constitution ?]

That argument has been used in the United States, but nevertheless it has been held that if a power is found in the Constitution, being given by the people, it may be used without fear. The ordinary meaning of words must be taken in construing the Constitution. A construction which may cripple the development of the Commonwealth should be rejected. In the United States it has been held that each of the grants of power is a separate

(1) 94 U.S., 164, at p. 177.
(2) 124 U.S., 465, at p. 480.
(3) 128 U.S., 96.

grant without limitations. In *D'Emden* v. *Pedder* (1) this Court held that, as far as they were applicable, they would follow the United States cases.

[GRIFFITH C.J.—That is as to the construction of identical words where their meaning is not altered by the context.]

Under the commerce clause of the United States Constitution it has been held that by reason of the *Interstate Commerce Act* 1887, which provided that it should be unlawful for an interstate carrier to charge more or less than the rate fixed in the schedule of rates which was required to be printed and published, a State Act making it unlawful for a railway company to charge a greater sum for freight than was specified in the bill of lading was rendered invalid: *Gulf, Colorado and Santa Fé Railway Co.* v. *Hefley* (2). That case shows that a State Statute valid in itself is rendered invalid by reason of legislation of Congress, and that Congress has power to fix a maximum and minimum rate for the interstate carriage of goods. See also *Baird* v. *St. Louis* (3); *Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *Interstate Commerce Commissioners* (4). In *Interstate Commerce Commissioners* v. *Cincinnati, New Orleans and Texas Pacific Railway Company* (5), it was said that Congress might itself prescribe rates for the interstate carriage of goods or might delegate the power to prescribe those rates to some subordinate tribunal. In *Interstate Commerce Commissioners* v. *Detroit, Grand Haven and Milwaukee Railway Co.* (6) in the opinion of the Court, occurs the following passage:—"It must be conceded that a State railroad corporation, when it voluntarily engages as a common carrier in interstate commerce by making arrangements for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the Act of Congress" (*Interstate Commerce Act* 1887). See also *Wabash, St. Louis and Pacific Railway Co.* v. *Illinois* (7). Freedom of trade between States does not mean freedom from regulation. It may mean freedom from taxation.

(1) 1 C.L.R., 91.
(2) 158 U.S., 98.
(3) 41 Fed. Rep., 592.
(4) 162 U.S., 184.
(5) 167 U.S., 479, at pp. 494, 505.
(6) 167 U.S., 633, at p. 642.
(7) 118 U.S., 557.

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As to implied powers as a means for carrying out enumerated powers, see *M'Culloch* v. *Maryland* (1). As to the nature of the power to regulate interstate commerce, see the *Lottery Case* (2). In the following cases the exercise by Congress of the power to regulate interstate commerce has been held to be valid: *United States* v. *St. Louis Railway Co.* (3); *Johnson* v. *Southern Pacific Co.* (4); *United States* v. *Southern Railway Co.* (5). See also *Judson on Interstate Commerce*, p. 382. In dealing with the powers of the Indian legislature, Lord *Selborne* L.C., in *The Queen* v. *Burah*, said (6):—"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

[GRIFFITH C.J.—That statement is not exhaustive. You must look at the context and the surrounding circumstances in order to see what the meaning of the words is.]

At any rate, the meaning of the affirmative words arrived at in that way is to be cut down only by express restrictions, and the Court will not constructively enlarge those restrictions. Even if

(1) 4 Wheat., 316, at p. 421.
(2) 188 U.S., 321, at p. 347.
(3) 107 Fed. Rep., 870.
(4) 196 U.S., 1.
(5) 135 Fed. Rep., 122.
(6) 3 App. Cas., 889, at p. 904.

the United States Supreme Court for a time took a somewhat narrow view of the power of Congress under the commerce clause, it has since gone back to the larger view taken in *M'Culloch* v. *Maryland* (1), and *Gibbons* v. *Ogden* (2). How large the view is is seen in *Crandall* v. *State of Nevada* (3). There appears to be no case except *United States* v. *Boileau* (4), in which legislation under the commerce clause has been upset. As to what is interstate trade, see *Interstate Commerce Commissioners* v. *Bellaire Railway Co.* (5); *United States* v. *Chicago Railway Co.* (6); *Hanley* v. *Kansas City Southern Railway Co.* (7). As to the power of the States to interfere with interstate traffic, see *Louisville Railroad Co.* v. *Railroad Commissioners* (8).

Sec. 51 (I.) of the Constitution being unlimited, sec. 98 is inserted for greater caution to show that it was clearly intended that the power as to trade and commerce should extend to State railways. That is borne out by the use of the word "extends" instead of "shall extend." Apart from sec. 102 there would have been power to prohibit preference or discrimination by the States as to railways, and sec. 102 is a restriction on that power.

[GRIFFITH C.J.—As to sec. 102 being restrictive, *Jessel* M.R., in *Ex parte Stephens* (9), speaks of "the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done."]

Sec. 104 is an admission that State railways engaged in interstate carriage of goods are subject to the Commonwealth Parliament, and is a limitation on sec. 98. If sec. 104 contains the only power the Commonwealth has to deal with State railways, then the last words of sec. 98 are nugatory.

In its original form in the draft bill sec. 102 contained the restrictive words only: See *Quick and Garran's Constitution of the Australian Commonwealth*, p. 902. As to the powers of Congress under the commerce clause with regard to navigation

(1) 4 Wheat., 316.
(2) 9 Wheat., 1.
(3) 6 Wall., 35.
(4) 85 Fed. Rep., 425, at p. 435.
(5) 77 Fed. Rep., 942.
(6) 81 Fed. Rep., 783.
(7) 187 U.S., 617.
(8) 19 Fed. Rep., 679, at pp. 698-700.
(9) 3 Ch. D., 659, at p. 660.

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and shipping: See *Patterson* v. *Bark Eudora* (1); *Robertson* v. *Baldwin* (2); *Allgeyer* v. *Louisiana* (3); *Lord* v. *Steamship Company* (4). In the last mentioned case it was decided that a ship on the high seas on a voyage between two States is subject to the regulating power of Congress. The navigation laws of the United States always have dealt with the wages of seamen: See *Hartshorn's Railroad and Commerce Clause*, p. 23. In *United States* v. *E. C. Knight Company* (5) it was held that the creation of a monopoly in a manufacture was not affected by the *Sherman Act* (26 Stat., 209), which only prohibited the creation of monopolies in interstate trade or commerce. It was there pointed out that a contract directly relating to manufacture, although indirectly or incidentally affecting commerce between States, was not within that Act. The distinction between manufacture and commerce is further dealt with in *Addyston Pipe and Steel Co.* v. *United States* (6): See also *Munn* v. *Illinois* (7). A strike of coal miners would be in the same position as a monopoly of manufacture so far as the power of Congress to deal with it. As to strikes: See *United States* v. *Workingmen's Amalgamated Council* (8); *United States* v. *Elliott* (9); *Arthur* v. *Oakes* (10). The Courts of the United States have been forced to the position that the requirements of a growing nation compel uniformity of action in connection with interstate commerce.

Sec. 51 (xxxv.) of the Constitution is one of the enumerated powers and is without any express qualification. The doctrine of *expressio unius exclusio alterius* does not apply to that section. The power granted is as to conciliation and arbitration, and that is what is expressed. It is not a power to make laws with regard to industrial disputes extending beyond the limits of one State, but it is a power to make laws with respect to conciliation and arbitration. If the power were not there, the Commonwealth Parliament would have no power to deal with industrial disputes unless they were connected with interstate commerce. This power is wider than that in the trade and commerce clause. If it is not

(1) 190 U.S., 169.
(2) 165 U.S., 275.
(3) 165 U.S., 578.
(4) 190 U.S., 541.
(5) 156 U.S., 1.
(6) 175 U.S., 211, at p. 238.
(7) 94 U.S., 113.
(8) 54 Fed. Rep., 994, at p. 1000.
(9) 62 Fed. Rep., 801.
(10) 63 Fed. Rep., 310.

the clause is useless. It must extend to disputes not connected with interstate commerce. There is no reason why it should be limited. Disputes extending beyond one State, but not connected with interstate commerce, affect the welfare of the Commonwealth just as much as if the disputes were connected with interstate commerce, and whether the industrial enterprise is carried on by a State or by private individuals. The only questions are, does the industry extend beyond one State, and does the dispute extend beyond one State? Here the industry is that of carrying. The businesses carried on by the Railways Commissioners in Victoria and New South Wales are the same. They are both common carriers. An industrial dispute extending beyond one State is not limited to a dispute between one employer and the employés of one employer. All the Constitution looks at is, what is the fact at the time of the dispute? Does the dispute in fact extend beyond one State? If there were disputes between pastoralists and shearers all over Australia as to the rate of wages without any combination between either employers or employés, that would be a dispute extending beyond one State. There must, however, be unity of action on each side. As to the meaning of "industrial dispute," see *Sidney Webb's Industrial Democracy*, ed. of 1902, p. 241; *Mr. and Mrs. Sidney Webb's History of Trades Unionism*, 5th ed., p. 446; *Report of Royal Commission on Strikes* (N.S.W.), p. 27; *Arbitration Act* 1894 (South Australia), No. 589; *Arbitration Act* 1894 (N.Z.), No. 18; *Conciliation Act* 1896 (Eng.) (59 & 60 Vict. c. 30); *Conspiracy and Protection of Property Act* 1875 (Eng.) (38 & 39 Vict. c. 86); *Conspiracy and Protection of Property Act* 1889 (Tas.), No. 28; *Arbitration Act* (1900) (W.A.), No. 20; *H. D. Lloyd's Country without Strikes*, p. ix. A business carried on by a State may extend beyond one State, for the State may authorize a corporation of its own creation to carry on businesses in another State. There must at the present time be running agreements between the Commissioners of Railways of Victoria and New South Wales, and those of Victoria and South Australia. Sec. 51 (XIII.) of the Constitution provides expressly for "State banking extending beyond the limits of the State concerned," and if the State banking does extend beyond those limits, the Commonwealth

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Parliament has power over the whole of the State banking. Similarly in sec. 51 (XIV.) as to State insurance. So also sec. 98 assumes that State railway business may extend beyond one State. The government of a State may assume any function it chooses, but it cannot by assuming a function lessen the power of the Commonwealth. The only express limitation contained in the Constitution on the power of the Commonwealth to interfere with State property is that contained in sec. 114 as to taxation: See *Clark's Australian Constitutional Law*, 2nd ed., p. 175. The language of sec. 51 (XXXV.) being unqualified, it is for the other side to show that limitations are to be implied in favour of State railways. So far as the carrying industry of Australia is concerned, the power in sec. 51 (XXXV.) would fail if the limitations contended for are adopted. The true course is to leave the words at large, and unencumbered, and leave their application to the good sense of the people, exercised through the federal legislature. No one can say that it is a dangerous thing to leave the settlement of disputes in the interstate carrying industry to the control of the only body which has any means of dealing with them effectively at one stroke.

[They also referred to *Interstate Commerce Commission* v. *Brimston* (1); *Legal Tender Cases* (2); *Clark's Australian Constitutional Law*, 2nd ed., p. 148; *Judson on Interstate Commerce*, p. 4; *Collector* v. *Day* (3); *Carr* v. *State* (4).]

Rolin was allowed to reply to the arguments for the Commonwealth, the right of general reply being reserved to the respondents.

The fact that no exception in favour of the States is made in sec. 51 (XXXV.), while in other sections such an exception is expressly made, is no reason for saying that such an exception is not to be implied in sec. 51 (XXXV.). The express exceptions are made *ex abundanti cautelâ*. *Gorton Local Board* v. *Prison Commissioners* (5).

[O'CONNOR J. referred to *Victorian Railways Commissioners* v. *Brown* (6).

(1) 154 U.S., 447, at p. 472.
(2) 12 Wall., 457, at p. 544.
(3) 11 Wall., 113, at p. 126.
(4) 22 Amer. St. Rep., 624.
(5) (1904) 2 K.B., 165 (*n*).
(6) 3 C.L.R., 316, at p. 341.

GRIFFITH C.J. referred to *Roberts* v. *Ahern* (1).]

The same principle is laid down in *Hornsey Urban Council* v. *Hennell* (2). The rule there laid down and which applies to the Crown being bound by a domestic Act may be stated in the same words with regard to State instrumentalities and the Constitution. The intention that a State instrumentality is to be bound must clearly appear.

[O'CONNOR J.—A State instrumentality may be affected without interfering with its efficiency. It may be that for some purposes a Government railway may be interfered with. But if the instrumentality would be affected in its efficient exercise the rule referred to might apply: *Railroad Co.* v. *Peniston* (3).]

In that case the tax was on property only. But such a corporation, although for some purposes an instrumentality, is not so for all purposes.

[BARTON J.—The Constitution is intended to delimit the respective powers of the Commonwealth and of the States, and, where an intrusion by the Commonwealth on the States is intended, you expect it to be expressly provided or necessarily implied.]

See also *Tiedemann's State and Federal Control of Personal Property*, 2nd vol., p. 989; *Central Pacific Railroad Co.* v. *California* (4); *Thomas* v. *Pacific Railroad* (5). It is said that the power given by the *Commonwealth Conciliation and Arbitration Act* 1904 over State railways is in aid of the States and does not impose a burden on them, but that might be said of all federal Acts. The State railways are State instrumentalities, just as the post office is: *Whitfield* v. *Lord Le Despencer* (6); and the banks which were the subject matter of consideration in *M'Culloch* v. *Maryland* (7); and *Osborne* v. *Bank of United States* (8). See also *United States* v. *Railroad Co.* (9); *State of Georgia* v. *Atkins* (10); *South Carolina* v. *United States* (11); *Harvard Law Review*, Feb. 1906, p. 287; *Ambrosini* v. *United States* (12). The fact that the State has chosen to vest the

(1) 1 C.L.R., 406.
(2) (1902) 2 K.B., 73, at p. 80.
(3) 18 Wall., 5.
(4) 162 U.S., 9.
(5) 9 Wall., 579.
(6) Cowp., 754.
(7) 4 Wheat., 316.
(8) 9 Wheat., 738.
(9) 17 Wall., 32, at p. 329.
(10) 1 Abbott, 22.
(11) 199 U.S., 437.
(12) 187 U.S., 1.

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railways in persons who have a discretion does not render the railways any the less a State instrumentality. To hold the contrary would be to shut out the judiciary from being a governmental function: See *Dunbar* v. *Guardians Ardee Union* (1). Any Government can appoint its own agents and may make them liable to be sued or not as it chooses.

[*Higgins* K.C.—A railway is not an essential function of the States.]

Nor is a bank, but the principle applies to it. The power to control this Government function does not at any rate extend so far as conciliation and arbitration. Inasmuch as conciliation and arbitration are dealt with in sec. 35 of the Constitution, and Government railways are not referred to there, the power of conciliation and arbitration as to Government railways will not be implied from secs. 51 (I.) and 98. The same principles must be applied to the construction of the Constitution as apply to any other Act: *State of Tasmania* v. *Commonwealth of Australia* (2). The maxim *expressum facit cessare tacitum* applies: *Norton on Deeds*, pp. 116, 500; *Noke's case* (3); *Aspdin* v. *Austin* (4); *Hare* v. *Horton* (5); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (6). There it was held that the express grant of powers operated as a limitation. As to the application of the maxim *generalibus specialia derogant*, see *Dwarris on Statutes*, 2nd ed., p. 605, citing *Warden of St. Paul's* v. *Dean of St. Paul's* (7); *Sates* v. *Knight* (8); *Kidston* v. *Empire Marine Insurance Co.* (9); *Black's Interpretation of Laws*, p. 139; *Citizens' Insurance Co. of Canada* v. *Parsons* (10). The whole subject of conciliation and arbitration is taken out of the trade and commerce clause, and is dealt with in sec. 51 (xxxv.). From sec. 101 it may be inferred that whatever matters were intended to be included in sec. 51 (I.) were such as could be dealt with by the Inter-State Commission under sec. 101, and that would not include conciliation and arbitration. As to what is interstate

(1) (1897) 2 I.R., 76.
(2) 1 C.L.R., 329, at p. 338.
(3) 14 Rep., 806.
(4) 5 Q.B., 671.
(5) 5 B. & Ad., 715.
(6) (1892) 3 Ch., 242, at p. 250.
(7) 4 Price, 78.
(8) 3 T.R., 442.
(9) L.R. 1 C.P., 535, at p. 546.
(10) 7 App. Cas., 96.

commerce, see *Hopkins* v. *United States* (1); *Hooper* v. *California* (2); *Paul* v. *Virginia* (3). Railways are not interstate commerce, but transportation by rail is, and the relations between the owners of railways and their employés are not part of commerce, but are only incident to it. The Commonwealth Parliament may legislate so as to prevent interference with interstate commerce, but it cannot legislate to prevent something which possibly may, as one of its results, interfere with interstate commerce. As to the argument based on laws in the United States relating to seamen, they cannot apply, for such laws are not under the trade and commerce clause, but are made under the Admiralty jurisdiction. *Prentice and Egan's Commerce Clause*, p. 95; *In re Garnett* (4). Assuming that laws relating to employment in interstate commerce might be made under the trade and commerce clause, this particular law is not so made, for it includes other matters in such a manner that it is impossible to disassociate the matters which would properly come under the trade and commerce clause from the other provisions. The Act must therefore be held to be unconstitutional so far as the trade and commerce clause is concerned. In other words, assuming that the Commonwealth Parliament has power to deal with the relationship of master and servant in matters connected with interstate commerce, it has in this Act dealt with that relationship in so broad a way that it might be affected apart altogether from interstate trade. The provisons of the Act are plainly not severable: *Trade Marks Cases* (5). The power under the trade and commerce clause goes no further than regulating interstate traffic, and does not extend to interference with the wages or conditions of employment of persons engaged in interstate traffic. *Western Union Telegraph Co.* v. *Pendleton* (6). The power is really to secure the carrying out of the provision in sec. 92 of the Constitution that trade, commerce, and intercourse among the States shall be absolutely free. The actual transportation is the only thing which directly has to do with interstate trade and commerce. The connection between wages or conditions of

(1) 171 U.S., 578, at p. 593.
(2) 155 U.S., 648, at p. 655.
(3) 8 Wall., 168.
(4) 141 U.S., 1, at p. 15.
(5) 100 U.S., 82, at p. 98.
(6) 122 U.S., 347.

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employment and interstate trade and commerce is too remote. In order that there may be an industrial dispute extending beyond the limits of one State, within the meaning of sec. 51 (xxxv.), there must be either identity of employment or an association of employers, neither of which can exist in reference to State railways. As to the meaning of industrial dispute, see *The Colliery Employés Federation of the Northern District, New South Wales* v. *Brown* (1).

Higgins K.C. in reply. The only question here is can this the association be registered? Apart from the question whether part of the Act dealing with arbitration is invalid, is the part dealing with conciliation invalid? The scheme of the Act is conciliation before arbitration. The parts dealing with conciliation and industrial agreements are easily severable from those dealing with arbitration. So soon as conciliation fails and one of the parties attempts to summon the other before the Court, then the point as to validity may be raised. There is no interference with State servants when there is a mere provision for conciliation and industrial agreements. Where interstate commerce is concerned there may be arbitration, even if not otherwise. It is quite true that the Commonwealth Parliament meant arbitration to follow on conciliation, but it may have failed in its aim. The Imperial Parliament has power to enable the Commonwealth Parliament to make laws as to State servants. Has it conferred that power? The words of sec. 51 (xxxv.) are perfectly general, and there is no exception unless it is to be implied. Although as in America the law implies in a federal Act a certain exception in the case of State instrumentalities, the question is in what kinds of Acts and as to what kinds of instrumentalities. It is only such Acts as directly burden or retard State instrumentalities, and it is only instrumentalities of such a character that self-preservation and necessity demand their freedom from burdens. That is to say, the principle applies to strictly governmental functions as distinguished from those which are not necessarily governmental functions. Remedial legislation is in England not held not to apply to the Crown. The State may be bound by Commonwealth legislation

(1) 3 C.L.R., 255, at p. 267.

for peace and order in the exercise of its functions although there may be an incidental burden. The main scope and principle of the *Commonwealth Conciliation and Arbitration Act* 1904 is remedial, and there is no presumption that State instrumentalities are not bound by it. There being a power given by the Imperial Parliament in general terms not saying who shall be bound, the Commonwealth Parliament can say who shall be bound, if the proposed Act is remedial. Having regard to the conditions existing in 1900, it is impossible to conceive of effective machinery for securing peace, order, and good government by means of arbitration unless the State industries were brought in. The State Parliament, for instance, could not deal so effectively with State coal mines as could the Commonwealth Parliament. The context shows that where in sec. 51 the State is intended to be excluded it is expressly mentioned, and where the State is meant to be included no mention is made of it. In British law the exemption of the Crown does not extend to a corporation which can act against the will of the Crown as in the case of Railway Commissioners.

The words of sec. 51 (xxxv.) of the Constitution are novel and have no technical meaning, and must therefore be construed according to common parlance. At all events, where workmen in different States are making common cause or preferring a common complaint, there the dispute extends beyond the limits of one State. In *Dunbar* v. *Guardians Ardee Union* (1), it was not held that the defendants were not liable because they were exercising governmental functions, but it was held that the persons who were guilty of negligence were not their servants, just as in *Bainbridge* v. *The Postmaster-General* (2) it was held that an officer in the post office was not a servant or agent of the Postmaster-General. The United States *Arbitration Act* of 1898 is not voluntary, for it prescribes penalties, gives power to summon witnesses, &c. An Arbitration Act does not impose a burden or restraint. It is not a restraint on a man to protect him against temptations to which he is specially liable. *Patterson* v. *Bark Eudora* (3). There is no direct decision in the United States that interference with State instrumentalities by the federal

(1) (1897) 2 I.R., 76. (2) (1906) 1 K.B., 178. (3) 190 U.S., 169.

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legislature is invalid, except in the case of taxation. Sec. 102 of the Constitution is intended to deal with unfair rates wholly within a State, and therefore with all trade and commerce, and not only with interstate trade and commerce. As to whether the whole of the *Commonwealth Conciliation and Arbitration Act* 1904, so far as it applies to State railways, is void, the principle of equity applies that if that which is within the power is severable from that which is beyond it, the excess only is void: *Topham* v. *Duke of Portland* (1); *Ranking* v. *Barnes* (2); *Trade Marks Case* (3). The American decisions do not go beyond those of the English Courts on that point. The Commonwealth Parliament has power to make laws as to disputes as to interstate commerce. It has made a law as to disputes extending beyond one State. So far then as a dispute satisfies both conditions—*i.e.*, if it is as to interstate commerce and extends beyond one State, the Act is valid. It would be most dangerous to interpret the Constitution on the principle that of two possible constructions that which will lead to disaster is to be rejected. The disaster to be apprehended here is that the Courts would in the last resort govern the business of the State railways. There is, however, no ambiguity in sec. 51 (xxxv.). The power needs no restriction. The safeguard is the wisdom of Parliament. The Constitution states the power and leaves it to the Parliament to state the subject matter of the power. The Court need not, and therefore should not, declare the invalidity of this Act: *Citizens Insurance Co. of Canada* v. *Parsons* (4). The part as to conciliation at least is valid, and therefore the registration under it is valid.

[He also referred to *United States* v. *Governor Robert McLane* (5); *Governor Robert McLane* v. *United States* (6).]

Cur. adv. vult.

17th December. The judgment of the Court was read by

GRIFFITH C.J. The Act under which the question now before the Court for decision is raised is entitled "An Act relating to Con-

(1) 1 De G. J. & S., 517.
(2) 33 L.J. Ch., 539.
(3) 100 U.S., 82, at pp. 96, 98.
(4) 7 App. Cas., 96.
(5) 31 Fed. Rep., 763.
(6) 35 Fed Rep., 926.

ciliation and Arbitration for the Prevention and Settlement of Industrial Disputes extending beyond the Limits of any one State." The objects of the Act are defined in sec. 2, and among them are :—" II. To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes; III. To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties; IV. In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award; V. To enable States to refer industrial disputes to the Court . . . ; VI. To facilitate and encourage the organization of representative bodies of employers and of employés and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employés to be declared organizations for the purposes of this Act." Sec. 4 is an interpretation clause. The term " employer " is defined to mean "any employer in any industry." The term " industrial dispute " means " a dispute in relation to industrial matters—

"(*a*) arising between an employer or an organization of employers on the one part and an organization of employés on the other part, or

(*b*) certified by the Registrar as proper in the public interest to be dealt with by the Court—

and extending beyond the limits of any one State, including disputes in relation to employment upon State railways, or to employment in industries carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State."

The term " industrial matters " includes " all matters relating to work, pay, wages, reward, hours, privileges, rights, or duties of employers or employés, or the mode, terms, and conditions of employment or non-employment; and in particular, but without limiting the general scope of this definition, includes all matters pertaining to the relations of employers and employés, and the employment, preferential employment, dismissal, or non-employment of any particular persons, or of persons of any particular sex or age, or being or not being members of any organization,

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association, or body, and any claim arising under an industrial agreement."

The term "industry" means "business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

The term "organization" means "any organization registered pursuant to this Act, and so far as applicable it also includes any proclaimed organization to which the Governor-General declares the Act to apply."

It is plain that the term "employer" is intended to include the Railway Commissioners of the several States, who under State Statutes control the State Railways.

Section 6 provides that "no person or organization shall, on account of any industrial dispute, do anything in the nature of a lock-out or strike." This section in its terms probably applies to the State Railway Authorities, it being, of course, always understood that the industrial dispute is one extending beyond the limits of the State.

Sec. 18 provides that the Court "shall have jurisdiction to prevent and settle 'pursuant to this Act' all industrial disputes," *i.e.* all industrial disputes extending beyond the limits of a State.

Sec. 19 defines the disputes of which the Court is to have cognizance, of which it is sufficient to mention the first two, namely—

"(*a*) All industrial disputes which are certified to the Court by the Registrar as proper to be dealt with by it in the public interest;

(*b*) All industrial disputes which are submitted to the Court by an organization, by plaint, in the prescribed manner."

Secs. 23 and 24 are as follows:—

"23. (1) The Court shall, in such manner as it thinks fit, carefully and expeditiously hear inquire into and investigate every industrial dispute of which it has cognizance and all matters affecting the merits of the dispute and the right settlement thereof.

"(2) In the course of such hearing inquiry and investigation the Court shall make all such suggestions and do all such things as appear to it to be right and proper for reconciling the parties and for inducing the settlement of the dispute by amicable agreement.

"24. (1) If an agreement between the parties is arrived at, a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court shall, as between the parties to the dispute, have the same effect as, and be deemed to be, an award.

"(2) If no agreement between the parties is arrived at within a reasonable time, and the President so certifies, the Court shall, by an award, determine the dispute."

Sec. 40 provides that "The Court by its award, or by order made on the application of any party to the proceedings before it, at any time in the period during which the award is binding, may—

(*a*) prescribe a minimum rate of wages or remuneration, and in that case shall on the application of any party to the industrial dispute, or of any organization or person bound by the award make provision for enabling some tribunal specified in the award or order to fix, in such manner and subject to such conditions as are specified in the award or order, a lower rate in the case of employés who are unable to earn the minimum wage so prescribed; and

(*b*) direct that as between members of organizations of employers or employés and other persons offering or desiring service or employment at the same time, preference shall be given to such members, other things being equal; and

(*c*) appoint a tribunal to finally decide in what cases an employer or employé to whom any such direction applies may employ or be employed by a person who is not a member of any such organization."

Secs. 28, 29, and 30, are as follows:—

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"28. (1) The award shall be framed in such a manner as to best express the decision of the Court and to avoid unnecessary technicality, and shall subject to any variation ordered by the Court continue in force for a period to be specified in the award, not exceeding five years from the date of the award.

"(2) After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made.

"29. The award of the Court shall be binding on—

(*a*) all parties to the industrial dispute who appear or are represented before the Court;

(*b*) all parties who have been summoned to appear before the Court as parties to the dispute, whether they have appeared in answer to the summons or not, unless the Court is of opinion that they were improperly summoned before it as parties;

(*c*) all organizations and persons on whom the award is at any time declared by the Court to be binding as a common rule; and

(*d*) all members of organizations bound by the award.

"30. When a State law or an award order or determination of a State Industrial Authority is inconsistent with an award or order lawfully made by the Court, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Sec. 48 provides that "The Court may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach under pain of fine or imprisonment."

Sec. 65 (*a*) provides that every organization shall be entitled to submit to the Court any industrial dispute in which it is interested.

It is abundantly clear from the provisions which I have read that the jurisdiction of the Court is coercive, that if the State railway authorities are subject to its jurisdiction the effective control of the State railways may to a great extent be taken out of their hands, and, further, that the applicant association, if registered as an organization, will be able to bring the New South Wales Railway Commissioners into Court as litigants for

the settlement of any industrial dispute arising between themselves and the Commissioners and extending beyond the limit of the State of New South Wales, whatever that expression may mean. Under the constitution of the applicant association its members cannot, as such, have any other employers than the Commissioners.

The original appellants have not taken any part in the argument of the appeal, but the States of New South Wales and Victoria, who were allowed by the Court to intervene, have maintained that the provisions of the Act, so far as they would operate, if effectual, to interfere with the free State control of State railways, are not authorized by the provisions of sec. 51 (xxxv.) of the Constitution, which empowers the Parliament of the Commonwealth to make laws for the peace, order, and good government of the Commonwealth with respect to "Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," because, they say, those general words ought not to be construed so as to import a coercive control of State instrumentalities, and also because, having regard to the conditions under which the State railway authorities carry on their functions, a dispute between them and their employés cannot in law be regarded as extending beyond the limits of the particular State. The counsel for the applicants on the other hand, and the counsel for the Commonwealth, which was also allowed to intervene, denied the validity of these objections, and further contended that, irrespective of par. xxxv., the enactment of which the validity is now in question is within the powers of the Commonwealth Parliament to make laws with respect to trade and commerce among the States (sec. 51 (i.)), which power is by sec. 98 of the Constitution expressly declared to extend to railways the property of any State. The matter has been very fully and ably argued by the counsel for all the parties, and we are much indebted to them for the assistance which they have given the Court in forming a conclusion on a question which must be regarded as of very great importance to the mutual relations of the Government of the Commonwealth and the Governments of the States.

The question to be determined is primarily one of construction

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of a written document. If the power which the Commonwealth Parliament have asserted their right to exercise is conferred by the Constitution as properly construed, the duty of the Court is to say so. If, on the contrary, that instrument does not confer the power, we are bound to refuse to give any effect to the attempted legislation.

The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth. This is recited in the preamble to the Act itself. The rules, therefore, that in construing a Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in an especial degree to the construction of such a Constitution. At the same time it must be remembered that the Constitution was intended to regulate the future relations of the Federal and State Governments, not only with regard to then existing circumstances, but also with regard to such changed conditions as the progress of events might bring about. (See *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*) (1). Another circumstance which, in our opinion, is to be regarded is that the Constitution as framed was to be, and was, submitted to the votes of the electors of the States. It ought, therefore, we think to be held, *primâ facie*, that, when a particular subject matter relating to the respective powers of the States and the Commonwealth was specifically dealt with, it was intended to invite the attention of the electors specifically to that subject matter and to the proposed manner of dealing with it. It follows, we think, from this consideration that the rules of construction expressed in the maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* are applicable in a greater, rather than in a less degree, than in the construction of ordinary contracts or ordinary Statutes.

With regard to State railways it is a matter of history that before 1890 all the six Colonies had established State railways, the control of which formed a very large and important part of State administration, and that very large financial obligations,

(1) 96 U.S., 1.

amounting to a sum far exceeding £100,000,000, had been incurred by the Colonies for their construction, as is expressly recognized in sec. 102 of the Constitution. In each case the actual administration of the railways was entrusted to a body specially constituted under State law for the purpose, but the revenue from the railways was State revenue, and the obligations incurred by their managers were State obligations. It is a fact also that the ability of the Colonies to meet their financial obligations in respect of loans was largely dependent upon the successful and profitable employment of the railways. It cannot, in our opinion, be disputed that the State railways were in their inception instrumentalities of the Colonial Governments, and we do not know of any authority for saying that this position was affected by the incorporation of the Railway Commissioners, which, in our opinion, was a matter of purely domestic legislation for the convenience as well of management as of the assertion and enforcement of contractual rights in respect of the commercial transactions involved in the transport of goods and passengers: *R.* v. *McCann* (1). These, then, were material facts existing at the time of the establishment of the Commonwealth, and which must be taken into consideration in construing the provisions of the Constitution now in question.

Sec. 51 enumerates amongst the specific powers with respect to which the legislative authority of the Commonwealth may be exercised—

> "(xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
>
> "(xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
>
> "(xxxiv.) Railway construction and extension in any State with the consent of that State."

Sec. 98, as already pointed out, extends the power of the Parliament as to interstate trade and commerce to State railways.

Sec. 101 provides that "There shall be an Inter-State Commission, with such powers of adjudication and administration as

(1) L.R., 3 Q.B., 677.

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the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

Sec. 102 provides that "The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission."

Section 104 provides that "Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States."

It is contended for the objectors that these sections declare and define the extent of the powers of the Commonwealth Parliament so far as regards interference with State railways, and that the generality of the words of (xxxv.) must be cut down accordingly. They also contend that the authority of the Commonwealth Parliament to interfere with State instrumentalities extends only so far as it is conferred in express words or by necessary implication, that the alleged power is not in the present case conferred by express words, and that any implication that might otherwise arise is excluded by the counter-implication that it was not intended by the framers of the Constitution to authorize any such interference except for the specific purposes and within the specific limits expressed or necessarily implied from the nature of the special power in question, such as, for instance, the power to regulate currency, weights and measures, and bankruptcy.

In *D'Emden* v. *Pedder* (1) this Court said :—"In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied"; and again (2):—"It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions."

In that case the question was as to an attempted invasion of the ambit of Commonwealth authority by a State authority. The present case is the converse, but the doctrine is equally applicable. Whether the alleged invasion is really one or not is an entirely different question. In *Collector* v. *Day* (3), in which the matter in controversy was the power of Congress to tax the salary of a judicial officer of a State, the doctrine was thus forcibly stated by *Nelson* J., delivering the judgment of the Supreme Court of the United States (4):—

"In this respect, that is, in respect of the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases

(1) 1 C.L.R., 91, at p. 109.
(2) 1 C.L.R., 91, at p. 111.
(3) 11 Wall., 113.
(4) 11 Wall., 113, at p. 127.

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the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

The argument is to our minds incontrovertible. It was answered that the doctrine only applies to taxation. But taxation is only an instance of interference and control. The foundation of the argument is the necessity for freedom from control, and taxation is only forbidden because it is an interference. In our opinion any authority which can lawfully say to another "Thou shalt" or "Thou shalt not" exercises control over that other in the sense in which that term is used in this argument. It is nothing to the purpose to say that the exercise of the power would be, or was intended to be, beneficial or remedial. Such an intention may, and perhaps ought to, be attributed to all legislative action.

Is it then an interference with the control of State railways to undertake to regulate the terms and conditions of the engagement, employment and remuneration of the State railway servants? Surely the question answers itself.

But it is said that a State railway is not a State instrumentality within the meaning of the rule, and the case of *South Carolina* v. *United States* (1) was referred to, in which the Supreme Court of the United States, by a majority of five to four (the minority consisting of most eminent lawyers) held that the State of South Carolina, which had made the liquor trade a State monopoly, could not invoke the doctrine so as to claim exemption from excise duty upon the liquor of which it made use. Whether the majority judgment would or would not commend itself to this Court in a similar case, we are of opinion that it has no application to the present case. The argument as presented to us is that State instrumentalities for the purposes of the doctrine in question are limited to those which are, strictly speaking, of what was called in argument a "governmental" character, and that the business of common carriers is not a part of any of the recognized branches of government, legislative, judicial and executive. We appre-

(1) 199 U.S., 437.

hend, however, that the execution or administration of the laws of the State is in the strictest sense a governmental function, and that no rule can be formulated, because there is no authority competent to formulate it, which shall prescribe what functions the State shall undertake in the supposed exercise of its duty to promote the well being of its people. There is high authority, both ancient and modern, for holding that the construction and maintenance of roads and means of communication is one of the most important, as it is necessarily one of the first, of the functions of government. It cannot be denied in this twentieth century that railways are a most important means of communication, or that they are in substance highways, however their use may be restricted or controlled by the conditions of the particular franchises granted in respect of them. Apart, however, from this general consideration, we are of opinion that in the year 1900, when the Constitution was adopted, the construction and maintenance of railways was in fact generally regarded as a governmental function in all the Australian Colonies, and that they are expressly recognized as such in the sections of the Constitution above quoted. We think, therefore, that the doctrine of mutual freedom from interference as between the Commonwealth and State Governments would be sufficient to exclude any implication that sec. 51 (xxxv.) was intended to extend to State railways. And, having regard to the careful enumeration of specific matters in respect of which express powers were conferred upon the Commonwealth Parliament to interfere with or control these railways, we think that the notion of such an implied extension is absolutely negatived.

It is therefore unnecessary to express any opinion on the question whether a dispute between the applicants and the Railways Commissioners could in point of law be held to extend beyond the limits of the State.

For these reasons we are of opinion that the provision now in question cannot be supported as a valid exercise of the powers conferred by sec. 51 (xxxv).

We pass to the contention that it is a valid exercise of the power, expressed in sec. 51 (i.), "to make laws for the peace, order, and good government of the Commonwealth with respect to

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trade and commerce with other countries and among the States," which is declared by sec. 98 to extend to railways the property of any State. A great number of decisions of the Federal Courts of the United States were cited to us, in which the similar power conferred by the American Constitution on Congress had been interpreted and applied. This Court is not, of course, bound by the American decisions, although so far as they had gone before the adoption of the Australian Constitution in 1900, the interpretation put upon analogous provisions in the United States Constitution is of very great weight. In the view which we take of this part of the case, so far from expressing disagreement with any of the decisions cited, we should be content to accept them. It was strongly urged that the power to regulate interstate trade and commerce, which is involved in the language of sec. 51 (I.) is plenary as to its objects, and includes a power to prescribe in every respect the rules by which such commerce is to be governed. Subject to the question how far the general rules of sec. 51 (i.) and sec. 98 are qualified by the special provisions as to State railways to which reference has already been made, we assent to this proposition. There is no doubt that it extends to the making of laws for the prevention and punishment of all active obstructions to the freedom of interstate commerce: *In re Debs* (1); *United States* v. *Workingmen's Amalgamated Council of New Orleans* (2). There is no doubt, also, that commerce includes the transportation of goods and persons on railroads used for inter-communication. It is nevertheless conceded that the general words must of necessity be subject to some limitation, not as to the manner in which the power may be exercised, but as to the legitimate objects of the power. For instance, the source of a particular branch of interstate commerce might be dried up by the refusal of persons to supply any subject matter for it. Or the effective carrying on of a branch of interstate commerce might be prevented or impeded by the refusal of some person not directly concerned in it to afford facilities without which it could not be effectively carried on. It does not follow, however, that the power would extend to such matters. In our judgment the power is limited to trade

(1) 158 U.S., 564, at p. 580. (2) 54 Fed. Rep., 994.

and commerce in being, and does not extend to matters which are matters precedent to its coming into being, whether necessary conditions precedent or not. In the case of *Addyston Pipe and Steel Co.* v. *United States* (1), decided in 1889, *Peckham* J., delivering the unanimous judgment of the Supreme Court of the United States, said (2):—"Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations, where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce"; and again (3):—"If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed.

"Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants."

In the earlier case of *Hopkins* v. *United States* (4), decided in

(1) 175 U.S., 211.
(2) 175 U.S., 211, at p. 228.
(3) 175 U.S., 211, at p. 234.
(4) 171 U.S., 578.

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October 1898, the same learned Judge delivering the judgment of the Court (from which *Harlan* J. dissented) said (1):—"To treat as condemned by the Act (the *Sherman Act*) all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the Act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the Act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly: *Ficklen* v. *Shelby County Taxing District* (2). Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce . . . To hold all such agreements void would in our judgment improperly extend the Act to matters which are not of an interstate commercial nature.

"It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the Statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the Act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the Statute? Suppose the railroad company which transports the

(1) 171 U.S., 578, at p. 592. (2) 145 U.S., 1.

cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the Act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the Act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depôt at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the Statute? Would an agreement among themselves by locomotive engineers, firemen, or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in the negative. The indirect effect of these agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade and commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate."

We entirely concur in the views expressed in the passage just cited. It is true, as pointed out in the argument before us, that the immediate subject of consideration in that case was the construction of the *Sherman Act*, but we think that the obser-

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vations are equally relevant in construing the power itself. There is no doubt that in all the instances enumerated it would be within the competence of a State legislature, in the exercise of its plenary power to deal with internal affairs, to make any laws it might think fit to restrain or regulate such agreements, but it does not follow that such laws could properly be described as laws to regulate interstate trade and commerce. If they could, the American State legislatures might be trespassing upon the domain of Congress.

In this connection the following passage from the judgment of the Supreme Court of the United States in the case of *Robbins* v. *Shelby County Taxing District* (1) is instructive, as showing the view accepted in the United States as to the powers of the State legislatures with regard to such matters:—"It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities."

In the execution of their power Congress has passed several laws, some, but not all, of which have been the subject of judicial decision. Amongst others, laws have been passed for preventing and punishing obstruction of interstate commerce, for securing the safety of men employed upon railways engaged in interstate traffic, for imposing tests of capacity upon engine drivers engaged in that traffic, and for the enforcement of awards as to terms of employment made upon voluntary submission to arbitration by the employers and the men. Congress has not, however, up to the present, undertaken to regulate by law the terms of engagement or employment of men so engaged. There can be no doubt that if the plenary power of Congress or of the Commonwealth Parliament extends to such regulation they may exercise that power through tribunals or special authorities set up for the

(1) 120 U.S., 489, at p. 493.

purpose, but the right to set up such tribunals or authorities does not extend beyond the power authorized to be delegated to them.

As at present advised, we are of opinion that the legislative authority of the Commonwealth Parliament under the power in question, so far as regards wages and terms of engagement, does not extend further—if it extends so far, as to which we reserve our opinion—than to prohibit for causes affecting interstate traffic specific persons from being employed in such traffic. It cannot, as already said, be disputed that the plenary powers of the State legislatures with respect to matters within their competence extend to everything done within the State which may, directly or indirectly, affect trade and commerce. But we think that the power of the Commonwealth Parliament to regulate interstate trade and commerce, although unlimited within its ambit, cannot as a mere matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial and proximate. And, in our opinion, the general conditions of employment are not of this character. We arrive at this conclusion upon the mere language of sec. 51 (I.). But it is much fortified by the language of (XXXII.), which expressly empowers the Commonwealth Parliament to make laws for the control of State railways with respect to transport for the naval and military purposes of the Commonwealth. Having regard to the rules of construction adverted to in the earlier part of this opinion, we think it is hard to reconcile the conferring of this express power with the implied existence under sec. 51 (I.) of a power which would undoubtedly, if the larger construction contended for is adopted, not only include that conferred by (I.), but go far beyond it. The word "control" as used in (XXVII.) cannot, we think, be limited to manual or physical control. It is the widest possible term, and is at least co-extensive with the asserted general power to "regulate."

Assuming, however, that the power in question does extend to the regulation by law of the terms of employment upon State railways, it is clear that it extends to them only so far as regards interstate traffic and only as far as regards men engaged in that traffic. And this consideration affords a fatal objection to the

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validity of the provision now in question, so far as it depends for support on the trade and commerce power.

It was laid down by the Supreme Court of the United States in the case of *United States* v. *Reese* (1), decided in 1875, and the rule has ever since been followed, (see the *Trade Mark Cases* (2); *United States* v. *Ju Toy* (3)) that, when in the attempted exercise of a power of limited extent an Act is passed which in its terms extends beyond the prescribed limits, the whole Act is invalid unless the invalid part is plainly severable from the valid. In the *Trade Mark Cases*, *Miller* J., delivering the unanimous judgment of the Court, said (4):—"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress." And again, referring to *United States* v. *Reese* he said (5):—

"It was urged, however, that the general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial. But the Court said, through the Chief Justice: 'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal Statute so as to make it specific, when, as expressed, it is

(1) 92 U.S., 214.
(2) 100 U.S., 82.
(3) 198 U.S., 253.
(4) 100 U.S., 82, at p. 96.
(5) 100 U.S., 82, at pp. 98, 99.

general only. . . . To limit this Statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law."

This reasoning appears to us conclusive. Now the *Conciliation and Arbitration Act* is not only not limited, so far as regards its attempted application to State railways, to matters having a direct and proximate relation to interstate traffic, but is not limited at all to that traffic or to persons engaged in it. Even, therefore, if the Commonwealth Parliament has the implied power contended for, this provision is not a valid exercise of the power.

It was suggested that the provisions of the Act as to conciliation were severable from the compulsory provisions as to arbitration. The objection which we have last considered is, however, a complete answer to this argument, so far as any coercive action could follow on the conciliation. Finally, it was suggested that the power conferred upon the President of the Court to endeavour to compose disputes was severable from the rest of the Act, and was not invalid. In the case, however, of a Federal Statute, it is not sufficient to say that it cannot do any harm. It is necessary to show affirmatively, if a Court is called upon to give effect to it, and if its validity is called in question, that it is within some power conferred by the Constitution either expressly or by necessary implication.

For these reasons we are of opinion that the provisions in question are *ultra vires* of the Commonwealth Parliament, and that the applicant Association cannot be registered.

There will be no order as to costs.

Question answered accordingly.

H. C. OF A. 1906.

THE FEDERATED AMALGAMATED GOVERNMENT RAILWAY AND TRAMWAY SERVICE ASSOCIATION v. THE NEW SOUTH WALES RAILWAY TRAFFIC EMPLOYES ASSOCIATION.

Solicitors, for respondents, *Brown & Beeby*, Sydney.

Solicitors, for interveners, *Crown Solicitors for the Commonwealth, the State of New South Wales, and the State of Victoria.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McLAUGHLIN . . . . . APPELLANT;
DEFENDANT,

AND

DAILY TELEGRAPH NEWSPAPER COMPANY LIMITED . . . . . RESPONDENTS.
PLAINTIFFS.

H. C. OF A. 1906.

SYDNEY, *Nov.* 29, 30. *Dec.* 3, 4, 10.

Griffith C.J., Barton and Isaacs, JJ.

Company—Decree for rectification of share register of company—Interpretation—Submission by plaintiff to indemnify company—Intention of parties and Court when making decree—Principal and surety—Suit by company to enforce lien—Counterclaim—Costs.

In a suit for rectification of their share register the respondent company were ordered to rectify by restoring the appellant's name to the register as holder of certain shares that had been transferred by the appellant's wife, acting under an invalid power of attorney, the appellant, by his counsel, making an undertaking or submission, which was embodied in the decree, to indemnify the respondents to the extent of all moneys received by his wife as the proceeds of the sales of the shares and against any loss that the respondents might sustain or liability they might incur to persons other than the appellant by reason of obedience to the decree.

The respondents, in execution of the decree, cancelled the registration in the names of the transferrees and restored the appellant's name as holder of the shares in question. The result was that, in respect of the shares of one of the transferrees, the defendants in obeying the decree incurred a loss within the meaning of the submission of a sum exceeding the total amount received by the appellant's wife for the sale of all the shares, and the wife was left liable to the other transferrees for the amount of the purchase money paid to her in respect of the shares transferred to them.